THERMTRON: DESTROYER OF PROCEDURAL CONSISTENCY IN REMAND

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INTRODUCTION

Removal is a deceptively simple concept taught in every first-year Civil Procedure course. The right to remove certain cases from state court to federal court is well-established in American jurisprudence, having existed in some form or fashion since the inception of the United States.[1] Traditionally, the statutes governing removal have been strictly construed, and "any doubt as to the validity of a particular removal will be construed negatively against removal."[2] Similarly, the statutes governing a federal court's remand of a case improperly removed had traditionally been afforded a strict construction.[3] However, the Supreme Court's holding in *Thermtron Prod., Inc. v. Hermansdorfer*[4] turned this principle of strict construction on its head and muddied the waters in this once-clear area of law. Not only has the Court's decision in *Thermtron* resulted in a body of law that is confusing, inconsistent, and unpredictable, but it has also resulted in several procedural idiosyncrasies of which the average practitioner is likely unaware.

This comment addresses *Thermtron* and its problematic ramifications on the resulting body of remand law, identifies little-known procedural implications for practitioners, and proposes possible solutions to the problem. Throughout this article, removal

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[1] *See* Thomas R. Hrdlick, *Appellate Review of Remand Orders in Removed Cases: Are They Losing a Certain Appeal?*, 82 MARQ. L. REV. 535, 535 (1999) (citing Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79; JOHN F. DILLON, REMOVAL OF CAUSES FROM STATE COURTS TO FEDERAL COURTS, WITH FORMS ADAPTED TO THE SEVERAL ACTS OF CONGRESS ON THE SUBJECT 1 (4th ed. 1887); JAMES H. LEWIS, REMOVAL OF CAUSES FROM STATE TO FEDERAL COURT 5 (1923)); *see also* 14C CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3721 (Rev. 4th ed. 2022).

[2] Hrdlick, *supra* note 1, at 536.

[3] Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 361 (1988) (Rehnquist, J., dissenting) ("[W]e expressed skepticism that 'Congress ever intended to extend carte blanche authority to the district courts to revise the federal statutes governing removal by remanding cases on grounds that seem justifiable to them but which are not recognized by the controlling statute.'") (quoting Thermtron Prods., Inc. v. Hermansdorder, 423 U.S. 336, 351 (1976)).

[4] 423 U.S. 336, 336-37 (1976).

and remand will often be mentioned in the same thought, as one would not exist without the other. However, it is important to understand that these are two different concepts, and this article specifically addresses issues regarding the federal *remand* statute.[5]

Part I chronicles the history of the remand statutes and the relatively clear state of the law leading up to the Supreme Court's landmark decision in *Thermtron*.[6] Next, Part II analyzes how the *Thermtron* Court's departure from strict statutory construction of the appellate bar of remand orders contained within 28 U.S.C. § 1447(d) acted as a catalyst for the current ambiguity in this area of the law. Part II also highlights the intrinsic connection between the statutory provision containing the appellate bar of remand orders (§1447(d)) and the provision outlining both the grounds for remand and the time in which to make a motion for remand (§1447(c)). Then, Part III discusses recent amendments to § 1447(c) and sheds light on the little-known "reasonable time" standard that has been applied to certain bases for remand as a result of the amendment. Finally, Part IV proposes potential solutions that would clarify procedure in this area of the law.

I. BACKGROUND

A. A Brief Overview of Removal

The doctrines of removal and remand work in tandem with one another. Remand, in this context, does not exist without the case

[5] 28 U.S.C. § 1447 governs remand procedures. The provisions relevant to this article include sections 1447(c) and (d). *See* 28 U.S.C. § 1447(c) ("A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."); 28 U.S.C. § 1447(d) ("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.").

[6] *See* 423 U.S. 336.

first being removed from state court to federal court.[7] A defendant has the right to *remove* a claim from state court to federal court when the action is within the federal court's original jurisdiction.[8] Relatedly, remand grants federal courts the right to remand (or plaintiffs the right to move for remand) the case back to state court when there is a lack of subject matter jurisdiction or some other defect with removal.[9] The doctrine of removal is neither constitutionally granted nor rooted in English common law; it is entirely a statutory creation.[10] As such, bases and procedures for removal "are entirely dependent on acts of Congress."[11]

The right to remove an action from state court to federal court was codified in the Judiciary Act of 1789,[12] and has existed, largely undisturbed, since that time. The present removal statute allows for the removal of any case in which the federal court would have had original jurisdiction, stating:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.[13]

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[7] Remand is a broader legal term than removal. The word removal is specifically tied to the statutory provision allowing removal of cases from state court to federal court (28 U.S.C. § 1441) whereas remand refers to sending any case "back to the court or tribunal from which it came." *Remand*, BLACK'S LAW DICTIONARY (5th pocket ed., 2016). In other words, remand is also the appropriate term to describe when a *state* appellate court sends a case back to a state trial court or when a federal appeals court sends a case back to a district court for further proceedings.

[8] *See* 28 U.S.C. § 1441(a).

[9] *See* § 1447(c), *supra* note 5.

[10] *See* Martin v. Hunter's Lessee, 14 U.S. 304, 349 (1816) ("This power of removal is not to be found in express terms in any part of the constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power . . . The time, the process, and the manner, must be subject to [Congress's] absolute legislative control."); *accord* 14C, CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3721 (Rev. 4th ed. 2022); Hrdlick, *supra* note 1; Robert T. Markowski, *Remand Order Review After Thermtron Products*, 4 U. ILL. L. F. 1086, 1088 (1977).

[11] WRIGHT & MILLER, *supra* note 1; *see also* Hrdlick, *supra* note 1.

[12] Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80 (repealed 1911).

[13] 28 U.S.C. § 1441(a).

Federal courts' original jurisdiction includes claims brought under both the diversity and federal question statutes, which are constitutionally granted and statutorily codified.[14] However, several other bases of original federal jurisdiction are entirely statutory creations, like removal itself. For example, Congress has granted federal courts jurisdiction in cases that involve related supplemental state law claims under § 1367, federal officers under § 1442, and certain civil rights claims under § 1443.[15]

Statutory additions to the federal jurisdiction scheme both expand and limit federal jurisdiction under removal.[16] Sections 1442 and 1443 expand the federal court's original jurisdiction under removal beyond its original jurisdiction over claims initially filed in federal court.[17] For example, under the federal officer removal statute, a defendant who is an "officer of the courts of the United States" may remove to federal court based on an anticipated federal defense[18] notwithstanding the fact that this violates the well-pleaded complaint rule requiring the federal question to appear "on the face of the plaintiff's properly pleaded complaint."[19]

Alternatively, there are several federal statutes that limit federal jurisdiction under removal "expressly mak[ing] particular lawsuits not removable, even though they are within the original subject-matter jurisdiction of the federal courts and could have been commenced there."[20] This prohibition on removal is most

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[14] *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, . . . arising under this Constitution, the Law of the United States, and Treaties made . . .;—between Citizens of different States . . ."); 28 U.S.C. §§ 1331, 1332.

[15] *See* 28 U.S.C. §§ 1367, 1442, 1443.

[16] WRIGHT & MILLER, *supra* note 1.

[17] *Id.*

[18] 28 U.S.C. § 1442(a)(3).

[19] Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) ("[F]ederal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint.").

[20] WRIGHT & MILLER, *supra* note 1; *see, e.g.*, 28 U.S.C. § 1445; *see also* Jones Act, 46 U.S.C. § 30104.

common in tort cases, which "reflect[s] Congress's judgment that the plaintiff should have an absolute right to choose the forum."[21]

Though removal is based on a federal court's original jurisdiction, which often involves a constitutional grant of authority, Congress is the ultimate arbiter of the scope of federal courts' original jurisdiction under removal.[22] Thus, Congress has the final say on what is "removable."[23] A federal statute can prohibit removal even where the Constitution grants federal courts original jurisdiction over a matter.[24] Because the statutory language is the only guidance courts have regarding legislative intent, courts generally strictly construe the removal statutes.[25] Parts II and III explore the consequences of courts' departure from strict statutory construction in this area of the law, demonstrating the inconsistent and unclear results of such an interpretation.

B. A Brief History of Remand

Remand as a legal concept differs slightly from removal in that the 'right of remand' is not an exclusively statutory creation. While § 1447(c) specifies the grounds for remand—any defect or a lack of subject matter jurisdiction[26]—remand based on a lack of subject-

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[21] WRIGHT & MILLER, *supra* note 1; *see also* Brown v. National R.R. Passenger Corp., 725 F. Supp. 873, 873 (D. Md. 1989) ("If plaintiff had filed suit in this Court, this Court would have had federal question jurisdiction; however, where plaintiff files in state court, as he did here, § 1445(a) prohibits removal of the case to federal court.");
e.g., Prescott v. United States, 523 F. Supp. 918, 939 (D. Nev. 1981), *aff'd*, 731 F.2d 1388 (9th Cir. 1984) ("It is well-settled that although Title 28 U.S.C. § 1445(c) prevents workmen's compensation suits from being removed to federal court if filed by claimants in state courts, such suits may still be filed in federal court pursuant to Title 28 U.S.C. § 1332 if there is diversity of citizenship and the amount in controversy is in excess of $10,000, exclusive of interest and costs.").

[22] *See supra* note 10 and accompanying text.

[23] *See* Healy v. Ratta, 292 U.S. 263 (1934).

[24] *See* 28 U.S.C. § 1441(a) ("Except as otherwise *expressly provided by Act of Congress*, any civil action brought in a [s]tate court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.").

[25] *Healy*, 292 U.S. at 270; Shamrock Oil & Gas Corp. v. Sheets, 310 U.S. 100, 108 (1941) ("Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation.").

[26] 28 U.S.C. § 1447(c).

matter jurisdiction is not a statutorily created "right." It simply means that the federal court does not have jurisdiction to hear the case, so, as a practical matter, the case should either be remanded or dismissed. Additionally, courts have consistently remanded cases based on grounds not mentioned by statute at all, such as remand based on the abstention doctrine or the presence of a contractual forum selection clause.[27] This disconnect between removal and remand is evident from the statutory history of each doctrine.

Though the right of removal was codified in the Judiciary Act of 1789,[28] Congress did not codify the right to remand a matter back to state court until 1875.[29] Notwithstanding the delayed codification, "lower courts [still] . . . remanded cases when they lacked subject matter jurisdiction" between the years of 1789 and 1875.[30] Given that remand was still occurring during this period despite its lack of codification, it logically follows that the "right of remand" includes non-statutory aspects. Remand's statutory/non-statutory hybrid nature is one possible, overly simplified explanation for the confusion surrounding remand and the logic

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[27] *See* 14C CHARLES ALLEN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3739 (Rev. 4th ed. 2022).

[28] *See supra* note 12 and accompanying text.

