Cross-Jurisdictional Remands

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Imagine that several foreign countries sue a handful of United States tobacco companies in Florida state court.¹ The foreign countries claim fraud, misrepresentation, and negligence on the part of the tobacco companies, and seek compensation from the companies for the costs of treating those with tobacco-related illnesses. The tobacco companies remove the cases to a Florida federal district court,² and then successfully move to transfer them to a Delaware federal district court.³ Only, once the cases arrive, the Delaware district court decides that the tobacco companies' jurisdictional argument is incorrect, and thus that the cases were improvidently removed. The Delaware district court then is statutorily required to return the case to state court.⁴

The question is, how should the Delaware court send back the case? Can the Delaware federal court remand the cases directly to the Florida state court from which they were originally removed? Or must the cases be retransferred to the Florida federal court for remand to the Florida state court? The answer matters for the reviewability of the district court's disposition of the case on appeal. District courts' transfer orders are generally reviewable by federal appellate courts;⁵

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¹ This hypothetical is loosely based on the facts of *Republic of Venezuela v Philip Morris Inc.*, 287 F3d 192, 194–96 (DC Cir 2002) and *Bloom v Barry*, 755 F2d 356, 356–57 (3d Cir 1985).

² See 28 USC § 1441(a) (2000) (permitting removal to federal court of any civil action of which the district courts of the United States have original jurisdiction). According to the tobacco companies, federal subject matter jurisdiction is premised on the federal common law of foreign relations: The plaintiffs are foreign sovereigns whose vital and material interests are at stake in the lawsuits. See *Philip Morris*, 287 F3d at 197.

³ See 28 USC § 1404(a) (2000) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.").

⁴ See 28 USC § 1447(c) (2000) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall be remanded*." (emphasis added)). See also *American Fire & Casualty Co v Finn*, 341 US 6, 18 (1951) (explaining the "wrongful extension of federal jurisdiction" that would result from permitting removal of cases over which federal courts lack original jurisdiction).

⁵ See, for example, *In re Dow Corning Corp.*, 86 F3d 482, 487–88 (6th Cir 1996) (treating the partial denial of a Section 157(b)(5) transfer motion as a final, immediately appealable order); *Sunbelt Corp v Noble, Denton & Associates, Inc.*, 5 F3d 28, 30 (3d Cir 1993) (reviewing the grant of a Section 1404(a) transfer motion by writ of mandamus); *In re Ricoh Corp.*, 870 F2d 570, 572 & n 4 (11th Cir 1989) (reviewing the denial of a Section 1404(a) transfer motion by writ of mandamus); *Hustler Magazine, Inc v United States District Court for the District of Wyoming*, 790 F2d 69, 70 (10th Cir 1986) (reviewing the denial of a Section 1404(a) transfer motion by writ of

their remand orders generally are not.⁶ If the Delaware district court may remand the cases directly to the Florida state court, that remand order would not be subject to appellate review, whereas an order simply retransferring the cases to the Florida federal court would be reviewable.⁷

At first glance, remand by a federal district court to a state court outside its district—or what might be called a *cross-jurisdictional remand*—is intuitively appealing. Why not accomplish in a single step what would otherwise require two, especially given the crowded docket of federal courts?⁸ This argument for efficiency may be particularly powerful as applied to cross-jurisdictional remands, which, though relatively rare,⁹ are likely to arise when there are a number of cases or claims at issue.¹⁰ However, that a particular procedure is efficient does not mean that Congress has authorized its use. In fact, the relevant remand statutes either prohibit or do not address directly the practice of cross-jurisdictional remand—a problem that courts largely have elided by failing to question their statutory authority to remand cases cross-jurisdictionally.

This Comment explores the propriety and wisdom of cross-jurisdictional remands. Part I describes both the various contexts in which courts can be presented with the opportunity to order cross-jurisdictional remand and the legal consequences of courts' procedural choices. Part II explains why interpreting the relevant remand statutes to allow cross-jurisdictional remand, as have most courts to face the issue, proves difficult to square with Supreme Court jurispru-

mandamus); *A.H. Robins Co, Inc v Piccinin*, 788 F2d 994, 1009 (4th Cir 1986) (reviewing a Section 157(b)(5) transfer order despite lack of finality because of the “relaxed rule of appealability” in bankruptcy cases); *In re Scott*, 709 F2d 717, 718–19 (DC Cir 1983) (reviewing the grant of a Section 1404(a) transfer motion by writ of mandamus); *Hayman Cash Register Co v Sarokin*, 669 F2d 162, 164 (3d Cir 1982) (reviewing a 1406(a) transfer order by writ of mandamus).

⁶ See Part I.A.4.a.

⁷ Transfer orders normally are reviewed by writ of mandamus, which courts classify as an “extraordinary remedy” that may only be granted on a showing of “clear and indisputable” right to issuance of the writ. See, for example, *Mallard v United States District Court for Southern District of Iowa*, 490 US 296, 309 (1989). This somewhat diminishes the advantages of retransfer to litigants. Nevertheless, there are still advantages to litigants and to the judicial system from a system of retransfer over cross-jurisdictional remand. See Parts I.A.4 (advantages to litigants) and III.C.3 (advantages to the judicial system).

⁸ For a general discussion, see Richard A. Posner, *The Federal Courts: Crisis and Reform* chs 3–4 (Harvard 1985) (detailing the growth of the federal caseload and its consequences for the judiciary).

⁹ See *In re Federal-Mogul Global, Inc*, 282 BR 301, 316 (Bankr D Del 2002) (“[I]t is rare for a District Court in one state to remand a matter to the state courts of another state. . .”).

¹⁰ See Part I.B. Its rarity is even more misleading if there are a number of cases that could be, but currently are not, remanded directly across jurisdictional lines. In fact, cases removed from state to federal court comprise about 12 percent of the total civil workload of federal district courts. The Administrative Office of the United States Courts does not have available statistics on the number of cases that are transferred post-removal.

dence and with the text of the statutes themselves. Part III then proposes a reading of the various remand statutes that is consistent with their text as well as the Court's jurisprudence, arguing that courts should eschew cross-jurisdictional remands.

I. HOW CROSS-JURISDICTIONAL REMANDS CAN ARISE

This Part discusses the different federal statutes that govern removal, transfer, and remand with an eye toward how cross-jurisdictional remands can arise. It begins with a general discussion of removal, transfer, and remand in the federal courts. It then surveys statutes that specifically govern multidistrict litigation ("MDL") and bankruptcy cases, and uses MDL and bankruptcy cases that involve cross-jurisdictional remand to highlight the importance of the remand issue to litigants.

