UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 92-1973, 93-1071

(Summary Calendar)

LUCILLE E. SKINNER,

Plaintiff-Appellee,

versus

VAN ECK SECURITIES CORPORATION,
ET AL.,

Defendants-Appellants.

IN RE VAN ECK SECURITIES CORPORATION,
PRUDENTIAL SECURITIES, INC.,
and GARRY SCOTT IVEY,

Petitioners.

Appeal from the United States District Court
For the Northern District of Texas
(3:92 CV 1763 T)

August 20, 1993

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Lucille Skinner filed an action in state court against Van Eck Securities Corporation, Prudential Securities, Inc., and Garry Scott Ivey (collectively referred to as the "defendants"), who

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* Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

removed the case to federal district court. Subsequently, Skinner filed a motion to remand the case back to state court, which was granted. The district court denied the defendants' motion for leave to file an amended notice of removal in the same order. The defendants appeal the district court's order and request a writ of mandamus directing the district court judge to vacate the order. Finding that we are without jurisdiction to review the district court's order, we dismiss both the appeal and the petition for writ of mandamus.

I

Lucille Skinner originally sued the defendants in Texas state court, alleging various state law claims. Skinner filed a supplemental petition, in which she stated that Garry Ivey was a resident of Georgia who did business in Texas and was not a resident of Texas as alleged in her original petition.[1] The defendants filed a timely notice of removal in federal district court, alleging diversity of citizenship of the parties.

Skinner filed a timely motion to remand the case back to state court, claiming that the defendants failed in their notice of removal to plead that diversity existed both at the time the original petition was filed and at the time the notice of removal was filed.[2] In response, the defendants filed a motion for leave

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[1] Skinner stated in her original petition that both she and Ivey were residents of Texas.

[2] The notice of removal stated that "[d]efendants Prudential and Van Eck are public corporations organized under the laws of the State of Delaware with their principal places of business in the State of New York. Defendant Ivey is a citizen of the State of Georgia, and Plaintiff is a citizen of the State of Texas." Record on Appeal at 1-2.

to amend their notice of removal to cure the alleged defect. The district court in a single order denied the motion to amend and remanded the case to state court. The defendants appeal the order denying the motion to amend, and, in the alternative, request a writ of mandamus directing the district court to vacate its order.[3]

II

A

The defendants claim that the district court abused its discretion in denying their motion to amend. The defendants in the petition for writ of mandamus also argue that the district court exceeded its authority in remanding the case to state court, because the district court abused its discretion in failing to allow the defendants to amend their notice of removal.

The critical issue is whether we have jurisdiction to review the district court's order, either on appeal or by mandamus. *See Hopkins v. Dolphin Titan Int'l, Inc,*, 976 F.2d 924, 925 (5th Cir. 1992); *In re Adm'rs of the Tulane Educ. Fund*, 954 F.2d 266, 268 (5th Cir. 1992). Unless otherwise provided by statute,[4] "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." 28 U.S.C. § 1447(d). This also includes review by mandamus. *See Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 723, 97 S. Ct. 1439, 1440, 52 L. Ed. 2d 1 (1977); *Tillman v. CSX Transp., Inc.*, 929

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[3] This appeal involves two consolidated cases, 92-1973 and 93-1071.

[4] Remand orders involving civil rights cases are reviewable. 28 U.S.C. 1447(d) (1988). In addition, the FDIC may appeal any order of remand. *Buchner v. F.D.I.C.*, 981 F.2d 816, 818 n.4 (5th Cir. 1993).

F.2d 1023, 1026 (5th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 176, 116 L. Ed. 2d 139 (1991). The Supreme Court has limited the § 1447(d) prohibition to remands based on 28 U.S.C. § 1447(c) (1988). *See Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 346, 96 S. Ct. 584, 590, 46 L. Ed. 2d 542 (1976). Section 1447(c) provides in part that "[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 section 1446(a)." Applying *Thermtron*, we have held that we have no jurisdiction to review a remand order based upon a *timely* § 1447(c) motion raising a defect in the removal procedure.[5] *See In re Medscope Marine Ltd.*, 972 F.2d 107, 110 (5th Cir. 1992).