[29] Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 470, 472 ("That if, in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require . . . .") (first iteration of the present-day remand statute, 28 U.S.C. § 1447(c)); *see also* Deborah J. Challener & John B. Howell, III, *Remand and Appellate Review When a District Court Declines to Exercise Supplemental Jurisdiction Under 28 U.S.C. § 1367(c),* 81 TEMP. L. REV. 1067, 1075-76 (2008).

[30] Challener & Howell, *supra* note 29, at 1075.

that ultimately led to the *Thermtron* decision.[31] Arguably, it is more difficult to capture all possible grounds for remand in a statute because it is not necessarily a positive "right" like the right of removal.[32] It is more a question of whether a federal district court is the appropriate forum for the case in question, and the answer to that question often lies outside the remand statute.

1. Section 1447(d) Legislative History & Case Law Pre-*Thermtron*

Prior to the *Thermtron* decision, § 1447(d) of the remand statute was one area of the statutory scheme in which there was no tension between remand's statutory and non-statutory aspects. The language of § 1447(d) barred all appeals of remand orders, regardless of the grounds,[33] and this interpretation was well-settled and non-controversial.[34] In other words, regardless of whether a case was remanded based on a statutory ground outlined in § 1447(c) or a non-statutory ground such as abstention, appeal of such an order was barred. *Thermtron* upended the uniform application of § 1447(d) by creating an exception to the appellate bar,[35] which has had significant consequences on the body of remand law as a whole.[36]

In the early American legal system, appellate review of remand orders was not barred. Just as federal district courts were

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[31] Hrdlick, *supra* note 1, at 535-37 ("As a set of jurisdictional statutes, the removal right is both wooden and malleable. The right is 'wooden' in the sense that the right must be exercised in strict conformity with the language of the statutes . . . The right is 'malleable' in the sense that the right is not fundamental, and thus has been and should be changed over time to suit prevailing views of both our State and Federal Judiciaries. These contradictory aspects of the removal privilege helped spawn a body of statutory case law and that confuses courts and commentators alike . . . .") (footnotes omitted). While Hardlick seems to be discussing both removal and remand under the umbrella of the term "removal privilege," his point can specifically be applied to the doctrine of remand.

[32] The right of removal can be viewed as "an entitlement to compel a specific government action:" allowing the defendant to remove a case that was validly filed in state court to federal court. *See* Alexis M. Piazza, *The Right to Education After* Obergefell, 43 HARBINGER 62 (2019).

[33] *See* 28 U.S.C. § 1447(d).

[34] *See, e.g.*, Morey v. Lockhart, 123 U.S. 56 (1887); Emps. Reinsurance Corp. v. Bryant, 299 U.S. 374 (1937).

[35] Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 352-53 (1976).

[36] *See* discussion *infra* Part II.

remanding cases prior to the enactment of the remand statute, "the Supreme Court of the United States *entertained appellate review of remand orders*" during this time as well.[37] Stated differently, at the time, "appellate review of remand orders, in one form or another, was presumed valid."[38] In the Act of March 3, 1875, Congress "created a formal right of appellate review, stating that 'the order of said circuit court dismissing or remanding said cause to the State court shall be reviewable by the [S]upreme [C]ourt on writ of error or appeal, as the case may be.'"[39]

However, only 12 years later, in an effort to "restrict the recently-expanded jurisdiction of the federal courts" due to "docket congestion," [40] Congress barred appeal of remand orders in the Act of March 3, 1887.[41]

> Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit 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 circuit court so remanding such cause *shall be allowed*.[42]

The passage of this statute not only "rescind[ed] the right of appellate review enacted twelve years earlier, but also reversed a

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[37] Hrdlick, *supra* note 1, at 539 (emphasis added).

[38] *Id.*

[39] *Id.* at 540 (citing Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 470, 472).

[40] *Id.* at 540-41; *see also* Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 EMORY L.J. 83, 91, 95 (1994) ("As part of Reconstruction, Congress enlarged the circuit courts' original and removal jurisdiction to protect federal officers and freedmen from hostile southern courts and to ensure enforcement of a growing panoply of federal rights.") (footnotes omitted).

[41] *See* Act of March 3, 1887, ch. 373, 24 Stat. 552, corrected by Act of Aug. 18, 1888, ch. 866, 25 Stat. 433; *see also Thermtron Prods.*, 423 U.S. at 346-47. ("The Act of Mar. 3, 1887, however, while not disturbing the provision for dismissal or remand for want of jurisdiction, not only repealed the provision in § 5 of the 1875 Act providing for appellate review of remand orders but contained a provision that 'improperly removed' cases should be remanded and that 'no appeal or writ of error from the decision of the circuit court *so remanding* such cause shall be allowed.'") (quoting Act of March 3, 1887, ch. 373, 24 Stat. 553) (emphasis added).

[42] Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, corrected by Act of Aug. 18, 1888, ch. 866, 25 Stat. 433 (emphasis added). The repeal of the clause in the 1875 Act authorizing appellate review is found in § 6 of the 1887 Act. *See id.* at § 6.

silent presumption of appellate review that had existed for almost a century, beginning with passage of the foundational Judiciary Act of 1789."[43] Despite this significant change to remand procedure, courts applied it with relative ease, "issu[ing] consistent and firm decisions stating that remand orders in removed cases were not subject to appellate review . . . ."[44]

Shortly after the passage of the 1887 Act, "the Supreme Court rejected any limitation [on the appellate bar] based on the . . . provision's placement within the statutory scheme[.]"[45] In *Morey v. Lockhart*, "the appellate bar appeared at the end of a long statutory section listing the types of cases that could be removed to federal court."[46] The defendant argued that the appellate bar's placement within the statute implied that the bar was only meant to apply to the type of removable case immediately preceding it in the statute rather than all of the listed types of removable cases.[47] However, the Court rejected the notion that the bar's placement within the statute was meant to limit its application, holding that "the prohibition has no words of limitation."[48]

In 1911, the Judicial Code was revised,[49] creating the statutory precursors to sections 1447(c) and 1447(d). Under 28 U.S.C. § 71 (§ 1447(d)'s statutory precursor), the language regarding the appellate bar interpreted in *Morey* largely stayed the same, "provid[ing] that any case 'improperly removed' could be remanded to state court and that any order 'so remanding' a removed case was not subject to appeal."[50] Additionally, § 1447(c)'s statutory precursor, 28 U.S.C. § 80, continued to "[allow] federal

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[43] Hrdlick, *supra* note 1, at 541-42.

[44] *Id.* at 543 (citing In re Matthew Addy Steamship & Com. Corp., 256 U.S. 417 (1921) (dismissing writ of mandamus); Yankaus v. Feltenstein, 244 U.S. 127 (1917) (dismissing writ of error); German Nat'l Bank v. Speckert, 181 U.S. 405 (1901) (dismissing direct appeal); Whitcomb v. Smithson, 175 U.S. 635 (1900) (stating writ of error may not lie against remand order); *see also* Missouri Pac. Ry. Co. v. Fitzgerald, 160 U.S. 556 (1896) (dismissing writ of error)).

[45] Hrdlick, *supra* note 1, at 546; *see also* Morey v. Lockhart, 123 U.S. 56 (1887).

[46] Hrdlick, *supra* note 1, at 546.

[47] *Id.*

[48] *Id.* (quoting *Morey*, 123 U.S. at 56).

[49] Robert E. Bunker, *The Judicial Code of March 3, 1911*, 9 MICH. L. REV. 697, 697 (1911) ("[T]he Sixty-first Congress passed . . . '[a]n Act to codify, revise and amend the laws relating to the judiciary.'").

[50] Hrdlick, *supra* note 1, at 546 (citing 28 U.S.C. § 71); *see also* Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 347-48 (1976).

district courts to remand any removed case which was not 'properly within the jurisdiction of said district court . . . .'"[51]

Although section 80 did not contain a separate appellate bar, the Supreme Court held unambiguously in *Employers Reinsurance Corp. v. Bryant* that the appellate bar still applied.[52]

> [Sections 71 and 80] are *in pari materia*, are to be construed accordingly rather than as distinct enactments, and, when so construed, show, as was held in *Morey v. Lockhart*, . . . that they are intended to reach and include all cases removed from a state court into a federal court and remanded by the latter.[53]

Thomas Hrdlick notes in his article, *Appellate Review of Remand Orders in Removed Cases: Are They Losing A Certain Appeal?*, that while both *Morey* and *Bryant* reach the same conclusion—no exceptions to the appellate bar—the reasoning differs slightly.[54] *Morey* cited the broad language of the appellate bar as the justification for its application to all remand bases while *Bryant* reasoned that the relationship between sections 71 and 80 justified the application of the bar.[55] *Bryant* reasoned that the two sections were meant to be construed together (*in pari materia*) such that the appellate bar in § 71 was read as a counterpart to the grounds for remand set forth in § 80.[56] Hrdlick argues that "this change proved important, because while the language of the appellate bar allowed for no exceptions, the *in pari materia* canon of construction created an opening for one."[57] Part II will discuss how the Court in *Thermtron* invoked the *in pari materia* canon of construction to create an exception to the appellate bar.

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[51] Hrdlick, *supra* note 1, at 546-47 (quoting 28 U.S.C. § 80).

[52] *Id.* at 547 (citing Emps. Reinsurance Corp. v. Bryant, 299 U.S. 374 (1937)); *see also Thermtron*, 423 U.S. at 347-48 (1976).

[53] *Bryant*, 299 U.S. at 380-81.

[54] Hrdlick, *supra* note 1, at 547.

[55] *Id.* ("Note that while *Bryant* cites and is consistent with the result in *Morey*, there is a subtle change in reasoning. *Morey* interpreted the appellate bar as applying to a remand order issued under any removal provision, citing the broad and comprehensive wording of the bar itself. *Bryant* reached the same conclusion, focusing not on the language of the bar, but on the notion that removal statutes were *in pari materia* and should be read together.").

[56] *Bryant*, 299 U.S. at 380-81.

[57] Hrdlick, *supra* note 1, at 547.

2. Section 1447(c) Legislative History & Case Law Pre-*Thermtron*

Following the Court's decision in *Bryant*, any analysis of the § 71 appellate bar necessarily required an analysis of § 80, the provision delineating the grounds for remand. Because the two provisions were *in pari materia*, the language and scope of one provision affected the language and scope of the other.

In 1948, following the Supreme Court's decision in *Bryant* and prior to its decision in *Thermtron*, Congress revised, consolidated, and clarified the Judicial Code located in Title 28, which included removal and remand provisions.[58] It was amended again shortly thereafter in 1949 "due to numerous drafting errors."[59] These revisions re-codified sections 80 and 71 into sections 1447(c) and (d), respectively.[60] After the revisions of 1949, § 1447(d) still categorically barred appeal of remand orders, and the language of § 1447(e) read as follows: "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."[61]

As will be discussed in the next section, courts' interpretation of the word "improvidently" in the removal statute became very important after the Court's decision in *Thermtron*.[62] However, it is unclear how courts interpreted this word prior to the *Thermtron* decision.[63] There is some evidence to suggest that courts interpreted an "improvident" removal as a legal defect, "rather than a removal that was merely imprudent or unfair to the plaintiff."[64] That being said, courts did not seem all that inclined to provide a concrete definition of the term. This apathy is evidenced by the paucity of cases discussing the meaning of the word "improvidently"

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[58] *See* Act of June 25, 1948, ch. 646, 62 Stat. 939 (1948); Challener & Howell, *supra* note 29, at 1077; *see also* Snapper, Inc. v. Redan, 171 F.3d 1249, 1254 (11th Cir. 1999); Albert B. Maris, *New Federal Judicial Code: Enactment by 80th Congress a Notable Gain*, 34 ABA 863 (1948).