A. Cross-Jurisdictional Remands in General

1. Removal.

Removal is the "judicial curiosity" that allows defendants to remove an action properly brought by the plaintiff in a state court to a federal district court.¹¹ Removal is a purely statutory right authorized by Congress,¹² and there are a number of federal statutes that allow for removal in certain circumstances. For example, the general removal statute, 28 USC § 1441, permits the defendant to remove any civil action that might have been brought originally in federal district court.¹³ Similarly, in the bankruptcy context, 28 USC § 1452 permits removal of any claim or cause of action¹⁴ that falls within the bankruptcy jurisdiction of the federal district court for the district in which the claim or cause of action is pending.¹⁵

The procedure for removal is simple. A defendant wishing to remove a civil action simply need file a notice of removal with the fed-

¹¹ *Tinney v McClain*, 76 F Supp 694, 698 (ND Tex 1948).

¹² The limits of removal are subject to Congress's discretion. See *Martin v Hunter's Lessee*, 14 US (1 Wheat) 304, 349 (1816) (Story) ("The time, the process, and the manner" of removal "must be subject to [Congress's] absolute legislative control.").

¹³ 28 USC § 1441(a). Section 1441 is subject to a number of statutory exceptions, not relevant here, in which Congress has prohibited removal of actions even though they are within the original subject matter jurisdiction of the federal courts.

¹⁴ 28 USC § 1452(a) (2000). There is an exception in Section 1452(a) prohibiting removal of any claims or causes of action from proceedings before the United States Tax Court or civil actions by a governmental unit to enforce its police or regulatory power. See *id.*

¹⁵ The bankruptcy jurisdiction of the federal district courts is defined by Section 1334 of Title 28. The district courts have original and exclusive jurisdiction of all cases under the Bankruptcy Code. See 28 USC § 1334(a) (2000). They have concurrent original jurisdiction over any other civil proceedings that arise under the Bankruptcy Code or that arise in or are related to bankruptcy cases. See 28 USC § 1334(b).

eral district court for the district or division in which the state action is pending, after which the action proceeds in the federal court as if it had been filed originally there.¹⁶ The propriety of the removal then is subject to challenge in the federal court, and the federal court may decide at any time during the litigation—on its own motion or at a party's urging—that it lacks federal subject matter jurisdiction and that the case was improperly removed.¹⁷ In the absence of subject matter jurisdiction, Section 1447(c) requires the federal court to remand, or send back, the case to state court.¹⁸

2. Transfer.

The issue of cross-jurisdictional remand would never arise if cases were only removed from a state court to the federal district court for the district in which the state court is located, and then remanded to that same state court in the absence of federal jurisdiction. However, once a case has been removed to federal court, there are several ways in which a case can be transferred to another federal district court. It is this combination of removal and transfer that gives rise to the possibility of a cross-jurisdictional remand.

For instance, 28 USC §§ 1404(a) and 1406(a) permit a district court to transfer an action to any other district in which the action might have, or should have, been brought.¹⁹ If a case is improperly removed, but the district court to which the case is removed transfers the case before discovering the removal's impropriety, the case is ripe for a cross-jurisdictional remand.²⁰ Even if the case was properly re-

¹⁶ See 28 USC § 1446 (2000). The defendant in a civil action also must give written notice of removal to the plaintiff and file a copy of the notice of removal with the state court in which the action originated. See Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, 14C *Federal Practice and Procedure: Jurisdiction* § 3738 at 249–51 (West 3d ed 1998).

¹⁷ See, for example, *Franchise Tax Board v Construction Laborers Vacation Trust*, 463 US 1, 8 (1983) (“[I]f it appears before final judgment that a case was not properly removed, because it was not within the original jurisdiction of the United States district courts, the district court must remand it to the state court from which it was removed.”); *Minis v Educational Testing Service*, 99 F3d 1253, 1258 (3d Cir 1996) (noting a district court's independent duty to remand for lack of subject matter jurisdiction); *American Policyholders Insurance Co v Nyacol Products, Inc*, 989 F2d 1256, 1258, 1264 (1st Cir 1993) (ordering the case remanded, based on the court's “unflagging duty” to ensure, sua sponte, its subject matter jurisdiction).

¹⁸ See 28 USC § 1447(c).

¹⁹ The distinction between the two provisions depends on whether the initial, pre-transfer venue is a proper one. Compare 28 USC § 1404(a) (governing transfer of properly venued claims), with 28 USC § 1406(a) (2000) (governing transfer of improperly venued claims).

²⁰ The transferor court may transfer the case before ruling on a motion to remand, or its ruling that the case was properly removed may be reconsidered by the transferee court. Law of the case principles do not preclude reconsideration of subject matter jurisdiction. See, for example, *Christianson v Colt Industries Operating Corp*, 486 US 800, 817 (1988) (permitting transferee federal court to reexamine transferor federal court's jurisdictional determination). However, courts should revisit jurisdictional determinations of coordinate courts prior to transfer only when those determinations are clearly erroneous. See *id* at 819, citing *Fogel v Chestnut*, 668 F2d

moved and transferred, subsequent events may leave the claims lacking any independent basis for federal jurisdiction. For example, at the time of removal and transfer, a case may contain a federal question and supplemental state law claims, and yet the federal question is compromised or dismissed post-transfer. The transferee district court may then elect to remand the pending state law claims cross-jurisdictionally.

3. Remand.

No matter how the case fails to present federal jurisdiction, the absence of federal jurisdiction means that the case must be remanded to state court. For the purposes of this Comment, the two relevant remand provisions are 28 USC § 1447(c), the general procedural provision governing remand after removal, and 28 USC § 1452(b), the provision governing remand of removed claims “related to” bankruptcy.²¹ The former does not address directly the procedural mechanism by which remand is to be accomplished, while the latter expressly disallows cross-jurisdictional remand.

a) General remand provision: Section 1447(c). The general remand provision, Section 1447(c), authorizes a federal court to remand a removed case if the federal court lacks subject matter jurisdiction or if there was a defect in the removal procedure.²² In fact, Section 1447(c) requires that “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”²³ What Section 1447(c) does not make explicit, however, is which court shall remand a case that has been improperly removed and then transferred. At first glance, the command appears aimed at the district court that finds subject matter jurisdiction is lacking. However, as discussed below in Part II.A, this interpretation proves difficult to square with Supreme Court jurisprudence concerning both the general and bankruptcy remand provisions.

b) Bankruptcy remand provision: Section 1452(b). Although the general remand provision applies in most contexts, bankruptcy cases or claims are subject to a more specific remand provision. The bankruptcy remand provision, Section 1452(b), states in relevant part that “[t]he court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground.”²⁴ Unlike the general remand provision, the bankruptcy remand provi-

100, 109 (2d Cir 1981) (“The law of the case will be disregarded only when the court has ‘a clear conviction of error.’”) (citation omitted).

