

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-20723  
Summary Calendar

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BENJAMIN BROCHSTEIN,

Plaintiff-Appellee,

versus

JOHN ALDEN LIFE INSURANCE  
COMPANY, ET AL.,

Defendants-Appellants.

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Appeal from the United States District Court for the  
Southern District of Texas  
(CA H 93 1041)

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August 9, 1995

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:\*

This is an appeal from a district court's order remanding the case to state court for lack of subject matter jurisdiction. See 28 U.S.C. § 1447(c). Because 28 U.S.C. § 1447(d) provides that such an order is not reviewable, we dismiss the appeal.

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\* Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

## I. FACTS AND PROCEDURAL HISTORY

Benjamin Brochstein brought suit in state court against John Alden Life Insurance Company, the provider of his corporation's medical insurance plan, Mike Smith, the insurance agent, and Frank Crystal & Company, Smith's employer, based on state-law claims of breach of good faith and fair dealing, breach of contract, and violations of the insurance code. Brochstein alleged that the defendants improperly delayed and refused to pay insurance benefits.

The defendants removed the case to federal court contending that Brochstein's claims were governed by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461. Brochstein moved to remand on the basis of lack of subject matter jurisdiction, arguing that no ERISA plan existed. The district court denied Brochstein's motion to remand, finding that the insurance plan at issue was covered by ERISA. The court allowed Brochstein to replead his complaint to include ERISA claims.

All parties filed motions for summary judgment, which the district court denied, ordering both parties to supplement the record. John Alden Life Insurance Company and Brochstein subsequently filed supplemental motions for summary judgment. The court took the motions under advisement, then issued an order and opinion finding that federal law did not apply to the insurance plan, and, thus, it did not have jurisdiction to hear the case. The court vacated all previous judgments and remanded the case to state court. The defendants appealed.

## II. ANALYSIS

"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(c). "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . . ." § 1447(d). "Despite its broad language, § 1447(d) applies only to remands made pursuant to § 1447(c)." Burks v. Amerada Hess Corp., 8 F.3d 301, 303 (5th Cir. 1993). Thus, this Court "will only review remand orders if the district court `affirmatively states a non-1447(c) ground for remand.'" Soley v. First National Bank of Commerce, 923 F.2d 406, 408 (5th Cir. 1991) (citation omitted). "[E]ven if the trial court neither states as grounds for remand the specific words of § 1447(c) nor cites the statute itself, the order is unreviewable if, by substantially similar language, it is evident that the court intends to remand for the grounds recited in § 1447(c)." Tillman v. CSX Transportation, Inc., 929 F.2d 1023, 1027 (5th Cir.), cert. denied, 502 U.S. 859, 112 S.Ct. 176 (1991). Further, a remand order based on lack of jurisdiction is not reviewable notwithstanding that it is clearly erroneous. Bogle v. Phillips Petroleum Co., 24 F.3d 758, 762 (5th Cir. 1994).

In its remand order, the district court began by explaining as follows:

This case will be remanded because federal law does not apply to the insurance plan. Because the court came to this conclusion after it had already decided the remaining issues in the case, this opinion explains the

court's reasoning both on remand and on the result it would have reached had it had jurisdiction over the case.

After opining that federal law did not apply to the insurance plan at issue, the court held that it "lack[ed] subject matter jurisdiction necessary to hear this case." The court thus specifically asserted that it lacked jurisdiction over the case, a § 1447(c) ground for remand. Next, the court, assuming in the alternative that it had jurisdiction, provided its opinion on the remaining issues.

Although the appellants acknowledge that the "remand of this case cannot be appealed," they argue that the district court's order "is necessarily a decision on both jurisdictional and substantive issues." Appellants assert that their substantive preemption defense to Brochstein's claims is separable from the jurisdictional issue. An order is separable from a remand order and subject to appellate review "if it precedes [the order] of remand `in logic and in fact' and is conclusive," i.e., it will have the preclusive effect of being functionally unreviewable in the state court." Linton v. Airbus Industrie, 30 F.3d 592, 597 (5th Cir.) (footnote omitted), cert. denied, \_\_ U.S. \_\_, 115 S.Ct. 639 (1994).

In Soley v. First National Bank of Commerce, 923 F.2d 406, we rejected the appellants' contention that the district court's discussion of their ERISA preclusion defense was separable from the remand order. The Court explained that:

[I]f the appellant[s'] interpretation of the remand order is correct, the rejection of an ERISA preemption

defense does not 'in logic and in fact' precede a remand order because, under the 'well-pleaded complaint' rule, a defense does not confer removal jurisdiction. Instead, if the district court considered the preemption defense, it did so only because of an erroneous belief that the defense was relevant to the jurisdictional issue . . . . [B]ecause we interpret the remand order as jurisdictional, the state court will have an opportunity to consider the appellants' preemption defense and the district court's order will have no preclusive effect.

Soley, 923 F.2d at 409-10. In contrast, the court below did not address the merits of the appellants' preemption defense, but rather it considered the merits of the case assuming preemption.

As in Soley, because the district court did not affirmatively state that it relied on a non-1447(c) basis, we are precluded from reviewing the remand order. Because the remand is not reviewable, the appellants' appeal will be dismissed. Further, because the remand was based on jurisdictional grounds, the state court will have an opportunity to consider the appellants' preemption defense, and the district court's order shall have no preclusive effect. Soley, 923 F.2d at 410.

#### CONCLUSION

For the above stated reasons, the appeal is DISMISSED.