[59] *Snapper*, 171 F.3d at 1254; *see also* Act of May 24, 1949, ch. 139, § 84, 63 Stat. 102 (1949).

[60] *Snapper*, 171 F.3d at 1254.

[61] 28 U.S.C. § 1447(e) (Supp. II 1946) (current version at 28 U.S.C.A. § 1447(e) (West 2011)) (emphasis added) [hereinafter "1948 version"].

[62] *See infra* Subsection II.A.1.

[63] Markowski, *supra* note 10, at 1092-93.

[64] *Id.* at 1093.

(prior to *Thermtron*), and in the few cases that do address the meaning, the attempt at providing a definition can only be described as half-hearted.[65]

This apparent apathy was likely due to the insignificance of defining the term at that time. Regardless of *why* a case was remanded back to state court, under the § 1447(d) appellate bar, the remand order could not be appealed. Likewise, unlike the current version of § 1447(c), which gives a plaintiff thirty days to move for remand (unless there is a lack of subject-matter jurisdiction),[66] there was no limiting timeframe on motions for remand in the 1948 version of § 1447(c).[67] *Thermtron* changed the entire remand landscape by creating an exception to the § 1447(d) appellate bar based on a ground for remand that apparently exceeded the scope of § 1447(c).[68] As a result, it became incredibly important to define the scope of § 1447(c), which included defining the word "improvidently."[69] If a case were remanded due to "improvident" removal (or lack of subject matter jurisdiction), the remand order fit within the scope of § 1447(c) and was thus barred from appeal.[70] Alternatively, if the case was remanded on grounds not based on "improvident" removal (or lack of subject matter jurisdiction), the remand order could be appealed under the *Thermtron* exception.[71]

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[65] *See, e.g.*, Haelan Labs., Inc. v. Topps Chewing Gum, Inc., 131 F. Supp. 262, 263 (E.D.N.Y. 1955) ("I think at most or at best 'improvidently' is the equivalent of *wrongfully*, or *without legal basis*.") (emphasis in original); Green v. Zuck, 133 F. Supp. 436, 438 (S.D.N.Y. 1955) ("The case may have been removed 'improvidently' in the sense that the petition for removal was not filed within the time prescribed by the statute, but this is not a jurisdictional defect.").

[66] 28 U.S.C. § 1447(c) ("A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within *30 days* after the filing of the notice of removal under section 1446(a).") (emphasis added).

[67] 1948 version, *supra* note 61.

[68] *See* Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 353-61 (1976) (Rehnquist, J., dissenting).

[69] *See infra* Subsection II.A.1; Snapper, Inc. v. Redan, 171 F.3d 1249, 1254 (11th Cir. 1999).

[70] *Snapper*, 171 F.3d at 1254.

[71] *Id.*

II. *THERMTRON* & ITS PROGENY

After eighty-nine years of a categorical appellate bar of remand orders, the Supreme Court's 1976 decision in *Thermtron* muddied the waters in a once-clear area of law and created an exception to the appellate bar that would widen to include an entire class of remand bases in the following decades.[72] This section details the Court's decision in *Thermtron* and the subsequent case law that perpetuated today's enduring confusion.

A. Thermtron

In *Thermtron*, the plaintiffs "[sought] damages for injuries arising out of an automobile accident,"[73] and the defendants removed the case to Federal District Court, in accordance with the removal procedures outlined in Title 28 U.S.C. §1441 and § 1446.[74] Although there was no defect in removal procedure or issue with subject matter jurisdiction, the District Court remanded the case back to state court, citing docket congestion.[75] The defendants "then filed in the Court of Appeals an alternative petition for a writ of mandamus or prohibition on the ground that the action had been properly removed and that [the District Judge] lacked authority to

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[72] S. Vance Wittie, *Appealing Remand Orders*, 22 APP. ADVOC. 111 (2009). ("Courts have adopted legal doctrines that remove whole categories of remand orders from the scope of section 1447(d).").

[73] *Thermtron*, 423 U.S. at 337.

[74] *Id.*; *see* 28 U.S.C. § 1441(a) ("Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."); 28 U.S.C. § 1441(b)(2) ("A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."); 28 U.S.C. § 1446(b)(1) ("The notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter."); 28 U.S.C. § 1446(b)(1) ("When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.").

[75] *Thermtron*, 423 U.S. at 339.

remand the case on the ground that he had asserted."[76] The Court of Appeals denied the petition, finding that it was within the District Court's discretion to enter the remand order, and the Court of Appeals lacked jurisdiction to hear such an appeal under § 1447(d).[77]

The Supreme Court reversed and remanded the case holding that (1) "[t]he District Court exceeded its authority in remanding the case on grounds not permitted by § 1447(c)[,]" (2) § 1447(d) does not bar appeals for remand orders that were not based on grounds specified in § 1447(c), and (3) "mandamus was the proper remedy to compel the District Court to entertain the remanded action."[78]

In support of its holding that the § 1447(d) bar on appeals only applied to remand grounds specified in § 1447(c), the Court pointed to its prior decision in *Employers Reinsurance Corp. v. Bryant* holding that the two provisions "'are [*in pari materia*]'" and should be "'construed accordingly rather than as distinct enactments . . .'"[79] At the time, the language of § 1447(c) granted courts the ability to remand cases removed "improvidently and without jurisdiction;"[80] thus, appeal was only barred for cases remanded on those grounds.[81] While the Court employed the same principles of construction as it did in *Bryant*, it reached an opposite conclusion regarding the outcome of the underlying case.[82] In *Bryant*, construing § 1447(c) and (d) together expanded the reach of the appellate bar, prohibiting appeal of the underlying claim, whereas, the *in pari materia* construction in *Thermtron* limited the application of the appellate bar, allowing appeal of the underlying claim.

In dissent, Justice Rehnquist, joined by Chief Justice Burger and Justice Stewart, pointed out that this holding dramatically departed from the way courts have interpreted the appellate bar for "almost 90 years."[83] Rehnquist argued that the Court's holding was

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[76] *Thermtron,* 423 U.S. at 336.

[77] *Id.*

[78] *Id.* at 336-37.

[79] *Id.* at 345 (quoting Emps. Reinsurance Corp. v. Bryant, 299 U.S. 374, 380-81 (1937)); *see also* Kloeb v. Armour & Co., 311 U.S. 199, 202 (1940).

[80] *Thermtron*, 423 U.S. at 346 (citing 28 U.S.C. § 1447(c) (1946 ed. Supp. III)).

[81] *Id.*

[82] *Compare Bryant*, 299 U.S. at 380-81 *with Thermtron*, 423 U.S. at 345.

[83] *Thermtron*, 423 U.S. at 356 (Rehnquist, J., dissenting).

not only contrary to the plain language of the statute but was also a direct contravention of the legislature's intent in enacting the statute.[84]

> The majority attempts to avoid the plain language of [section] 1447(d) by characterizing the bar to review as limited to only those remand orders entered pursuant to the directive of [section] 1447(c), *i.e.*, those cases "removed improvidently and without jurisdiction." But such a crabbed reading of the statute ignores the undoubted purpose behind the congressional prohibition. If the party opposing a remand order may obtain review to litigate whether the order was properly pursuant to the statute, his ability to delay and to frustrate justice is wide ranging indeed. By permitting such a result here, the Court effectively undermines the accepted rule established by Congress and adhered to for almost 90 years.[85]

Justice Rehnquist also correctly prophesized the far-reaching implications of the *Thermtron* decision, noting the majority's naivety in hoping "that the effect of today's decision will be limited to the unique circumstances of this case."[86]

Thermtron conclusively established what *Bryant* had already suggested: § 1447(c) and (d) were inextricably linked, and any change or decision affecting one provision would also affect the other. The minute the Court handed down the *Thermtron* decision, the exception already exceeded the specific circumstances of that case because *any* invalid grounds for remand exceeded the scope of §1447(c) and were thus appealable. Additionally, as will be discussed in Section II.B, following *Thermtron*, the Court later held that any *valid* grounds for remand that exceeded the scope of § 1447(c) were also appealable.[87]

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[84] *Id.* at 355-56 (Rehnquist, J., dissenting).

[85] *Id.*

[86] *Id.* at 356.

[87] *See infra* Section II.B.

1. Section 1447(c): 1988 Amendment

As previously noted, it became very important to define the meaning of the word "improvidently" in § 1447(c) following the Court's decision in *Thermtron* because the meaning dictated whether a certain remand order was appealable.[88] After *Thermtron*, many courts limited their reading of the word "improvidently" to apply to legal defects, "anchoring the definition in errors in the removal process"[89] set forth in §§ 1441 and 1446.[90] Said differently, courts were interpreting the word "improvidently" to apply only to *procedural* defects.[91] This more narrow interpretation of the word "improvidently" resulted in the creation of a third class of remand bases: those that were both non-procedural and non-jurisdictional in nature.[92] And because this class of remand bases were non-procedural (*i.e.*, the word "improvidently" did not apply) and non-jurisdictional (*i.e.*, there was no lack of subject-matter jurisdiction), they were not deemed to fall within the scope of § 1447(c); therefore, they were not barred from appeal under § 1447(d).[93]

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[88] Snapper, Inc. v. Redan, 171 F.3d 1249, 1254-55 (11th Cir. 1999).

[89] *Id.* at 1254.

[90] *See* 28 U.S.C. §§ 1441, 1446(b)(1).

[91] *See, e.g.*, In re Merrimack Mut. Fire Ins., 587 F.2d 642 (5th Cir. 1978) (holding that "improvidently" refers to the statutory removal procedural requirements); Sheet Metal Workers Int'l Ass'n v. Seay, 693 F.2d 1000, 1005 (10th Cir. 1982) ("A case is not 'improvidently' removed, it has said, if all procedural requirements, such as timely filing of removal petition, have been met.") (footnote omitted); Rothner v. City of Chicago, 879 F.2d 1402, 1411 (7th Cir. 1989) ("[I]t is logical and reasonable to interpret the term to mean noncompliance with Congress' specific and detailed statutory provisions.").

