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Removal, Remand, and Review: The Three Rs of Appellate "Nonreview"

by Jay E. Grenig

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ISSUE

When a state court case is removed, i.e., transferred, to federal court, is a federal district court's subsequent order remanding, i.e., returning, the case to state court reviewable by a federal appellate court?

FACTS

In March 1992, Anthony Petrarca filed suit in Ohio state court against Child World, Inc., alleging that Child World had failed to pay rent under two commercial lease agreements. Petrarca also sought payment from Cole National Corporation ("Cole") because Cole allegedly guaranteed the performance of Child World under the leases. Things Remembered entered the case as successor, by merger, to Cole.

Some two months later, on May 6, 1992, Child World filed for protection from its creditors under Chapter 11 of the Bankruptcy Code. Shortly thereafter, Child World repudiated its lease obligations to Petrarca, citing its bankruptcy.

On August 28, 1992, Petrarca filed an amended complaint against Things Remembered, alleging additional claims regarding five other

leases. The amended complaint recited that Child World had filed for bankruptcy.

Petrarca's action prompted Things Remembered and Child World to remove the case from state court to federal court, either to district court or to bankruptcy court. Accordingly, on September 25, 1992, more than 30 days after Petrarca filed his initial state court complaint and more than 90 days after Child World filed for bankruptcy, Things Remembered and Child World filed notices of removal in the United States District Court for the Northern District of Ohio and in the United States Bankruptcy Court for the Northern District of Ohio. (As the name suggests, a state case can be removed, i.e., transferred from state court to federal court, under certain circumstances as when the case raises issues of federal law.) The notices of removal were based on two federal statutes: the general removal statute, 28 U.S.C. § 1441 (1988), and the removal statute dealing specifically with bankruptcy matters, 28 U.S.C. § 1452.

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THINGS REMEMBERED, INC. v.
ANTHONY A. PETRARCA
DOCKET NO. 94-1530

ARGUMENT DATE:
OCTOBER 2, 1995
FROM: THE SIXTH CIRCUIT

Case at a Glance

Anthony Petrarca sued Things Remembered in state court. Things Remembered had the case transferred to federal district court, which sent the case back to state court after concluding that Things Remembered acted too late. The Sixth Circuit refused to entertain the appeal of Things Remembered, holding that it did not have jurisdiction. The Supreme Court is asked to determine if the Sixth Circuit was correct.

Petrarca responded to the removal effort on October 23, 1992, by filing a motion to remand the case to Ohio state court. In support of his remand motion, Petrarca argued that neither the district court nor the bankruptcy court had jurisdiction because Things Remembered had not filed its removal notices within the 30-day time period provided under the general removal statute, 28 U.S.C. § 1446(b), or the 90-day time period applicable under the bankruptcy removal statute, Fed. R. Bankr. P. 9027(2).

Petrarca's challenge to Things Remembered's removal efforts was heard by the Ohio bankruptcy court, which held the removal timely under the 30-day limitations period provided in the general removal statute. According to the bankruptcy court, the case did not become removable under the general removal statute until Petrarca filed his amended complaint which mentioned the Child World bankruptcy for the first time. That mention conferred federal court jurisdiction over the case under the general removal statute if the notice of removal was filed within 30 days of the filing of Petrarca's amended complaint, which it was.

The Ohio bankruptcy court went on to hold that the notice of removal filed under the bankruptcy removal statute was not timely. Here, the court noted that the applicable 90-day limitations period began to run when Child World filed for bankruptcy in May 1992 and had expired more than a month before the bankruptcy-based removal notice was filed. Things Remembered did not appeal that ruling to the district court.

Petrarca, however, appealed to federal district court, which held that removal was untimely under both removal provisions. Because

removal was untimely, the district court held that neither it nor the bankruptcy court had jurisdiction over the case. Accordingly, the district court remanded the case to Ohio state court.

Things Remembered appealed to the Sixth Circuit, which held that a remand order, whether issued under the general removal statute or the bankruptcy removal statute, is not reviewable on appeal. See 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 . . ."); 28 U.S.C. § 1452(b) ("An order entered under this subsection remanding a claim or cause of action . . . is not reviewable by appeal or otherwise . . .").