²¹ See 28 USC § 1447(c); 28 USC § 1452(b).

²² See 28 USC § 1447(c).

²³ Id.

²⁴ 28 USC § 1452(b).

sion makes clear which court must remand the claim or cause of action: A claim removed from state court may be remanded by the federal "court to which [it] is removed," rather than by any subsequent federal court to which it is transferred.²⁵

4. Appellate review.

a) *Scope of review.* While Section 1447(c) authorizes the remand of removed cases, Section 1447(d) precludes review "by appeal or otherwise" of those remand orders.²⁶ Like Section 1447(d), Section 1452(b) also bars appellate review of bankruptcy remand orders,²⁷ although it specifies the statutory provisions under which review may not be obtained.²⁸ Despite the seemingly unambiguous text of Section 1447(d), the Supreme Court created an important exception to 1447(d)'s bar on appellate review in *Thermtron Products, Inc v Hermansdorfer*.²⁹

In *Thermtron*, the district court remanded the case because its docket was too crowded to enable it to hear the case expeditiously.³⁰ The Supreme Court held that appellate courts may review remand orders based on reasons other than those articulated in Section 1447(c). That is, they may review remand orders not based on either (1) a lack of subject matter jurisdiction or (2) a defect in the removal procedure.³¹ The Court reasoned that Sections 1447(c) and (d) must be read *in pari materia*: The ban on appellate review prescribed by Section 1447(d) is limited to remand orders based on the grounds for rejecting removal authorized by Section 1447(c).³²

Despite the plain language of Section 1447(d), *Thermtron* has permitted review of a slew of substantive challenges to remand or-

²⁵ Section 1452(b) confers the power to remand a bankruptcy claim only on "[t]he court to which such claim or cause of action is removed." 28 USC § 1452(b). To the extent that a transferee court relies instead on an alleged "inherent" power to remand a bankruptcy claim, see *In re Federal-Mogul Global, Inc*, 282 BR 301, 317 (Bankr D Del 2002), Section 1452(b)'s bar on appellate review is not implicated. It applies solely to remand orders entered pursuant to Section 1452(b) itself. See 28 USC § 1452(b) ("The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action . . . is not reviewable by appeal or otherwise. . . .") (emphasis added). For further discussion of this point, see text accompanying note 108.

²⁶ See 28 USC § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.").

²⁷ See 28 USC § 1452(b).

²⁸ See text accompanying notes 125–28.

²⁹ 423 US 336 (1976).

³⁰ See *id.* at 340–41 & n 3.

³¹ See 28 USC § 1447(c).

³² See *Thermtron*, 423 US at 345–46 ("[O]nly remand orders issued under § 1447(c) and invoking the grounds specified therein . . . are immune from review under § 1447(d).").

ders.³³ In other words, litigants may claim that a district court acted outside its statutory authority in deciding to remand for a reason not contemplated by the remand statutes. By the same token, if the remand statutes do not authorize the practice of cross-jurisdictional remand, then these procedural challenges should also result in appellate review of cross-jurisdictional remand orders. Litigants should be able to claim that a district court acted outside its statutory authority in deciding to remand in a way not contemplated by the remand statutes.

Of course, an appellate court might confine its review to the procedural error without reaching the merits of the jurisdictional determination.³⁴ In other words, even if the appellate court were to conclude that the district court had erred in cross-jurisdictionally remanding, it might only order the district court to retransfer. However, this retransfer order would itself be reviewable once entered.³⁵ Just as importantly, it is unclear what would authorize an appellate court only to consider the procedural question and not the underlying jurisdictional issues. The bar to appellate review in Section 1447(d) has been lifted in order to consider the remand order at all; what then prevents review of the order in its entirety?

Perhaps the bar has been lifted only as to the procedural error, since the district court is only claimed to have exceeded its statutory authority in resolving that issue. Of course, nothing in the statutory text compels this result, and it is hard to see what good would be served by partial review. If the purpose of immunizing remand orders from appellate review is “to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues,”³⁶ then that purpose has already been defeated to the extent that *Thermtron* allows appellate review. If the remand order is to be reviewed, the time saved by partial review should be balanced against the risk that the litigants have lost a federal forum to which they are entitled.³⁷ Indeed, the time added by review of the jurisdictional issues may be marginal: An appellate court is already looking at the merits, in effect, in order to assess whether there is appellate jurisdiction. Without knowing the true

³³ See, for example, Thomas R. Hrdlick, *Appellate Review of Remand Orders in Removed Cases: Are They Losing Their Appeal?*, 82 Marq L Rev 535, 562 (1999) (arguing that Section 1447(c), as amended in 1996, swallows the *Thermtron* exception of reviewability for substantive challenges to remand orders). See also *In re Amoco Petroleum Additives Co.*, 964 F2d 706, 708 (7th Cir 1992) (Easterbrook) (noting that *Thermtron* is contrary to the text of Section 1447(c) and has produced confusion among lower courts).

³⁴ See *Allied Signal Recovery Trust v Allied Signal Inc.*, 298 F3d 263, 271 (3d Cir 2002) (ordering retransfer of a case that had been cross-jurisdictionally remanded, but declining to consider whether there was federal jurisdiction).

³⁵ See text accompanying notes 5–7.

³⁶ *Thermtron*, 423 US at 351.

³⁷ See text accompanying note 156.

ground for the district court's decision to remand, the appellate court cannot know whether the district court remanded on a ground outside its statutory authority.

b) *Standard of review.* Suppose that a district court orders a cross-jurisdictional remand, and then the appellate court considers at least the procedural question and orders that the case be retransferred. Transfer orders normally are reviewed by writ of mandamus, which courts classify as an "extraordinary remedy" that may only be granted on a showing of "clear and indisputable" right to issuance of the writ.³⁸ This diminishes the advantages of retransfer to litigants. Is the game worth the candle?

It probably is, even beyond the obvious set of cases in which the retransfer order is sufficiently flawed to justify mandamus. First, whatever the advantages to litigants, the judicial system as a whole still may profit from a system of retransfer over cross-jurisdictional remand.³⁹ Second, and more specifically to litigants, retransfer rather than remand may be of special importance in the bankruptcy context. Courts have noted that "Congress intended to allow for immediate appeal in bankruptcy cases of orders that 'finally dispose of discrete disputes in the larger case.'"⁴⁰ A retransfer order removes a claim from the bankruptcy court and returns it to the federal court from whence it came, all for the purpose of sending the claim back to the state court in which it originated. Because the retransfer order "finally dispose[s] of [a] discrete dispute[] within the larger case," there is good reason for courts to review these orders by a lesser standard than mandamus, whether as final or collateral orders. In this way, a court's choice between retransfer and cross-jurisdictional remand can be quite important to the litigants.