[92] *See* 2 DAVID W. MCKEAGUE & BROCK A. SWARTZLE, BUS. & COM. LITIG. FED. CTS. § 17:54-17:56 (5th ed. 2021); City of Albuquerque v. Soto Enters., 864 F.3d 1089, 1095 (10th Cir. 2017) ("By contrast, the following grounds fall outside the 'any defect' group: (1) the district court's discretionary decision not to exercise supplemental jurisdiction; (2) the district court's discretionary remand of pendent claims; (3) abstention; (4) waiver of the federal forum in a forum-selection clause; and (5) the district court's crowded docket."); *Snapper*, 171 F.3d at 1253 (11th Cir. 1999) ("Other grounds for remand exist, however, that are external to the removal process and do not depend on any 'defect' in the removal itself. The most common examples of these grounds arise in the contexts of forum selection clauses, abstention, and supplemental jurisdiction."); Quackenbush v. Allstate Ins., 517 U.S. 706, 712 (1996) ("[A]bstention-based remand order does not fall into either category of remand order described in § 1447(c), as it is not based on lack of subject matter jurisdiction or defects in removal procedure.").

[93] *See, e.g.*, Milk 'N' More, Inc. v. Beavert, 963 F.2d 1342 (10th Cir. 1992); Bennett v. Liberty Nat'l Fire Ins., 968 F.2d 969, 970 (9th Cir. 1992).

Examples of this third class of remand bases include remand based on abstention, contractual forum selection clauses, and discretionary remand of supplemental state law claims.[94] The common theme among these remand bases is that each involves a situation in which the federal district court maintains jurisdiction, but for one reason or another, declines to exercise its jurisdiction in this particular instance.[95] Likewise, the basis for remand is not procedural in that it does not involve a situation specified in the removal statutes, such as failure to remove within 30 days of service, violation of the forum-defendant rule, or failure to obtain consent from all defendants.[96]

While many courts operated under this relatively narrow reading of the word "improvidently," "the term itself was obviously vulnerable to a much broader interpretation."[97] In addition to this general vulnerability, some courts applied a broad reading of "improvidently" in other contexts, primarily regarding waiver of removal based on a defendant's conduct.[98]

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[94] *See Snapper*, 171 F.3d at 1255 ("Of particular relevance to our case, judicial decisions under the 1948 version uniformly held that a remand based on a forum selection clause did not implicate a removal defect, did not stem from an 'improvident' removal, was not a remand based on a ground specified in § 1447(c), and therefore was not a remand insulated from appellate review by § 1447(d). Judicial decisions were likewise uniform with regard to remands in the contexts of abstention and supplemental jurisdiction.") (footnote omitted); *supra* note 87 and accompanying text.

[95] *See* Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 640 (2009) ("Upon dismissal of the federal claim, the District Court retained its statutory supplemental jurisdiction over the state-law claims. Its decision declining to exercise that statutory authority was not based on a jurisdictional defect but on its discretionary choice not to hear the claims despite its subject-matter jurisdiction over them."); *see, e.g.*, Wallace v. La. Citizens Prop. Ins., 444 F.3d 697, 701 (5th Cir. 2006) (holding that a CAFA "local controversy" exception "does not deprive federal courts of subject matter jurisdiction, but rather, acts as a limitation upon the exercise of jurisdiction granted . . . ."); Ankenbrandt v. Richards, 504 U.S. 689, 704, (1992) ("[E]ven though subject-matter jurisdiction might be proper, sufficient grounds exist to warrant abstention from the exercise of that jurisdiction.").

[96] *See* 28 U.S.C. §§ 1441(b)(2), 1446(b)(1), 1446(b)(2)(A); MCKEAGUE & SWARTZLE, *supra* note 92, § 17:54.

[97] *Snapper*, 171 F.3d at 1255.

[98] *See* Schmitt v. Ins. Co. of N. Am., 845 F.2d 1546 (9th Cir. 1988); In re Weaver, 610 F.2d 335 (5th Cir. 1980) (holding that remand based on defendant's waiver of right to remove was *improvident*).

In an effort to clarify the meaning of § 1447(c), Congress amended the provision in 1988.[99] After the amendment, the statute read, in relevant 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 § 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.[100]

Congress clearly intended to codify most courts' current interpretation of the statute by removing the word "improvidently" and adding the phrase "removal procedure."[101] In the wake of this amendment, "courts were unanimous in holding that remands in the contexts of forum selection clauses, abstention, and supplemental jurisdiction were not remands based upon defects in removal procedure and thus were not remands provided for in § 1447(c)."[102] The natural conclusion of such a holding was that these bases for remand were neither subject to the thirty-day time frame required for remand motions under § 1447(c) nor barred from appeals under § 1447(d).[103]

B. Undermining the Logic of Thermtron

1. *Carnegie-Mellon*

Thermtron created uncertainty pertaining to what specific set of circumstances would trigger the exception.[104] The application of

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[99] *See* Judicial Improvements and Access to Justice Act of 1988, Pub.L. 100–702, Title X, § 1016(c), 102 Stat. 4670 (1988).

[100] 28 U.S.C. § 1447(c) (1994) (current version at 28 U.S.C.A. § 1447(c) (West Supp.1998)) (emphasis added).

[101] *See Snapper*, 171 F.3d at 1256 ("Congress clarified the interpretive difficulties engendered by the 1948 version, specifically endorsing the narrow interpretation of the judicial decisions described above."); City of Albuquerque v. Soto Enters., Inc., 864 F.3d 1089, 1096 (10th Cir. 2017) ("Because of this uncertainty, and 'specifically endorsing the narrow interpretation' of improvidence, Congress amended the statute in 1988 by removing 'improvidently' and replacing it with 'any defect in removal procedure.'") (quoting Snapper, Inc. v. Redan, 171 F.3d 1249, 1256 (11th Cir. 1999)).

[102] *Id.* at 1256-57 (footnotes omitted).

[103] *Id.*

[104] Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 351-52 (1976).

the test seemed straightforward: if the grounds for remand were not contained within § 1447(c), then the remand order was invalid and thus appealable.[105] However, in 1988, this straightforward, logical framework was significantly undermined in *Carnegie-Mellon Univ. v. Cohill*, adding to the confusion surrounding remand procedures.[106] The underlying claim in *Carnegie-Mellon* involved both a federal question and related state law claims, and the defendant removed to federal court based on the doctrine of pendant jurisdiction established in *Mine Workers v. Gibbs*.[107] Shortly after removal, the federal question claim was eliminated, and the District Court made the discretionary decision to remand the remaining state law claims back to state court.[108] Accordingly, the question before the Supreme Court was whether the District Court had the authority to remand the case when the grounds for remand were not specified in the statute.[109]

The Court acknowledged that while the language in *Thermtron* seemed fairly explicit in requiring that any grounds for remand must be specified by statute,[110] it "[lost] controlling force when read against the circumstances of that case."[111] The District Court in *Thermtron* had "no authority to decline to hear the removed case" because its jurisdiction was based in diversity, "which is not discretionary."[112] In contrast, *Gibbs* clearly established that a district court had the discretion to decline to hear a case involving pendant state law claims via *dismissal*; thus, it logically followed that a district court also had the discretion to decline to hear a case via *remand*.[113] The implication of this finding

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[105] *Thermtron Prods., Inc.*, 423 U.S. at 351-52.

[106] *See generally*, 484 U.S. 343, 356 (1988) ("Thermtron therefore does not control the decision in this case.").

[107] *Id.* at 348 (citing Mine Workers v. Gibbs, 383 U.S. 715 (1966)).

[108] *Id.* at 346.

[109] *Id.* at 351. At the time, the court's authority to remand pendant state law claims was not based in any statute, as this case was decided prior to the codification of the supplemental jurisdiction statute, 28 U.S.C. § 1367, in 1990.

[110] *Id.* at 355-56 (citing *Thermtron*, 423 U.S. at 349 n. 9 ("Lower federal courts have uniformly held that cases properly removed from state to federal court within the federal court's jurisdiction may not be remanded for discretionary reasons not authorized by the controlling statute.")).

[111] *Id.* at 355.

[112] *Id.* at 356.

[113] *Id.*

meant that valid grounds for remand did not necessarily have to be contained in the remand statute. Thus, the bright line rule established in *Thermtron* became murkier.

The natural follow-up question after *Carnegie-Mellon* was whether a *valid* basis for remand that existed outside the scope of § 1447(c) was barred from appeal under § 1447(d). *Thermtron* involved what the Court considered to be an *invalid* basis for remand, which was the justification for exempting the remand order from the bar on appeals. As will be discussed later in Subsection II.B.1, the Court goes on to hold certain *valid* bases for remand, which are not contained within the remand statute, are, in fact, appealable.[114] With this in mind, logically, one might think that any valid basis for remand that is not contained within § 1447(c) is appealable; however, the Court further complicated this body of law in *Things Remembered, Inc. v. Petrarca*.[115]

2. *Things Remembered*

In 1995, just seven years after *Carnegie-Mellon*, the logical framework underlying the *Thermtron* decision was challenged yet again in *Things Remembered*.[116] In *Things Remembered*, the plaintiff filed an action in Ohio state court alleging several claims related to a breach of contract.[117] A few months after the plaintiff filed its complaint, the defendant filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the Southern District of New York.[118] The defendant then removed the case, "bas[ing] its removal on the bankruptcy removal statute, 28 U.S.C. § 1452(a), as well as the general federal removal statute, 28 U.S.C. §

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[114] *See, e.g.*, Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996); Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635 (2009); *see also* Wittie, *supra* note 72, at 111-12.

[115] Things Remembered, Inc. v. Petrarca, 516 U.S. 124 (1995).

[116] *Id.*

[117] *Id.* at 125 ("Respondent commenced this action in March 1992 by filing a four-count complaint against Child World, Inc., and Cole National Corporation in the Court of Common Pleas in Summit County, Ohio. The state action charged Child World with failure to pay rent under two commercial leases. The complaint also sought to enforce Cole's guarantee of Child World's performance under the leases. Petitioner is Cole's successor in interest.").

[118] *Id.* at 125-26.

1441(a)."[119] Ultimately, the District Court in the Northern District of Ohio found that removal had been untimely under both sections 1452(a) and 1441(a).[120] As a result, the District Court remanded the case back to state court.[121] In response, the defendant appealed the order to the Sixth Circuit, and the Sixth Circuit held that both § 1452(b) and § 1447(d) barred appellate review of the District Court's order and dismissed the appeal as a result.[122]

The Supreme Court granted certiorari and affirmed the judgment of the Sixth Circuit, holding that removal was untimely; thus, the District Court's remand order was barred from appellate review.[123] This holding in itself does not necessarily conflict with the *Thermtron* decision, as untimely removal under § 1441 fits squarely within the bases for remand outlined in § 1447(c) and is barred from appeal in § 1447(d). However, the logic diverges from *Thermtron* when the Court states that the conclusion would be the same "regardless of whether removal was effected pursuant to § 1441(a) or § 1452(a)."[124]

In tension with *Thermtron*, here, the Supreme Court is saying that "[s]ection 1447(d) applies 'not only to remand orders made in suits removed under [the general removal statute], but to orders of remand made in cases removed under *any other statutes*, as well.'"[125] The Court reasoned that § 1452's lack of an express provision granting the right of appeal meant that "[Congress] must have intended [the] section 1447(d) [bar on appeals] to apply."[126] Thus, any remand orders based on a removal statute are barred

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[119] *Things Remembered, Inc.*, 516 U.S. at 126 (footnote omitted). *See also* 28 U.S.C. § 1441(a); *supra* note 74 and accompanying text; 28 U.S.C. § 1452(a) ("A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.").