"[T]he availability and means of appellate review turns exclusively on the district court's reason for remand." *McDermott Int'l. v. Lloyds Underwriters of London*, 944 F.2d 1199, 1201 n.1 (5th Cir. 1991); *see also Mobil Corp. v. Abeille Gen. Ins. Co.*, 984 F.2d 664, 665 (5th Cir. 1993); *Tillman*, 929 F.2d at 1026. Therefore, the "district courts should take care to explain their reasons for remanding cases." *McDermott*, 944 F.2d at 1201 n.1. "[W]e will only review remand orders if the district court `affirmatively states a non-1447(c) ground for remand.'" *Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406, 408 (5th Cir. 1991)

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[5] However, we have held that a remand based on an *untimely* motion is not considered a § 1447(c) remand and is therefore reviewable. *Medscope*, 972 F.2d at 110. *See, e.g., In re Digicon Marine, Inc.*, 966 F.2d 158 (5th Cir. 1992); *McDermott Int'l v. Lloyd's Underwriters of London*, 944 F.2d 1199 (5th Cir. 1991); *In re Shell Oil Co.*, 932 F.2d 1523 (5th Cir. 1991); *Baris v. Sulpico Lines, Inc.*, 932 F.2d 1540 (5th Cir.), *cert. denied*,)) U.S.)), 112 S.Ct. 430, 116 L.Ed.2d 449 (1991).

(quoting *In re Merrimack Mut. Fire Ins. Co.*, 587 F.2d 642, 647 (5th Cir. 1978)).

In its remand order, the district court stated:

> Plaintiff argues that a petition for removal based on diversity must plead that diversity existed both at the time of the filing of the original petition for removal and at the time of the filing of the original complaint. Plaintiff is correct. *Wells v. Celanese Corp. of America*, 239 F.Supp. 602, 604 (E.D. Tenn. 1964); *Schwinn Bicycle Corp. v. Brown*, 535 F.Supp. 486 (D. Ark. 1982). Plaintiff is also correct that Defendants, in their original notice of removal failed to plead that diversity existed at the time of the filing of the original complaint. Defendants acknowledge the defect.
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> Defendants attempt to correct the defect by filing an amended notice of removal. Whether or not to permit such an amendment is within the discretion of the court. The court is of the opinion that Defendants should not be permitted to file an amended notice of removal. Thus, Defendants have failed to properly remove this case, and this case must be remanded.

Record on Appeal at 315. The district court never mentioned § 1447(c) in its remand order. Nonetheless, we believe the district court concluded that there was a defect in removal procedure and remanded the case under § 1447(c), because the district court (a) used the word "defect," (b) stated that the defendants failed to properly remove the case, and (c) cited to two cases where the district courts remanded the cases under § 1447(c). Therefore, the remand order is unreviewable. *See Tulane*, 954 F.2d at 269.[6]

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[6] The district court incorrectly based its finding that the defendants improperly removed the case on the ground that the notice of removal failed to plead that diversity existed both at the time of the filing of the original notice of removal and at the time of the filing of the original complaint. *See* Record on Appeal at 315. The Supreme Court set forth the standard as follows:

> [A] case [is] not removable from the state court, unless it

B

The defendants also urge us to review the portion of the order denying the motion to amend on the ground that it is distinct and separable from the remand portion and, therefore, may be reviewed on appeal. *See Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140, 55 S. Ct. 6, 79 L. Ed. 2d 244 (1934) (portion of order dismissing cross-action was reviewable); *Mitchell v. Carlson*, 896 F.2d 128 (5th Cir. 1990) (portion of order vacating previous substitution order and resubstituting original defendant was reviewable); *Vatican Shrimp Co. v. Solis*, 820 F.2d 674, 680 & n.7 (5th Cir.), *cert. denied*, 484 U.S. 953, 108 S. Ct. 345, 98 L. Ed. 2d 371 (1987) (portion of order imposing Rule 11 sanctions was reviewable). Given that we do not have jurisdiction to review the remand order, any review of the order dismissing the motion to amend is moot, because we lack the power to provide the defendants with an effective remedy should we find in their favor and to affect the rights of the parties. *See In the Matter of Sullivan Cent. Plaza, I, Ltd.*, 914 F.2d 731, 735 (5th Cir. 1990); *Armendariz v. Hershey*, 413 F.2d 1006, 1008 (5th Cir. 1969).

> appear[s] affirmatively in the petition for removal, *or elsewhere in the record*, that at the commencement of the action, as well as when the removal was asked, [the defendants] were citizens of some other state than the one of which the plaintiff was, at those respective dates, a citizen.

Stevens v. Nichols, 130 U.S. 230, 9 S. Ct. 518, 518-19, 32 L. Ed. 914 (1889) (emphasis added); *see also Jackson v. Allen*, 132 U.S. 27, 10 S. Ct. 9, 33 L. Ed. 249 (1889). The defendants argue that the record affirmatively shows that diversity existed both at the time the original suit was filed and at the time the notice of removal was filed, and that therefore the district court erroneously remanded the case. However, we decline to decide that issue, because § 1447 "prohibits review of all remand orders issued pursuant to § 1447(c) whether erroneous or not." *Thermtron*, 423 U.S. at 343, 96. S. Ct. at 589, 46 L. Ed. 2d at 549.

III

For the foregoing reasons, we **DISMISS** both the appeal and the petition for writ of mandamus.