B. Cross-Jurisdictional Remands in Specific Contexts

Multidistrict litigation and bankruptcy provide good examples of why the issue of cross-jurisdictional remand can be so important to litigants, particularly defendants. These types of cases can involve hundreds or even thousands of cases or claims that have been removed, transferred, and then consolidated in particular courts.⁴¹ Cross-jurisdictional remand is most likely in these cases, because collapsing retransfer and remand into a single step appears significantly more ef-

³⁸ *Mallard v United States District Court for Southern District of Iowa*, 490 US 296, 309 (1989).

³⁹ See Part III.C.3.

⁴⁰ *In re Sonnax Industries*, 907 F2d 1280, 1283 (2d Cir 1990), quoting *In re Saco Local Development Corp.*, 711 F2d 441, 444 (1st Cir 1983) (Breyer).

⁴¹ See, for example, *In re Federal-Mogul Global, Inc.*, 300 F3d 368, 372-73 (3d Cir 2002) (discussing the procedural path of the thousands of personal injury claims before the court).

ficient. Procedural challenges are an additional means for litigants to garner appellate review and retain the federal fora they covet.⁴² However, recent MDL and bankruptcy cases reveal that litigants have failed to raise procedural challenges; or that, when they have pressed such challenges, district courts have responded with confusion and have not elicited meaningful guidance from circuit court opinions.

1. Multidistrict litigation.

Section 1407, which established the Judicial Panel on Multidistrict Litigation, provides for the transfer to a single district of all civil actions that are pending in different districts involving one or more common questions of fact.⁴³ Defendants can remove a case from state to federal court and then initiate a reference to the Judicial Panel by claiming that similar cases are pending in another federal district court.⁴⁴ As with transfer under Sections 1404(a) and 1406(a), the Judicial Panel may enter a transfer order or conditional transfer order before the plaintiff has an opportunity to file, or the original district court has an opportunity to rule on, a motion to remand.⁴⁵

Republic of Venezuela v Philip Morris Inc.,⁴⁶ a recent case from the D.C. Circuit, demonstrates the significance of appellate review of remand orders in the multidistrict litigation context, and why litigants might benefit by challenging cross-jurisdictional remands on procedural grounds. *Philip Morris* involved six suits filed by various foreign countries against United States tobacco companies in Florida state court.⁴⁷ The tobacco companies then removed to the United States

⁴² See, for example, Kevin M. Clermont and Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything about the Legal System? Win Rates and Removal Jurisdiction*, 83 Cornell L Rev 581 (1998) (finding that successful removal significantly improves the defendant's chances of prevailing on the merits).

⁴³ See 28 USC § 1407 (2000); Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, 15 *Federal Practice and Procedure: Jurisdiction* § 3862 at 502 (West 2d ed 1986). Although Section 1407 only provides for transfer for pretrial treatment, in practice transferee courts often see the cases through to settlement or trial. See id at 503–04. But see *Lexecon Inc v Milberg Weiss Bershad Hynes & Lerach*, 523 US 26, 40 (1998) (holding that a district court that transferred a case for pretrial proceedings under Section 1407 may not use Section 1404(a) to transfer the case to itself for trial).

⁴⁴ See 28 USC § 1407(a) (The Judicial Panel will transfer an action upon determination that transfer “will be for the convenience of parties and will promote the just and efficient conduct of such actions.”).

⁴⁵ See Mike Roberts, *Multidistrict Litigation and the Judicial Panel, Transfer and Tag-Along Orders Prior to a Determination of Remand: Procedural and Substantive Problem or Effective Judicial Policy?*, 23 Memphis St U L Rev 841, 843 (1993) (explaining that defendants often quickly initiate reference to the Judicial Panel in hopes of forcing plaintiffs to litigate the remand question in a distant federal forum).

⁴⁶ 287 F3d 192 (DC Cir 2002).

⁴⁷ Id at 194–95. The foreign states filed virtually identical complaints claiming fraud, negligence, and unjust enrichment on the part of the tobacco companies, and seeking compensation from the companies for the costs of treating those afflicted with tobacco-related illnesses.

District Court for the Southern District of Florida.⁴⁸ According to the tobacco companies, removal was proper because there was federal subject matter jurisdiction, premised on the federal common law of foreign relations: The plaintiffs were foreign sovereigns whose vital and material interests were at stake in the lawsuits.⁴⁹ At the same time, the tobacco companies successfully moved to have the cases consolidated by the Judicial Panel on Multidistrict Litigation and transferred to the D.C. district court.⁵⁰ The D.C. district court, however, rejected the tobacco companies' jurisdictional argument, and remanded four of the cases directly to the Florida state court.⁵¹ The defendants appealed and the D.C. Circuit declined to hear the case, claiming that Section 1447(d) barred it from exercising appellate jurisdiction.⁵²

The D.C. Circuit's refusal to hear the case may have been a direct result of the defendants' presentation of the issue. The tobacco companies only challenged the D.C. district court's remand order on substantive grounds,⁵³ and never disputed the procedural propriety of the D.C. district court's cross-jurisdictional remand. Had the tobacco companies convinced the D.C. Circuit that cross-jurisdictional remands are not statutorily authorized by Section 1447(c), the D.C. district court would have been forced to retransfer the case to the Florida federal court for subsequent remand. That transfer order would have been reviewable, and review should have extended to the issue of whether federal subject matter jurisdiction may be premised on the federal common law of foreign relations.⁵⁴

2. Bankruptcy.

The bankruptcy context has its own set of transfer provisions. Title 28 USC § 1412, akin to the general transfer provision in Section 1404(a), permits a district court to transfer a case or proceeding under the Bankruptcy Code to a district court for another district, provided that a transfer is in the interest of justice or for the convenience of the parties.⁵⁵ Additionally, 28 USC § 157(b)(5) allows the district court in which a bankruptcy case is pending to transfer to itself personal injury tort and wrongful death claims.⁵⁶

⁴⁸ *Id.*

⁴⁹ *Id.* at 197.

⁵⁰ *Id.* at 195.

⁵¹ See *id.* at 195–96.

⁵² *Id.* at 196–97.

⁵³ See *id.* at 196.

⁵⁴ See Part I.A.4.a.

⁵⁵ 28 USC § 1412 (2000).

⁵⁶ 28 USC § 157(b)(5) (2000). Note that the circuit courts are divided on whether the denial of a Section 157(b)(5) transfer motion is appealable as a final order, as a collateral order, or by way of mandamus. Contrast *In re Dow Corning Corp.*, 86 F3d 482, 487–88 (6th Cir 1996) (re-

With these bankruptcy transfer statutes, as with the general transfer statutes, cross-jurisdictional remand is an option if the transferee court decides that it lacks jurisdiction over a removed case or claim. However, in bankruptcy cases it need not be a jurisdictional determination that raises the prospect of cross-jurisdictional remand. Even if it has jurisdiction to hear a case transferred to it by another court, the transferee court may decide to abstain from hearing the matter,⁵⁷ depending on the law of the circuit.⁵⁸ This, too, opens the door to a cross-jurisdictional remand, which allows the abstaining transferee court to remand the case or claim directly to the state court from which it was originally removed.