[120] *Things Remembered*, 516 U.S. at 126.

[121] *Id.* at 127.

[122] *Id.*

[123] *Id.* at 127-28 (citing Gravitt v. Sw. Bell Telephone Co., 430 U.S. 723 (1977) ("Section 1447(d) thus compels the conclusion that the District Court's order is 'not reviewable on appeal or otherwise.'")).

[124] *Id.* at 128.

[125] *Id.* (quoting United States v. Rice, 327 U.S. 742, 752 (1946)) (alteration and emphasis in original).

[126] Wittie, *supra* note 72, at 112.

from appeal "unless the statute expressly—or in a few instances, implicitly—provide[d] for appellate review."[127]

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Carnegie-Mellon and *Things Remembered* undermined *Thermtron* in two key ways. First, *Carnegie-Mellon* held that valid grounds for remand can exist outside of the remand statute (§ 1447(c)).[128] This holding directly conflicts with *Thermtron*, which held that appeals were only appropriate *because* the remand order was invalid, and the order was invalid *because* it exceeded the scope of § 1447(c).[129] So, while *Thermtron* created the exception allowing appeals of *invalid* remand orders, *Carnegie-Mellon* arguably opened the door to a much broader exception allowing appeals of certain *valid* remand orders.[130] Second, *Things Remembered* seemed to expand the *in pari materia* canon of construction beyond sections 1447(c) and 1447(d) to *any other statute* granting the right of removal.[131] This holding is not necessarily at odds with *Thermtron*; although it seemed to potentially narrow the scope of the *Thermtron* holding. However, the trend towards narrowing the scope of the *Thermtron* holding is called into question when the Court, in later years, allowed appeals under a different removal statute despite the absence of an explicit grant of appellate review.

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[127] *Id.*; *see* Hrdlick, *supra* note 1, at 560.

[128] Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343 (1988).

[129] *Id.* at 361 (White, J., dissenting) ("This action cannot be reconciled with the holding in *Thermtron* that cases cannot be remanded for nonstatutory reasons.").

[130] *Carnegie-Mellon* did not contemplate the appealability of the remand order in question; however, many courts interpreted the holding to allow appeals of *Gibbs* remands. *See* Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 130 (1995) (Kennedy, J., concurring) ("Despite the broad sweep of § 1447(d), . . . various Courts of Appeals have relied on *Thermtron* to hold that § 1447(d) bars appellate review of § 1447(c) remands but not remands ordered under [*Carnegie-Mellon*].").

[131] The Court very clearly understood the *Thermtron in pari materia* canon of construction to apply only to 1447(c) and (d) at the time of the *Thermtron* decision. *Things Remembered*, 516 U.S. at 130 (Kennedy, J., concurring) ("We further held that the prohibition of appellate review in § 1447(d) does not bar review of orders outside the authority of subsection (c), reasoning that subsections (c) and (d) were to be given a parallel construction. We observed that a remand order other than the orders specified in subsection (c) had 'no warrant in the law' and could be reviewed by mandamus.") (internal citations omitted).

C. Expanding the Thermtron *Exception*

While *Carnegie-Mellon* and *Things Remembered* undermined the reasoning supporting the *Thermtron* holding, but neither case actually expanded the exception to the appellate bar beyond the specific circumstances outlined within. The following two cases expanded the *Thermtron* exception to the appellate bar, further demonstrating the Court's willingness to promulgate an atextual reading of § 1447(d).

1. *Quackenbush*

Just as the Court seemed to potentially lean towards narrowing the *Thermtron* exception in *Things Remembered*,[132] it went in the opposite direction in 1996 in *Quackenbush v. Allstate Ins. Co.*[133] The Court expanded the *Thermtron* exception by holding that a remand made outside the scope of § 1447(c) was not only valid but also appealable.[134] *Quackenbush* was removed on diversity grounds[135] but was later remanded by the District Court based on a *Burford* abstention.[136] 28 U.S.C. § 1291 allows "appeals from all final decisions of the district courts of the United States,"[137] and unlike general remand orders, remand based on abstention is generally considered to be a *final decision*.[138]

Even though the statute under which the case was removed did not expressly provide for appellate review (28 U.S.C. § 1332), the statute that applied to the basis for remand did (28 U.S.C. § 1291). This holding was consistent with the Court's reasoning in *Things Remembered*. Unlike § 1452(a), which was the statute at

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[132] *See supra* note 129 and accompanying text.

[133] *See* Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996).

[134] *Id.*

[135] *Id.*; *see also* 28 U.S.C. § 1332.

[136] *Quackenbush*, 517 U.S. at 727; *see also* Burford v. Sun Oil Co., 319 U.S. 315 (1943) (directs federal courts to decline to exercise jurisdiction when state administrative agency action is unresolved).

[137] 28 U.S.C. § 1291.

[138] *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, *2 (1983) ("The District Court's stay order was appealable as a 'final decision' to the Court of Appeals under 28 U.S.C. § 1291. Since the order was based on the conclusion that the federal and state actions involved the identical issue of arbitrability, and this issue was the only substantive issue present in the federal action, a stay of the federal action pending resolution of the state action meant that there would be no further litigation in the federal court.").

issue in *Things Remembered*, § 1291 did expressly provide for appellate review. Therefore, review was not barred by § 1447(d).

It is interesting to note, however, that the Court in *Quackenbush* seemed to reinforce a limited reading of the appellate bar espoused in *Thermtron*, rather than acknowledging the broader application the Court adopted in *Things Remembered*.[139] The Court made a point to state that "[o]nly remands based on grounds specified in § 1447(c) are immune from review under § 1447(d),"[140] which seems at odds with the Court's decision just one year prior in *Things Remembered*.[141]

2. *Carlsbad*

In 2009, in *Carlsbad Tech., Inc. v. HIF Bio, Inc.*,[142] the Supreme Court further expanded the *Thermtron* exception to the appellate bar to include remand orders based on a district court's discretionary remand of supplemental state law claims under Title 28 U.S.C. section 1367(c).[143] The underlying case was removed pursuant to section 1441(c) due to the presence of a federal claim under the Racketeer Influenced and Corrupt Organizations Act (RICO); however, the District Court remanded the remaining state law claims when the federal RICO claim was dropped.[144] The defendant appealed the remand order to the Federal Circuit, and the Federal Circuit dismissed the appeal, finding that the case was not reviewable on appeal due to the district court's lack of subject-matter jurisdiction over the state law claims.[145]

The Supreme Court reversed the Federal Circuit's judgment, holding that "[a] district court's order remanding a case to state court after declining to exercise supplemental jurisdiction over

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[139] *Quackenbush,* 517 U.S. at 714-15.

[140] *Id.* at 711-12.

[141] *See supra*, notes 124-126 and accompanying text.

[142] 556 U.S. 635 (2009).

[143] 28 U.S.C. § 1367(c). ("The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.").

[144] *See* Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 637 (2009).

[145] *Id.*

state-law claims is not a remand for lack of subject-matter jurisdiction for which appellate review is barred by §§ 1447(c) and (d)."[146] The Court reasoned that §§ 1367(a) and (c) specifically granted the federal court jurisdiction over supplemental state law claims, and it was entirely within the court's discretion "whether to exercise that jurisdiction after dismissing every claim over which it had original jurisdiction . . . ."[147]

In support of its holding, the Court harkened back to the *in pari materia* reasoning from *Thermtron*, requiring that §§ 1447(c) and (d) must be construed together.[148] According to the Court, the relevant portion of § 1447(c) provides that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."[149] Because remand based on remaining supplemental state law claims did not constitute a jurisdictional defect, the § 1447(d) bar on appeals did not apply.[150]

The Court's holding in *Carlsbad* further muddies the waters for § 1447 for two reasons. First, the decision appears to directly conflict with the Court's holding in *Things Remembered*. In *Things Remembered*, the § 1447(d) bar on appeals applied to all removal and remand statutes unless the statute expressly provided for appeal.[151] § 1367 does not expressly provide for an appeal in the event the district court remands supplemental state law claims,[152] so, following the logic of *Things Remembered*, appellate review should be barred.

Second, the holding suggests that the Supreme Court has condoned an interpretation of the latest version of § 1447(c) that is not in accord with the statutory language. So now, in addition to an atextual interpretation of § 1447(d), the Supreme Court also seems to sanction an atextual reading of § 1447(c), expanding the possibilities for confusion and inconsistencies. The next section will

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[146] *Id.* at 641.

[147] *Id.* at 639 (citing Osborn v. Haley, 549 U.S. 225, 245 (2007) ("Even if only state-law claims remained after resolution of the federal question, the District Court would have discretion, consistent with Article III, to retain jurisdiction.")).

[148] *Id.* at 638.

[149] 28 U.S.C. § 1447(c).

[150] *Carlsbad Tech., Inc.*, 556 U.S. at 638-39.

[151] *See* Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 128 (1995).

[152] *See* 28 U.S.C. § 1367.

explore the potential ramifications of the Court's holding in *Carlsbad* on the interpretation of the current version of § 1447(c).

III. THE SCOPE OF 1447(C) FOLLOWING 1996 AMENDMENT

Amending § 1447(c) in 1988 to replace the word "improvidently" with "procedural defect" meant that it was fairly evident that grounds for remand like abstention, forum selection clauses, and supplemental state law claims fell outside the scope of the provision.[153] For this reason, they were not barred from appeal under § 1447(d) either. Additionally, plaintiffs moving for remand on these bases were not subject to the thirty-day timeframe specified by the statute. When Congress amended the statute again in 1996, the new language cast serious doubt on whether these same grounds were still appealable and still exempt from the thirty-day standard applied to procedural defects.

While the 1988 amendment largely clarified the scope of § 1447(c), it also raised very important, age-old questions about the distinction between substantive and procedural law. In the years following the 1988 amendment, a conflict among the circuits developed on the question of whether the forum-defendant rule was substantive or procedural.[154] This issue arose "[w]hen diversity jurisdiction [was] the only ground for federal subject matter jurisdiction in a case initially filed in state court," and the plaintiff filed a motion to remand based on the fact that a defendant was a citizen of the forum state.[155]

Generally, under the 1988 versions of § 1447(c), "procedural defect" was interpreted to apply to noncompliance with requirements set forth in §§ 1441 and 1446.[156] However, courts had trouble reasoning that a violation of the forum-defendant rule

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[153] *See* Snapper, Inc. v. Redan, 171 F.3d 1249, 1256-57 (11th Cir. 1999); *see also supra* Subsection II.A.1.