It is this decision that the Supreme Court reviews, having granted the petition for a writ of certiorari filed by Things Remembered. 115 S. Ct. 1821 (1995).

CASE ANALYSIS

There are two keys to understanding this case. One key is the language of the two removal statutes. The second key, playing off of the first, is which statute Things Remembered really relied on in removing Petrarca's state case to a federal forum.

First things being first, it is necessary to look to the language of the two removal statutes. The general removal statute reads: "An order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise" unless the case involves equal protection claims. 28 U.S.C. § 1447(d). The bankruptcy removal statute reads: "The court to which such claim or cause of action is removed may remand the claim or cause of action on *any equitable ground*. An order entered under this subsection

. . . is not reviewable by appeal or otherwise . . ." 28 U.S.C. 1452(b). (Emphasis added.)

Turning to the second key to this case — which removal provision Things Remembered really used — recall that Things Remembered filed for removal under both the general and the bankruptcy statutes. Before the Supreme Court, however, Things Remembered insists that it has proceeded all along under the bankruptcy removal provision and that its removal notice filed in district court, while duplicative of the notice filed in bankruptcy court, was filed out of a lawyerly excess of caution.

Things Remembered proceeds to argue that appeal is proper in this case because the bankruptcy removal section bars only appellate review of equitable remand orders, e.g., a remand order based on general principles of fairness. Here, Things Remembered stresses that the order in this case was based on jurisdictional grounds — untimely filing — which is a legal, not equitable, ground supporting remand.

Petrarca counters that Things Remembered principally relied on the general removal statute, not the bankruptcy statute. In support of this argument, Petrarca references the notice of removal filed in his Ohio case by Things Remembered and notes that the notice cites only 28 U.S.C. § 1446, the general removal provision. Moreover, Petrarca points out that Things Remembered failed to appeal the bankruptcy court's ruling that its notice of removal was untimely under the bankruptcy statute, a failure indicating that Things Remembered was not relying on that provision.

That leaves only the general removal statute, which does not contain any language suggesting that only

remand orders based on equitable grounds are unreviewable on appeal. Petrarca contends that the plain language of the general removal statute prohibits appellate review of any and all remand orders except remand orders in cases raising equal protection claims, an exception obviously not relevant in this case. Petrarca concludes that the Sixth Circuit was correct in applying the general removal statute and in holding that it did not have jurisdiction to review the district court's remand order.

Petrarca has an alternative argument in the event the Supreme Court concludes that Things Remembered really did proceed under the bankruptcy removal provision. Here, he points to the legislative history of the provision and argues that Congress was concerned with the inequity of forcing a plaintiff with purely state law claims from being forced to litigate those claims in federal court. Given Congress' understanding of what constituted an equitable ground when it enacted the bankruptcy removal statute and assuming that the statute applies here, appellate review is barred.

SIGNIFICANCE

Both Things Remembered and Petrarca have authority to support their respective views on the issues. Things Remembered points to decisions of the Third and Eleventh Circuits, *Pacor v. Higgins*, 743 F.2d 984 (3d Cir. 1984), *In re National Developers, Inc.*, 803 F.2d 616 (11th Cir. 1986); Petrarca points to decisions of the Fifth and Seventh Circuits, *Sykes v. Texas Air Corp.*, 834 F.2d 488 (5th Cir. 1987); *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223 (7th Cir. 1991), in addition to the Sixth Circuit decision in this case.

The Supreme Court's decision, therefore, can be expected to resolve this conflict. If the Court holds that there is appellate review of district court rulings remanding cases to state court, there could be substantial delays in litigating along with increased costs as the parties appeal decisions over where to litigate. On the other hand, if the Court holds that there is no appellate review, the present level of inconsistent or conflicting decisions regarding when remand orders are reviewable could be headed for an increase.

ATTORNEY OF THE PARTIES

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For Anthony A. Petrarca
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AMICUS BRIEFS

In support of Anthony A. Petrarca
The Connecticut Bar Association, Commercial Law and Bankruptcy Section (Counsel of Record: G. Eric Brunstad, Jr.; Hebb & Gitlin; (203) 240-2700).