A recent bankruptcy case, *In re Federal-Mogul Global, Inc.*,⁵⁹ drives home the legal consequences that follow from judicial interpretations of the remand statutes. *Federal-Mogul* began for the most part in state courts across the country, when thousands of plaintiffs filed suit against United States automobile manufacturers claiming injury from brake pads lined with asbestos.⁶⁰ One of the brake pad manufacturers, Federal-Mogul Global, declared bankruptcy in federal district court in Delaware.⁶¹ The automakers then began removing the thousands of claims against them to federal court as “related to” the Federal-Mogul bankruptcy,⁶² and thus within the bankruptcy jurisdiction

viewing as both a final and collateral order), with *Federal-Mogul*, 300 F3d 368, 384 (3d Cir 2002) (reviewing by mandamus). Courts have noted that “Congress intended to allow for immediate appeal in bankruptcy cases of orders that ‘finally dispose of discrete disputes in the larger case.’” *In re Sonnax Industries*, 907 F2d at 1283, quoting *In re Saco Local Development Corp.*, 711 F2d at 444 (Breyer). The denial of a Section 157(b)(5) transfer motion “finally dispose[s] of [a] discrete dispute[] within the larger case,” and thus should be reviewed by a lesser standard than mandamus. For further discussion of this point, see Part I.A.4.b.

⁵⁷ Federal district courts may abstain from hearing certain types of bankruptcy proceedings, and, under certain circumstances, they must abstain. See 28 USC § 1334(c).

⁵⁸ The circuits are split on whether abstention applies in removed cases. Contrast *Security Farms v International Brotherhood of Teamsters*, 124 F3d 999, 1009–10 (9th Cir 1997) (holding that abstention does not apply in removed cases), with *Christo v Padgett*, 223 F3d 1324, 1331–32 (11th Cir 2000) (allowing abstention in removed cases); *In re Southmark Corp.*, 163 F3d 925, 929 (5th Cir 1999) (same); and *Robinson v Michigan Consolidated Gas Co, Inc.*, 918 F2d 579, 584 n 3 (6th Cir 1990) (same). For courts that hold abstention applicable to a removed bankruptcy claim, a decision to abstain requires a subsequent remand of the claim to state court—by either the district court to which the claim was transferred or the district court to which the claim was removed. (These courts are the same with cross-jurisdictional removals under Section 157(b)(5). See note 141.) Even courts that do not apply abstention to removed bankruptcy claims could still remand the claims under Section 1452. See 28 USC § 1452 (permitting remand of removed bankruptcy claims on any “equitable ground”).

⁵⁹ 300 F3d 368 (3d Cir 2002).

⁶⁰ See *id.* at 372.

⁶¹ *Id.*

⁶² *Id.* at 373. The automakers claimed that if they were found liable to consumers, they would pursue contribution and/or indemnification claims against the debtor, Federal-Mogul. Some circuits have held that these types of lawsuits against nondebtors, by raising the specter of subsequent liability against the debtor, are “related to” the debtor’s bankruptcy for purposes of

of the federal courts.⁶³ Simultaneously, the automakers moved the Delaware district court to transfer all of the claims against them, whether in state or federal court, to itself under Section 157(b)(5).⁶⁴

The Delaware district court provisionally granted the automakers' transfer motion,⁶⁵ but it ultimately found that the claims were insufficiently "related to" the Federal-Mogul bankruptcy to support federal jurisdiction.⁶⁶ This meant that it had to return thousands of claims to the hundreds of state courts from which they were removed.⁶⁷ The Delaware district court elected to cross-jurisdictionally remand the claims, relying on the bankruptcy remand provision, Section 1452(b).⁶⁸

The automakers appealed and, unlike the defendants in *Philip Morris*, challenged the district court's cross-jurisdictional remand on procedural grounds.⁶⁹ Although the Third Circuit held that Section 1452(b) permits cross-jurisdictional remand,⁷⁰ the difficulties in its approach are discussed below in Part II.B. Had the Third Circuit instead held that Section 1452(b) prohibits cross-jurisdictional remand, then the Delaware district court's remand order should have been reviewable—and the car companies should have been able to challenge on appeal the district court's finding that it lacked subject matter jurisdiction over the removed claims.⁷¹

This would have had at least two significant consequences. First, the Third Circuit would have been obliged to address the issue that had confronted the district court: the precise scope of "related to" bankruptcy jurisdiction.⁷² In addition, the tens of thousands of claims at issue might have remained in federal court. Cases like *Philip Morris* and *Federal-Mogul* illustrate why the issue of cross-jurisdictional remands appears most likely to arise in contexts like multidistrict litigation and bankruptcy, where the efficiency gains are most pronounced—and the consequences for reviewability most severe.

the Bankruptcy Code. See *In re Dow Corning Corp.*, 86 F3d at 494; *A.H. Robins Co., Inc v Piccinin*, 788 F2d 994 (4th Cir 1986).

⁶³ See note 15 and accompanying text.

⁶⁴ See *Federal-Mogul*, 300 F3d at 373.

⁶⁵ See *In re Federal-Mogul Global, Inc.*, 282 BR at 304–05 (discussing the grant of the automakers' provisional transfer motion pursuant to Section 157(b)(5)).

⁶⁶ *Id.* at 317. It held as an alternate ground of decision that abstention in favor of state court adjudication was appropriate. *Id.* See text accompanying notes 57–58.

⁶⁷ See 28 USC § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.").

⁶⁸ See *In re Federal-Mogul Global, Inc.*, 282 BR at 316–17 (arguing that returning the claims to the federal courts to which they were removed would be "a waste of judicial energy" compared to cross-jurisdictionally remanding).

⁶⁹ See *Federal-Mogul*, 300 F3d at 385–86.

⁷⁰ *Id.* at 386–87.

⁷¹ See Part I.A.4.a.

⁷² See note 62.

II. WHY CROSS-JURISDICTIONAL REMANDS ARE A PROBLEM

Having examined how cross-jurisdictional remands can arise and why they deserve more attention from both litigants and courts, this Part explains why, under the statutes governing remand by federal courts and Supreme Court jurisprudence, cross-jurisdictional remands are troubling. It then surveys current practice in the federal courts, and concludes that courts have generally ignored the problem posed by cross-jurisdictional remands.