[154] *Id.* at 1258; *see also* City of Albuquerque v. Soto Enters., Inc., 864 F.3d 1089, 1096 (10th Cir. 2017).

[155] *Snapper*, 171 F.3d at 1257-58.

[156] *See, e.g.*, Rothner v. City of Chicago, 879 F.2d 1402, 1411 (7th Cir. 1989) ("Replacing the word 'improvidently' with 'defect in removal procedure' is consistent with the view that 'improvidently' draws its meaning from the procedural rules set out in the removal statutes.")

contained in § 1441[157] was a defect in removal procedure, rather than a substantive, jurisdictional issue for a court sitting in diversity.[158] Nonetheless, most courts treated the forum-defendant rule violation as a procedural defect and applied the thirty-day standard because it was the type of statutory procedural defect contemplated by § 1447(c).[159] Classifying the forum-defendant rule as a procedural defect required a broad view of the word "procedure;" thus, other courts declined to take such an expansive view, resulting in a circuit split.[160]

A. 1996 Amendment

In an effort to resolve this circuit split,[161] Congress amended § 1447(c) yet again in 1996 and simply removed the phrase "removal procedural," establishing the present-day version of § 1447(c).[162] In relevant part, the statute presently reads as follows: "A motion to remand the case on the basis of ***any defect*** other than lack of subject matter jurisdiction must be made within 30 days of the filing of the notice of removal under § 1446(a)."[163]

This amendment, along with the Court's holding in *Thermtron*, is the crux of the procedural confusion surrounding the body of remand law.[164] On its face, Congress's choice to remove the word "procedural" seems like an obvious move to abolish this third class of non-procedural, non-jurisdictional bases for remand to which courts were applying a different standard. However, the judicial and legislative history surrounding the amendment do not support this reasoning.[165] As a result, courts have been operating in a legal grey area regarding the appropriate standard to apply, particularly with regard to the thirty-day time limit in § 1447(c).

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157 28 U.S.C. § 1441(b)(2).

158 *Snapper*, 171 F.3d at 1257-58.

159 *See, e.g.*, Korea Exch. Bank v. Trackwise Sales Corp., 66 F.3d 46, 50-51 (3d Cir. 1995); In re Shell Oil, 932 F.2d 1518, 1523 (5th Cir. 1991); *cf.* Pierpoint v. Barnes, 94 F.3d 813, 817-19 (2d Cir. 1996).

160 *See* LaMotte v. Roundy's, Inc., 27 F.3d 314, 316 (7th Cir. 1994).

161 City of Albuquerque v. Soto Enters., 864 F.3d 1089, 1096 (10th Cir. 2017).

162 *See* United States District Court: Removal Procedure Act of 1996, Pub. L. No. 104-219, 110 Stat. 3022 (1996).

163 28 U.S.C. § 1447(c) (emphasis added).

164 *See supra* Part II.

165 *See* H.R. Rep. No. 104-799, *as reprinted in* 1996 U.S.C.C.A.N. 3417-18; *LaMotte*, 27 F.3d at 314.

Most courts have continued to interpret § 1447(c) as requiring or at least allowing a different standard for non-procedural, non-jurisdictional issues; however, that interpretation has not been uniformly embraced.[166]

At first blush, it seems clear that Congress's intent in amending § 1447(c) in 1996 was to limit the universe of remand orders into two categories: those based on (1) defects with subject-matter jurisdiction and (2) everything else. However, it is not at all clear from the legislative history that Congress intended to drastically change the remand landscape as it currently stood.[167] There were no reports or legislative hearings on the amendment in the Senate, and the House issued a report but held no hearings.[168] There were no hearings "because [the Committee] viewed the bill as technical and noncontroversial, and it received broad bipartisan support."[169] The House Report repeatedly stated that the purpose of the amendment was to clarify § 1447(c),[170] which suggests that Congress did not believe "it was altering the operation of § 1447(c) so much as clarifying and perhaps restoring its initial intentions when creating the thirty-day limit in 1988."[171]

Early after the passage of the 1996 amendment, scholars contemplated whether the new language of § 1447(c) expanded its

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[166] *Compare* Watson v. City of Allen, Tex., 821 F.3d 634 (5th Cir. 2016); *Soto Enters.*, 864 F.3d at 1094-97; Atl. Nat. Tr. LLC v. Mt. Hawley Ins., 621 F.3d 931, 938 (9th Cir. 2010); Snapper, Inc. v. Redan, 171 F.3d 1249, 1253-60 & n. 18 (11th Cir. 1999); Graphic Commc'ns Loc. 1B Health & Welfare Fund A v. CVS Caremark Corp., 636 F.3d 971, 974-76 (8th Cir. 2011); Kamm v. Itex Corp., 568 F.3d 752, 753, 755-57 (9th Cir. 2009) *with* Levin v. Tiber Hold. Co., 1999 WL 649002, at *3-4 (S.D.N.Y. Aug. 25, 1999); Comm'r of Ins. of the State of Michigan v. CMB Kyoto Plaza Shopping Ctr. L.L.C., 42 F. Supp. 2d 726, 734 (W.D. Mich. 1998).

[167] Hrdlick, *supra* note 1, at 564 ("The implications of this change, as will be explained below, may be dramatic. If dramatic, such a change will come as a complete surprise to Congress. Congress did not intend or understand the new language to affect a dramatic change in the law. To the contrary, the legislative history establishes that Congress thought the amendment technical in nature, merely a clarification of prior legislative intent.").

[168] *See* H.R. Rep. No. 104-799, *as reprinted in* 1996 U.S.C.C.A.N. 3417; *see also* 141 Cong. Rec. S9580-02 (June 30, 1995); *see also* Hrdlick, *supra* note 1, at 564.

[169] H.R. Rep. No. 104-799, reprinted in 1996 U.S.C.C.A.N. at 3417-18; *see also* Hrdlick, *supra* note 1, at 564.

[170] H.R. Rep. No. 104-799, *supra* note 168; *see also* Hrdlick, *supra* note 1, at 564-65.

[171] Hrdlick, *supra* note 1, at 566.

scope to now include every possible basis for remand.[172] If that were the case, as Hrdlick noted in his article, this statutory update would swallow the *Thermtron* exception.[173] If the scope of § 1447(c) now covered all grounds for remand, the appellate bar in § 1447(d) would apply to every remand order.

> Now, as amended by Congress and interpreted by Professor Siegel, § 1447(c) encompasses the entire universe of remand motions. Any remand motion—and, more importantly, any resulting remand order—is referable to § 1447(c) and falls within its scope. If § 1447(c) encompasses all remand orders in removed cases, then § 1447(d) precludes appellate review of all remand orders in removed cases.[174]

However, in the years since the amendment's passage, most lower courts that have addressed this question have continued to interpret § 1447(c) just as they did prior to the amendment.[175] In other words, courts have continued to apply a different timeframe and appealability standard to non-procedural, non-jurisdictional grounds for remand. The Supreme Court implicitly condoned this interpretation in *Carlsbad* by holding that a case remanded due to the remaining supplemental state law claims was appealable.[176] Such an interpretation is yet another departure from the strict statutory construction usually applied in this area of the law.

B. Courts' Interpretation

1. The Scope of Section 1447(c) with Regard to Appealability

The Eleventh Circuit was one of the first circuits to confront the scope of § 1447(c) following its amendment in *Snapper, Inc. v. Redan* in 1999.[177] The court faced the question of whether the new

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[172] *See, e.g.*, 14C WRIGHT & MILLER, *supra* note 1, § 3739.2; Hrdlick, *supra* note 1, at 568; David D. Siegel, *Commentary on 1996 Revision to Section 1447(c)*, 28 U.S.C.A. § 1447(c) (West Supp. 1991).

[173] Hrdlick, *supra* note 1, at 568-69.

[174] *Id.* at 569 (citing Siegel, *supra* note 172).

[175] *See infra* Section III.B

[176] Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635 (2009).

[177] 171 F.3d 1249 (11th Cir. 1999).

language in § 1447(c)[178] expanded the scope of the provision to apply to grounds for remand "external to the removal process" such as a forum selection clause.[179] In order to ascertain whether the term "defect" applied to a forum selection clause, the court looked to Black's Law Dictionary where 'defect' was "define[d] as […]'[t]he want or absence of some legal requisite; deficiency; imperfection; insufficiency.'"[180] Based on the definition, the court held that "defect" described failures to comply with procedures in the removal statutes rather than any and all grounds for remand that were not a lack of subject matter jurisdiction.[181]

The court distinguished forum selection clauses from other procedural defects that arise from failure to comply with the removal statutes by noting its externality from the removal process.[182] "A remand based on a forum selection clause depends on an adjudication of the meaning of the clause, [and] . . . [t]he ultimate determination that the clause does not permit further adjudication in that particular federal forum does not render the removal 'defective' in any ordinary sense of the word . . . ."[183]

Additionally, the court argued that the legislative history and historical interpretation of § 1447(c) supported the notion that Congress did not intend to require such "an expansive interpretation of the term 'defect' so as to include any remand[-]able ground other than lack of subject matter jurisdiction . . . ."[184] The court concluded that remand based on a forum selection clause was

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[178] The language of § 1447(c) changed from "*any defect in removal procedure*" to "*any defect other than lack of subject matter jurisdiction*." *See* 28 U.S.C. 1447(c); *supra* notes 95, 154 and accompanying text.

[179] *Snapper*, 171 F.3d at 1253.

[180] *Snapper*, 171 F.3d at 1253 (quoting Black's Law Dictionary 418 (6th ed. 1990)).

[181] *Id.* ("The 'legal requisites' of removal are found in the removal statutes and include, *inter alia*, those enunciated in § 1446(a) (the filing requirements) and § 1446(b) (the timeliness requirement). The failure to comply with these express statutory requirements for removal can fairly be said to render the removal 'defective' and justify a remand pursuant to § 1447(c).").

[182] *Id.*

[183] *Id.* The court also pointed out that "defect" as used in § 1447(c) did not apply to remand based on abstention or pendant state law claims, because "such determinations involve external considerations such as issues of federal/state comity." *Id.*

[184] *Id.*; *see also* Rothner v. City of Chicago, 879 F.2d 1402, 1411 (7th Cir. 1989); Sheet Metal Workers Int'l Ass'n v. Seay, 693 F.2d 1000, 1005 (10th Cir. 1982); In re Merrimack Mut. Fire Ins., 587 F.2d 642, 645 (5th Cir. 1978).

outside the scope of the new language of § 1447(c); thus, under the *Thermtron* exception, appeal was not limited by § 1447(d).[185]

Most circuits have adopted the *Snapper* interpretation regarding the scope of § 1447(c), finding that remand based on abstention, forum selection clauses, and supplemental jurisdiction did not constitute a "defect" under the new statutory language.[186] While the Supreme Court did not specifically address the meaning of the word "defect" in *Carlsbad*, it can be inferred that it has also adopted a narrower reading of § 1447(c). Given that the Court allowed appeal of a remand order based on supplemental jurisdiction, it could not have constituted a "defect" under § 1447(c)

2. "Reasonable Time" Standard

Adopting this narrow interpretation of the word "defect" in § 1447(c) also means that the thirty-day time limit contained in the same provision does not apply to the non-jurisdictional, non-procedural bases for remand. Circuits that have adopted this interpretation, specifically addressing the timeframe question, have applied a "reasonable time" standard rather than the thirty-day limit.[187] Admittedly, questions regarding the appropriate time to move for remand arise far less often than questions regarding the appealability of a given remand basis. However, it is a critical question when applicable because it affects the entire course of

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[185] *Snapper*, 171 F.3d at 1259; *see also* Hudson United Bank v. LiTenda Mortg. Corp., 142 F.3d 151 (3d Cir. 1998).

[186] *See, e.g.*, Grace Ranch, L.L.C. v. BP Am. Prod. Co., 989 F.3d 301 (5th Cir. 2021) (holding that remand based on abstention was not "defect" under § 1447(c) and was thus appealable); City of Albuquerque v. Soto Enters., 864 F.3d 1089 (10th Cir. 2017) (holding that defendant's waiver of right of removal was not "defect" under § 1447(c) and was thus appealable under § 1447(d)); Yakin v. Tyler Hill Corp., 566 F.3d 73 (2d Cir. 2009) (holding remand based on forum selection clause appealable under § 1447(d) because not "defect" under § 1447(c)); Autoridad de Energia Electrica de Puerto Rico v. Ericsson Inc., 201 F.3d 15 (1st Cir. 2000) (holding that remand based on a forum selection clause was not a "defect" under § 1447(c) and was thus appealable under § 1447(d)).

[187] *See* Graphic Commc'ns Loc. 1B Health & Welfare Fund A v. CVS Caremark Corp., 636 F.3d 971, 974-76 (8th Cir. 2011) (holding Class Action Fairness Act ("CAFA") local controversy provision not subject to the 30-day time limit because it operated like abstention); Kamm v. ITEX Corp., 568 F.3d 752 (9th Cir. 2009) (holding that the "reasonable time" standard "still applies to remand motions not governed by § 1447(c)."); Gold v. New York Life Ins., 730 F.3d 137 (2d Cir. 2013) (holding that CAFA home state exception was not jurisdictional, thus plaintiff's motion to remand was subject to "reasonable time" standard).

litigation. Practitioners are currently at a disadvantage because the "reasonable time" standard is not widely known, as it is an exclusively judicial creation.

Snapper did not address the "reasonable time" standard, but its reasoning set the stage for other circuits to do so. *Snapper* also acknowledged the obvious issue with applying a thirty-day standard to these types of remand bases, noting that "the 30–day time limit might be the death knell of remands of pendent state claims; [such] a decision . . . will virtually never be ripe within such a limited time frame, and in large part, the same is true with respect to remands based upon principles of abstention."[188]

It is important to note that in the wake of the 1996 amendment to § 1447(c), not all courts were in agreement regarding the effect of the amendment. The Southern District of New York, in *Levin v. Tiber Holding Co.*, held that a motion for remand based on abstention was subject to the thirty-day limit in § 1447(c).[189] The court acknowledged that under *Quackenbush* and prior to 1996, "a motion to remand based upon abstention [was] not subject to the 30 day time limit contained in section 1447(c)."[190] However, following the 1996 amendment, the court interpreted the change in language to mean that the thirty-day time limit now applied to all bases for remand other than issues with subject-matter jurisdiction.[191] The court cited several other "courts and commentators" that had interpreted the amendment the same way[192] and reasoned that the interpretation employed by the Eleventh Circuit in *Snapper* "would

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[188] *Snapper*, 171 F.3d at 1260; *see also* Siegel, *supra* note 172.

[189] Levin v. Tiber Holding Co., No. 98 Civ. 8643 (SHS), 1999 WL 649002, *4 (S.D.N.Y. Aug. 25, 1999).

[190] *Id.* at *3 (citing Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 711 (1996) ("[T]he Supreme Court held that motions to remand based upon abstention were not subject to the section 1447(c) time limit . . . That decision, however, was predicated upon the then applicable version of section 1447(c) which read '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 ... .'")) (emphasis in original).

[191] *Id.*

[192] *Id.* at *4 (citing Comm'r of Ins. of the State of Michigan v. CMB Kyoto Plaza Shopping Ctr. L.L.C., 42 F.Supp.2d 726, 734 (W.D. Mich. 1998); Siegel, *supra* note 172. *Cf.* Hudson United Bank v. LiTenda Mortg. Corp., 142 F.3d 151,156 n. 8 (3d Cir. 1998) (stating that "textual changes [of 1996 amendment] were designed . . . to clarify Congressional intent on the timing of remands made for reasons other than lack of subject matter jurisdiction"); In re Plowman, 218 B.R. 607, 612 (Bankr. N.D. Ala.1998) (1996 amendment made § 1447(c) more inclusive)).

render the 1996 amendment—which specifically removed the phrase 'in removal procedure'—meaningless."[193]

In contrast, every circuit that addressed the question since *Levin* has adopted the "reasonable time" standard, including the Second Circuit.[194] Prior to the 1996 amendment of § 1447(c), courts applied the "reasonable time" standard to those bases for remand that fell outside the scope of § 1447(c).[195] Determining what constitutes a "reasonable time" frame requires an individualized inquiry into the facts of each case and a consideration of factors including, but not limited to, reason for delay, prejudice to the opposing party, and judicial economy.[196]

For example, "a reasonable time may be 'significantly shorter' in situations where remand is 'generally apparent from the time of removal,' and may even be synonymous with the statutory requirement of thirty days[]."[197] Thus, the "reasonable time" standard is more forgiving than the 30-day time limit; however, it is not without limitations. The Second, Eighth, and Ninth circuits have all adopted the reasonable time standard for non-procedural, non-jurisdictional bases for remand,[198] and based on the First, Fifth, Tenth, and Eleventh Circuits' interpretation of the scope of § 1447(c) and appealability of non-procedural, non-jurisdictional remand orders,[199] it seems likely that those circuits would adopt the test as well.

Practitioners and district courts alike are faced with a situation in which the procedures governing remand and the appealability of remand orders is incredibly unclear. The Supreme

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[193] *Id.* at *3.

[194] *See* cases cited *infra* note 198.

[195] Graphic Commc'ns Loc. 1B Health & Welfare Fund A v. CVS Caremark Corp., 636 F.3d 971, 976 (8th Cir. 2011) (citing Snapper, Inc. v. Redan, 171 F.3d 1249, 1257 (11th Cir. 1999)).

[196] Removal: Remanding the Case to State Court, WESTLAW PRACTICAL LAW LITIGATION, https://us.practicallaw.thomsonreuters.com/1-518-8628 [https://perma.cc/6Y7S-8W9U] (last visited Sept. 23, 2022).

[197] *Graphic Commc'ns*, 636 F.3d at 976 (quoting *Snapper*, 171 F.3d at 1257).

[198] *See id.*; *see also, e.g.*, Gold v. New York Life Ins. Co., 730 F.3d 137 (2d Cir. 2013) (holding that CAFA home state exception was not jurisdictional, thus plaintiff's motion to remand was subject to "reasonable time" standard); Kamm v. ITEX Corp., 568 F.3d 752 (9th Cir. 2009) (holding that the "reasonable time" standard "still applies to remand motions not governed by § 1447(c).").

[199] *See* cases cited *supra* note 186 and accompanying text; *Snapper*, 171 F.3d at 1249.

Court has not spoken on how the 1996 amendment to § 1447(c) affects the exception to the appellate bar from *Thermtron*, yet it seems to have implicitly endorsed the idea that non-procedural, non-jurisdictional bases for remand do not constitute a "defect" under § 1447(c) in *Carlsbad*.[200] Based on that holding, it seems likely that the Supreme Court would support the "reasonable time" standard for non-procedural, non-jurisdictional bases for remand.

IV. POSSIBLE SOLUTIONS

There are several approaches that either the Supreme Court or Congress could take to mitigate the confusion surrounding sections 1447(c) and (d). Even if the Supreme Court were to only address one of the two provisions, they are inextricably linked, so any reform regarding one provision will have far reaching implications for the other.

A. Overrule Thermtron

The first and perhaps most obvious solution is to overrule *Thermtron*. *Thermtron* was not a unanimous decision to begin with,[201] and several justices have called for, or at least contemplated, overturning it in the years since.[202] In the original dissent, Justice Rehnquist pointed out the holding's blatant disregard for the plain text of the statute and accurately predicted

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[200] *See supra* note 176 and accompanying text.

[201] Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 353 (1976) (Rehnquist, J., dissenting). Justice Rehnquist was joined by Chief Justice Burger and Justice Stewart. *Id.*

[202] *See* Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 642-45 (2009) (Stevens, J., concurring) ("Today, as in *Thermtron*, the Court holds that § 1447(d) does not mean what it says. If we were writing on a clean slate, I would adhere to the statute's text.") (Scalia, J., concurring) ("I write separately, though, to note that our decision in *Thermtron* was questionable in its day and is ripe for reconsideration in the appropriate case.") (Breyer, J., concurring) ("Consequently, while joining the majority, I suggest that experts in this area of the law reexamine the matter with an eye toward determining whether statutory revision is appropriate."); *see also* Kakarala v. Wells Fargo Bank, N.A., 578 U.S. 914 (2016) (Thomas, J., dissenting denial of certiorari) ("The question presented by this petition is whether the Court should overrule *Thermtron Products, Inc. v. Hermansdorfer*. *Thermtron* adopted an atextual reading of 28 U.S.C. § 1447(d) . . . Because I remain of the view that *Thermtron* was wrongly decided, I respectfully dissent from the denial of certiorari.") (citations omitted).

the far-reaching implications of such a decision.[203] In *Carlsbad*, Justice Scalia's concurrence summarized the extremely unclear contradictory nature of the law following the *Thermtron* decision.[204]

> Over the years, the Court has replaced the statute's clear bar on appellate review with a hodgepodge of jurisdictional rules that have no evident basis even in common sense. Under our decisions, there is no appellate jurisdiction to review remands for lack of subject-matter jurisdiction, though with exception, there is jurisdiction to review remands of supplemental state-law claims, and other remands based on abstention, though presumably no jurisdiction to review remands based on the "defects" referenced in § 1447(c). If this muddle represents a *welcome* departure from the literal text, the world is mad.[205]

Likewise, both Justice Scalia's and Justice Stevens's concurrences underscored *Thermtron* and subsequent case law's nonobservance of the statutory language of § 1447(d), reasoning that the outcome of *Carlsbad* would be opposite had *Thermtron* never happened.[206] As recently as 2016, Justice Thomas called for overruling *Thermtron* yet again in a dissent against a denial of certiorari in *Kakarala v. Wells Fargo Bank, N.A.*[207] Justice Thomas echoed the concerns of prior justices regarding *Thermtron*'s "defi[ance of] established principles of statutory construction" and also highlighted the "unworkable" nature of *Thermtron* and the resulting body of law.[208]