A. The Reconciliation Requirement of *Things Remembered*

It may be tempting to treat the questions surrounding the general and bankruptcy remand provisions as simple ones. Whatever Congress's reasons for drafting the two statutes differently, the general remand provision simply does not mirror the bankruptcy remand provision. Section 1452(b) specifically allows only "[t]he court to which [a] claim or cause of action is removed" to subsequently remand that case or claim;⁷³ however, Section 1447 contains no such textual prohibition. Thus, claims removed on the basis of federal bankruptcy jurisdiction may not be remanded directly to the state courts from whence they came, but cases removed on other bases may be cross-jurisdictionally remanded pursuant to Section 1447(c). This argument is strengthened by the mandatory nature of Section 1447(c), which states that a case "*shall* be remanded" if "*at any time before final judgment it appears that the district court lacks subject matter jurisdiction.*"⁷⁴ Once a transferee district court decides that it lacks subject matter jurisdiction, an immediate remand appears the only authorized response. Whatever this approach's merits, addressed at greater length in Part III, it seems foreclosed by current Supreme Court jurisprudence. In *Things Remembered, Inc v Petrarca*,⁷⁵ Anthony Petrarca filed suit in an Ohio state court against his lessee and a guarantor seeking rent due on two commercial leases.⁷⁶ Things Remembered, Inc. (TRI) was the successor-in-interest on the guaranty.⁷⁷ After the suit had been filed, the lessee declared bankruptcy.⁷⁸ TRI then removed the action under both the general federal removal statute, 28 USC § 1441(a), and the bankruptcy removal statute, 28 USC § 1452(a).⁷⁹ The United States District Court for the Northern District of Ohio ultimately concluded

⁷³ 28 USC § 1452(b).

⁷⁴ 28 USC § 1447(c) (emphasis added).

⁷⁵ 516 US 124 (1995).

⁷⁶ Id at 125.

⁷⁷ Id.

⁷⁸ Id at 125–26.

⁷⁹ Id at 126.

that Petrarca's removal petition was untimely under both Sections 1441(a) and 1452(a) and remanded the case to state court.⁸⁰ The legal issue before the Supreme Court was which remand statute—Section 1447 or 1452—applied. Petrarca argued that because the proceeding was a bankruptcy case removed pursuant to Section 1452(a) only the remand power and appellate bar contained in Section 1452(b) applied. According to Petrarca, the general remand provision of Section 1447 was trumped in the bankruptcy context by the more specific remand provision of Section 1452. Section 1452(b) permits remand “on any equitable ground,” and bars appellate review of such remand orders.⁸¹ Since the district court had remanded on the basis of a procedural defect, and not an equitable ground, Petrarca claimed that Section 1452(b) did not bar review.

The Supreme Court rejected Petrarca's argument and held that Section 1447(d) applies to *all* remand orders, regardless of the statutes under which the suits were removed.⁸² According to Justice Thomas, writing for a unanimous Court:

There is no express indication in § 1452 that Congress intended that statute to be the exclusive provision governing removals and remands in bankruptcy. Nor is there any reason to infer from § 1447(d) that Congress intended to exclude bankruptcy cases from its coverage. The fact that § 1452 contains its own provision governing certain types of remands in bankruptcy . . . does not change our conclusion. There is no reason §§ 1447(d) and 1452 cannot comfortably coexist in the bankruptcy context. We must, therefore, give effect to both.⁸³

Thus, the Court rebuffed the notion that Sections 1447 and 1452 are mutually exclusive, with the latter governing bankruptcy remands and the former governing all other remands. According to the Court, lower courts must “give effect to both” provisions when remanding bankruptcy cases or claims, at least where there is no reason that the provisions “cannot comfortably coexist.”⁸⁴

The need to “give effect to both” remand statutes in the bankruptcy context creates difficulties that extend well beyond the bankruptcy setting. On the one hand, courts that generally allow cross-jurisdictional remands under Section 1447(c) must ignore the plain text of Section 1452(b) when it comes to bankruptcy remands; otherwise, the general provision allows in *all* cases what the specific provi-

⁸⁰ Id at 126–27 & n 2.

⁸¹ 28 USC § 1452(b).

⁸² See *Things Remembered*, 516 US at 128.

⁸³ Id at 129.

⁸⁴ Id.

sion forbids in a *subset* of those cases. Of course, courts could reconcile the two provisions by reading Section 1447(c) to prohibit cross-jurisdictional remands in all cases, but this is hardly a more inviting solution. It forces courts to pretend that Section 1447(c) speaks where it is silent; after all, unlike Section 1452(b), Section 1447(c) does not specify which court must order the case remanded.

Consider a case like *Federal-Mogul*, in which bankruptcy claims are removed, transferred, and then remanded for lack of subject matter jurisdiction. Looking only at the text of the two remand provisions, Section 1447(c) requires—or, at least, permits—that the claims “be remanded” directly to state court by the transferee federal court, while the text of Section 1452(b) forbids such a remand. The difficulty in reconciling the provisions belies Justice Thomas’s contention that Sections 1447(c) and 1452(b) are easily harmonized.

B. Judicial Interpretation of the Remand Provisions

The majority of courts—and apparently litigants—has assumed that Section 1447(c) permits cross-jurisdictional remands, and thus the reviewability of cross-jurisdictional remands under Section 1447(c) remains largely an open question. However, the issue has received fuller attention in the bankruptcy context. Courts are divided on whether Section 1452(b) permits cross-jurisdictional remands, and thus on whether appellate review of cross-jurisdictional remands under Section 1452(b) is available. None of the courts, however, attempted the difficult task of reading each remand statute in light of the other, and thus what sparse analysis exists is unsatisfyingly incomplete.

1. General remand provision: Section 1447(c).

Several courts have permitted cross-jurisdictional remands under Section 1447(c),⁸⁵ but none of the courts had occasion to consider the propriety of such remands. For instance, in *Bloom v Barry*,⁸⁶ the Third Circuit had to decide whether a case could be remanded to a state court other than the one from which it was removed. The case in *Bloom* had been removed from a Florida state court, and then transferred to a New Jersey federal court. The New Jersey federal court, finding that it lacked subject matter jurisdiction, remanded the case to a New Jersey state court.

⁸⁵ See, for example, *Philip Morris* 287 F3d at 195–97; *Abels v State Farm Fire & Casualty Co.*, 770 F2d 26, 33 & n 13 (3d Cir 1985); *Bloom v Barry*, 755 F2d 356, 358 (3d Cir 1985).

⁸⁶ 755 F2d 356 (3d Cir 1985).