As discussed in Subsections I.B.2 and II.A.1, the confusion regarding the scope and application of § 1447 arose as a result of the *Thermtron* decision.[209] Prior to the decision, all appeals of remand orders were barred under § 1447(d), so the scope of remand bases outlined in § 1447(c) were less consequential. Following the *Thermtron* decision, the scope of these provisions became

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[203] *Thermtron*, 423 U.S. at 353 (Rehnquist, J., dissenting).
[204] *Carlsbad*, 556 U.S. at 643 (Scalia, J., concurring).
[205] *Id.* (Scalia, J., concurring) (citations omitted) (emphasis in original).
[206] *Id.* at 642-43 (Stevens, J., concurring) (Scalia, J., concurring).
[207] 578 U.S. 914 (Thomas, J., dissenting).
[208] *Id.*
[209] *See supra*, Subsections I.B.2 and II.A.1.

increasingly important for both courts and practitioners, and it was often unclear which standard to apply to a given grounds for remand.[210]

Thus, if *Thermtron* were to be overruled, questions regarding when to apply § 1447(d)'s bar on appeals would be conclusively resolved; the bar would apply to all remand orders. Further, because overruling *Thermtron* would dissolve this third class of appealable remand orders under § 1447(d) (those that are both non-jurisdictional and non-procedural in nature), it is quite possible, if not likely, that the same would be true for those same bases under § 1447(c). In other words, the term "defect" would now be all-encompassing, and, as a result, the thirty-day-time-to-move-for-remand limit would apply to all grounds for remand other than a lack of subject matter jurisdiction.

However, such a broad interpretation of "defect" in § 1447(c) is not a certain outcome of overruling *Thermtron* as there are certain practical justifications supporting the "reasonable time" standard that are not in-play with regard to appeals under § 1447(d). As the Eleventh Circuit noted in *Snapper*, certain bases for remand "will virtually never [become] ripe within [the thirty-day] time frame . . . ."[211] So, if courts were to employ such a broad construction of § 1447(c) as to apply the thirty-day limit to all bases for remand (other than lack of subject matter jurisdiction), that would effectively render plaintiffs' ability to move for remand on those bases moot.

This proposal is bolstered by the likelihood of its adoption by the Supreme Court given that several justices have already contemplated the idea.[212] However, given the Supreme Court's denial of certiorari in *Kakarala*, it is unclear whether there is sufficient interest among the justices to take up this issue for resolution. Overruling *Thermtron* would yield substantial progress towards clearing up the uncertainty regarding the appealability of certain remand bases, although it is not entirely clear how it would

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[210] *Kakarala*, 578 U.S. at 915 (Thomas, J., dissenting) ("*Thermtron* has also proved unworkable. It has spawned a number of divisions in the lower courts over whether certain remands are based on jurisdictional or nonjurisdictional grounds, and how to determine which is which.").

[211] *See* Snapper, Inc. v. Redan, 171 F.3d 1249, 1260 (11th Cir. 1999).

[212] *See* cases cited *supra* note 202 and accompanying text.

impact the scope of remand bases governed by the mandates of § 1447(c). And, if *Thermtron's* overruling did result in a broad construction of the term "defect," applying the thirty-day limit to all bases for remand, courts would be faced with a new issue altogether: grounds for remand that exist but effectively cannot be invoked.

B. Supreme Court Rules on Question That Raises "Reasonable Time" Standard

If the Supreme Court were to rule on a question that raises the "reasonable time" standard, it would resolve the question regarding the appropriate standard to apply for the time to move for remand on non-procedural, non-jurisdictional bases. Ruling in favor of the "reasonable time" standard would have the effect of clarifying and publicizing the standard. Because most circuits have already employed (or have indicated a level of support for employing) the "reasonable time" standard, a ruling in its favor would not change the state of the law as much as it would clarify when and why the standard applies. Likewise, a decision in favor of the standard would publicize what was otherwise an obscure judicial creation.

However, such a ruling would not necessarily resolve the uncertainty regarding the appealability of those same bases. Because a favorable ruling on this issue is essentially just an endorsement of the current state of the law, the appealability question would largely be in the same position as it was before such a decision. Alternatively, if the Court ruled against the "reasonable time" standard, such a ruling would strongly suggest that the Court does not believe that non-procedural, non-jurisdictional bases for remand should be treated differently than mere procedural defects under § 1447(c). The logical conclusion of that ruling would likely be that these same bases should not be treated differently under § 1447(d) and are thus not appealable. This is yet another path for the Supreme Court to reach the ultimate conclusion that *Thermtron* should be overruled.

While it is certainly possible for the Court to hold that the "reasonable time" standard is contrary to the language of the statute and thus invalid while still maintaining the *Thermtron* exceptions to the appellate bar, such an outcome is unlikely and implausible. It is implausible to the extent that, logically, it does

not make sense to do away with the third class of grounds for remand under § 1447(c) but not under (d), but it is also unlikely because there exist arguably stronger policy reasons for maintaining the distinction under (c) but not under (d).

As previously mentioned, certain bases for remand will not become ripe within thirty days, supporting the argument in favor of maintaining the third class of remand grounds under § 1447(c).[213] In contrast, as Justice Breyer noted in his concurrence in *Carlsbad*, the grounds for remand that are appealable and those that are not are anomalistic.[214] He pointed out that § 1447(d) bars appeals "of a district court decision in an instance where that decision may well be wrong and where a wrong decision could work considerable harm," such as an erroneous finding of a lack of subject matter jurisdiction.[215] Yet *Thermtron* allows appeal of a court's discretionary decision to remand a case based on supplemental state law claims, which "is unlikely to be wrong and [even if wrong] is unlikely to work serious harm."[216]

This solution presents similar benefits and drawbacks to overruling *Thermtron*. A ruling either in favor of or against the "reasonable time" standard would answer some questions while leaving others unresolved and could potentially result in the creation of new issues altogether. Thus, while either option presents a step in the right direction towards clarifying this area of the law, the best solution requires statutory intervention.

C. Revise Title 28 Section 1447 of the United States Code.

Revising sections 1447(c) and (d) would allow Congress to definitively clarify this area of the law and express its intent. Congress has already demonstrated a willingness to codify

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[213] *Snapper*, 171 F.3d at 1260.

[214] Carlsbad Tech., Inc. v. HIF Bio, Inc., 556 U.S. 635, 644-45 (2009) (Breyer, J., concurring).

[215] *Id.*; *see* Siegel, *supra* note 172 ("The occasion for deciding whether to abstain can arise well into the litigation, far beyond the 30-day time period that applies to remand motions under § 1447(c).").

[216] *Carlsbad*, 556 U.S. at 644.

exceptions to the appellate bar contained in § 1447(d),[217] so it seems logical that if Congress agrees with the category of exceptions *Thermtron* created, it adds those exceptions to § 1447(d) as well. There are obvious pitfalls in trying to name an exhaustive list in statute as there will always be a circumstance that falls outside of the named exceptions that arguably should belong. However, the statute is currently written to list exceptions, and it would require little effort to simply add language stating that appeal is not barred for remand based on 28 U.S.C. § 1367 (the supplemental jurisdiction statute), § 1291 (the statute discussing the finality of remand based on abstention), and forum selection clauses. Likewise, if it were Congress's goal to do-away with the *Thermtron* exceptions, it would be relatively easy to add limiting language to the statute. For example:

> 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 [*only*] to section 1442 or 1443 of this title shall be reviewable by appeal or otherwise.[218]

The original intent behind the appellate bar was twofold: (1) to promote judicial economy and manage the federal docket-size, and (2) "to prevent the additional delay" caused by a removing party seeking appellate review in the interest of fairness to the plaintiff.[219] Congress could revise the statute to either adopt the *Thermtron* exceptions or to expressly disclaim any exceptions outside the two currently listed in the statute, while staying true to this original intent. If Congress fails to act here, it is possible that the category of exceptions becomes so wide that it swallows the rule.

As for the language of § 1447(c), the fix there is relatively simpler. The entire statute could remain the same with the addition

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[217] 28 U.S.C. § 1447(d) ("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.") (emphasis added).

[218] *See* § 1447(d). This version includes a proposed addition to do-away with the *Thermtron* exceptions.

[219] Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 354 (1976); *see also* Hrdlick, *supra* note 1, at 540-41; Wasserman, *supra* note 40, at 95.

of some qualifying language about bases for remand that will not become ripe within thirty days. For example:

> [A] motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a)[,]" *or if the basis of the motion does not become ripe within 30 days, within a reasonable time after the basis ripens*.[220]

In *Carlsbad*, Justice Breyer, joined by Justice Souter, suggested that a statutory revision in this area of the law might be appropriate.[221] Justice Breyer seemed to support a statutory revision rather than simply overruling *Thermtron*.[222] In his concurrence, he suggested he was in favor of some degree of ability to appeal remand orders, just not the ones that were currently appealable.[223] This solution is probably the least likely to occur because instead of relying on a minimum of five individuals on the Supreme Court to agree, the passage of an amendment would require the agreement of the hundreds of individuals in Congress. Additionally, Congress does not seem to view this issue as a high priority. The law in this area has been unclear since *Thermtron's* passage in 1976, and in the four times that Congress has amended § 1447 since then, Congress has failed to add any clarity to § 1447(d).[224] Likewise, Congress has not revisited § 1447(c) since the amendments in 1996.

CONCLUSION

Echoing Justice Scalia's concurrence in *Carlsbad*, the current statutory scheme governing remand can best be described as a "muddle."[225] The Court's atextual reading of the appellate bar contained within § 1447(d) in *Thermtron* and subsequent cases

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[220] § 1447(c) (alternation in orginal) (emphasis added).

[221] *Carlsbad*, 556 U.S. at 645 (Breyer, J., concurring).

[222] *Id.*

[223] *Id.*

[224] Pub. L. 100-702, title X, § 1016(c), Nov. 19, 1988, 102 Stat. 4670; Pub. L. 102-198, § 10(b), Dec. 9, 1991, 105 Stat. 1623; Pub. L. 104-219, § 1, Oct. 1, 1996, 110 Stat. 3022; Pub. L. 112-51, § 2(d), Nov. 9, 2011, 125 Stat. 545.

[225] *Carlsbad*, 556 U.S. at 643 (Scalia, J., concurring).

have created an indecipherable web of exceptions to the bar. Likewise, lower courts' apparent disregard of the plain language of § 1447(c) following its 1996 amendment has further complicated matters. Practitioners and lower courts alike are now faced with a landscape in which the time to move for remand on certain grounds is unclear and the subsequent appealability of remand orders made on such grounds is also unclear. Without decisive action from Congress, the procedural standards governing certain classes of remand bases will remain a legal morass.