The Third Circuit held the remand improper, because “[r]emand’ means ‘send back.’ It does not mean ‘send elsewhere.’”⁸⁷ The court went on to say—in a single sentence and without citing any authority—that if the New Jersey district court concluded once again on remand that it lacked subject matter jurisdiction, “an order remanding the instant case to the Florida state court should be entered pursuant to 28 USC § 1447(c).”⁸⁸ However, the *Bloom* court was never called on to decide whether cross-jurisdictional remands are authorized by Section 1447(c).⁸⁹

At most, the court in *Bloom* assumed that Section 1447(c) authorizes cross-jurisdictional remands, because nothing in Section 1447(c) limits the scope of remand to state courts geographically located within the state in which the district court sits. The handful of other cases to order cross-jurisdictional remands rests on the same assumption: None of the cases considers the source of the authority to remand directly across jurisdictional lines, let alone locates the source of the authority in Section 1447(c).⁹⁰ The assumption running through the cases would be more defensible in the face of Section 1447(c)’s apparent silence, were it not for the need to reconcile the general and bankruptcy remand provisions. A court that wishes to permit cross-jurisdictional remand under Section 1447(c) must then explain how, in bankruptcy cases, Section 1447(c) permits what the text of Section 1452(b) seems to explicitly forbid.

Bloom is significant, however, because, in holding that *procedurally* unauthorized remand orders are subject to appellate review, it represents a sensible extension of *Thermtron*. Whereas *Thermtron* allows review of substantively unauthorized remand orders, *Bloom* allows review of procedurally unauthorized remand orders.⁹¹ By analogy, if Section 1447(c) does not permit cross-jurisdictional remands, such remand orders are reviewable.⁹²

⁸⁷ Id at 358.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ See, for example, *Philip Morris*, 287 F3d at 195–97 (leaving unconsidered the statutory authority for cross-jurisdictional remands); *Abels*, 770 F2d at 33 & n 13 (same).

⁹¹ See, for example, *In re Ford Motor Company/Citibank (South Dakota), N.A. Cardholder Rebate Litigation*, 264 F3d 952, 964–65 (9th Cir 2001) (asserting appellate jurisdiction over remand order where defendant claimed that district court had exceeded its statutory authority in purporting to remand a dismissed action), cert granted as *Ford Motor Co v McCauley*, 534 US 1126 (2002), cert dismissed as improvidently granted, 123 S Ct 584 (2002).

⁹² For further discussion of why procedurally unauthorized remand orders should be reviewable, see Part I.A.4.a.

2. Bankruptcy remand provision: Section 1452(b).

Section 1452(b), of course, authorizes remand by “[t]he court to which such claim or cause of action is removed,”⁹³ rather than by any subsequent district court to which the claim or cause of action is transferred.⁹⁴ Despite the statutory text, some lower federal courts have permitted cross-jurisdictional remand in bankruptcy cases without any analysis of Section 1452(b).⁹⁵ Only a few federal appellate courts have considered the textual question and they are divided on the question of whether 1452(b) permits cross-jurisdictional remands. The Ninth Circuit has held that Section 1452(b) does not permit cross-jurisdictional remand, while the Third Circuit has held that it does.⁹⁶

a) *Textual approach.* In *In re U.S. Refining & Marketing Co, Inc.*,⁹⁷ the Ninth Circuit considered whether the text of 1452(b) authorizes a California federal court to cross-jurisdictionally remand a case to the Texas state court in which the case had originated. It decided that the cross-jurisdictional remand order was not authorized by Section 1452(b), since the California federal court was not the “court to which [the] claim or cause of action [was] removed.”⁹⁸ While the Ninth Circuit commended the lower court’s efforts “to conserve valuable judicial resources” by sending the action directly back to the Texas state court, it found this procedural shortcut at odds with the statutory text.⁹⁹ Rather than remand the action directly, the California federal court should have retransferred the action to the federal district court in Texas, which could have then remanded to state court. This “seriatim approach” of retransfer and remand, while arguably less efficient than cross-jurisdictional remand, is “the procedure mandated by Congress.”¹⁰⁰

⁹³ 28 USC § 1452(b).

⁹⁴ See text accompanying note 25.

⁹⁵ See, for example, *In re Best Reception Systems, Inc.*, 219 BR 988, 990 (Bankr ED Tenn 1998) (declining to stay remand of cases from Tennessee bankruptcy court to Alabama and Georgia state courts in which they had originated); *In re Missouri Properties, Ltd.*, 211 BR 914, 928 (Bankr WD Mo 1996) (remanding case from Missouri bankruptcy court to Texas state court in which it had originated); *In re Danbury Square Associates, Ltd Partnership*, 150 BR 544, 547–49 (Bankr SD NY 1993) (remanding case from New York bankruptcy court to Connecticut state court in which it had originated).

⁹⁶ Compare *In re U.S. Refining & Marketing Co, Inc.*, 2000 US App LEXIS 219, *2 (9th Cir 2000) (unpublished) (barring cross-jurisdictional remand pursuant to Section 1452(b)), with *Allied Signal Recovery Trust v Allied Signal Inc.*, 298 F3d 263, 271 (3d Cir 2002) (allowing cross-jurisdictional remand pursuant to Section 1452(b)); *Federal-Mogul*, 300 F3d at 386–87 (same). Under Ninth Circuit rules, unpublished opinions are not binding precedent; however, this does not diminish the persuasiveness of the Ninth Circuit’s textual analysis. See Ninth Circuit Rule 36-3(a), online at <http://www.ca9.uscourts.gov> (visited Mar 17, 2003).

⁹⁷ 2000 US App LEXIS 219, *2 (9th Cir 2000) (unpublished).

⁹⁸ *Id.* at *2–3 (quoting Section 1452(b)).

⁹⁹ *Id.* at *3.

¹⁰⁰ *Id.*

b) *Inherent powers approach.* At least one lower court has recognized, though it ultimately rejected, the Ninth Circuit's textualist approach. In *In re Federal-Mogul Global, Inc.*,¹⁰¹ the Delaware district court acknowledged that Section 1452(b) on its face appears to preclude cross-jurisdictional remand, but declared that "it is not clear what interest would be served" by heeding this statutory limitation and retransferring the claims to the federal courts to which they were removed.¹⁰² The court characterized the issue as "really just [a question] of inter-jurisdictional bookkeeping";¹⁰³ and it claimed that its "inherent powers, those 'necessary to the exercise of all others,' resolve[d] any lingering questions" about its authority to order a direct cross-jurisdictional remand of the thousands of claims at issue in the case.¹⁰⁴

The Delaware district court failed, however, to see the broader implications of its holding: At issue were both the district court's authority to order a cross-jurisdictional remand and the appellate court's authority to review that order. If the claims had been retransferred to the federal courts to which they had been removed, those courts, in turn, would have been bound by the Delaware district court's jurisdictional determination under law of the case principles.¹⁰⁵ Nevertheless, the retransfer order, unlike a remand order, would not have been subject to Section 1447(d)'s bar on appellate review, and would have been reviewable.

The district court in *Federal-Mogul* also failed to explain why the power to order a cross-jurisdictional remand is among the "inherent powers" of courts, or those powers "necessary to the exercise of all others."¹⁰⁶ Whatever powers inhere in courts, these powers are not a license to disregard statutory limitations,¹⁰⁷ and it is unclear why a cross-jurisdictional remand—as opposed to a transfer—is truly "necessary

¹⁰¹ 282 BR 301 (Bankr D Del 2002).

¹⁰² Id at 317.

¹⁰³ Id at 316.

¹⁰⁴ Id at 317 (citations omitted).

¹⁰⁵ The district court's determination that it lacked subject matter jurisdiction would not have been so clearly erroneous as to merit reconsideration by other district courts. See, for example, *Christianson v Colt Industries Operating Corp*, 486 US 800, 815–17 (1988) (requiring clear error for a coordinate court to disregard the doctrine of the law of the case); *Hayman Cash Register Co v Sarokin*, 669 F2d 162, 164–70 (3d Cir 1982) (requiring the transferee court, in the absence of unusual circumstances, to accept as the law of the case the transferor court's determinations regarding personal jurisdiction and venue).

¹⁰⁶ *In re Federal-Mogul Global, Inc.*, 282 BR at 317.

¹⁰⁷ See, for example, *Bank of Nova Scotia v United States*, 487 US 250, 254 (1988) (calling it "well established" that even a "sensible and efficient use of [a federal court's] supervisory power" is invalid if in conflict with constitutional or statutory restrictions) (quotation omitted). Consider *Carlisle v United States*, 517 US 416, 425–28 (1998) (holding that, whatever courts' "inherent powers" are, they do not include the power to circumvent or conflict with the Federal Rules of Criminal Procedure).

to the exercise of all other[]" powers.¹⁰⁸ Regardless, to the extent that district courts rely on inherent powers to order cross-jurisdictional remand, their authority is not derived from Section 1447(c) or 1452(b), and thus their orders are not subject to the bars on appellate review in Sections 1447(d) and 1452(b).¹⁰⁹

Interestingly, the Third Circuit held on appeal in *Federal-Mogul* that the Delaware district court's cross-jurisdictional remand order was authorized by Section 1452(b) and therefore was insulated from appellate review.¹¹⁰ However, the appellate court addressed neither the district court's argument that the route of remand is nothing more than a question of bookkeeping, nor its argument that cross-jurisdictional remand is among courts' inherent powers. Rather, the Third Circuit based its decision on two of its own prior precedents, *Abels v State Farm Fire & Casualty Company*¹¹¹ and *Bloom*,¹¹² and the D.C. Circuit's recent opinion in *Philip Morris*.¹¹³ Yet none of these cases questions the propriety of cross-jurisdictional remands. Thus, none of these cases effectively answers the Ninth Circuit's argument that the language in Section 1452(b) does not authorize cross-jurisdictional remand. Moreover, *Abels*, *Bloom*, and *Philip Morris* all involve remands pursuant to Section 1447 rather than Section 1452.¹¹⁴ Because these cases did not involve the remand of bankruptcy claims, there was no need to address Section 1452(b)'s textual proscription against cross-jurisdictional remand. In short, *Federal-Mogul*, rather than offering any real response to the Ninth Circuit's straightforward textual analysis in *U.S. Refining*, elided the very issue it was supposed to resolve.

¹⁰⁸ See, for example, *In re Prudential Insurance Co America Sales Practices Litigation Agent Actions*, 278 F3d 175, 188–89 (3d Cir 2002) (allowing that one of a court's inherent powers is to sanction attorneys who appear before it).

¹⁰⁹ This is made explicit in Section 1452(b), where the bar on appellate review applies solely to remand orders entered pursuant to Section 1452(b) itself. See 28 USC § 1452(b) ("The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered *under this subsection* remanding a claim or cause of action . . . is not reviewable by appeal or otherwise. . . .") (emphasis added). By contrast, Section 1447(d) bars appellate review of "[a]n order remanding a case," without stating that the order must be entered pursuant to Section 1447(c). However, *Thermtron* read Section 1447(d) as if it contained such language. See Part I.A.4.a.

¹¹⁰ *Federal-Mogul*, 300 F3d at 386–87.

¹¹¹ 770 F2d 26 (3d Cir 1985).

¹¹² 755 F2d 356.

¹¹³ 287 F3d 192.

¹¹⁴ See *Philip Morris*, 287 F3d at 195–96 (leaving unconsidered the statutory authority for cross-jurisdictional remands under Section 1447); *Abels*, 770 F2d at 33 & n 13 (same); *Bloom*, 755 F2d at 358 (same). The Third Circuit cited to the same cases in its decision in *Allied Signal*, which similarly held that Section 1452(b) permits cross-jurisdictional remand. See 298 F3d at 270–71.

c) *Inherited powers approach.* *Federal-Mogul* was one of a pair of recent cases—*Allied Signal Recovery Trust v Allied Signal Inc*¹¹⁵ is the other—in which the Third Circuit upheld cross-jurisdictional remands of bankruptcy claims. In *Allied Signal*, the Third Circuit provided a different rationale for permitting cross-jurisdictional remand under Section 1452(b), namely, the general principle that “a transferee court is deemed to inherit all of the authority of a transferor court.”¹¹⁶ According to the *Allied Signal* court, because the transferor court may remand a case to the state court from which it was removed, so may the transferee court. The authority to remand cases or claims cross-jurisdictionally derives not from Section 1452(b), but from the common law principle that a transferee court stands in the shoes of a transferor court with respect to a transferred case.

However, the court did not explain how a transferee court could be “deemed” to inherit the authority to order cross-jurisdictional remands given the text of Section 1452(b). Generally speaking, it may be true that a transferee court stands in the shoes of a transferor court with respect to a transferred case, but that general principle is superseded by the plain language of a statute—like Section 1452(b)—that expressly limits the particular power of a particular court.¹¹⁷

Indeed, the Third Circuit effectively rewrote the statute by excising the words “to which such claim or cause of action is removed” from Section 1452(b). After all, the only courts in a position to remand the claims are the removal court and any transferee court. The *Allied Signal* court’s interpretation thus ignores the rule that statutes are to be construed, if possible, to give every word operative effect.¹¹⁸ Whether the Third Circuit and its lower courts are correct that Section 1452(b) ought not limit the power of district courts to remand cases directly to state court, “the proper venue for resolving that issue remains the floor of Congress.”¹¹⁹

¹¹⁵ 298 F3d 263, 271 (3d Cir 2002).

¹¹⁶ *Allied Signal*, 298 F3d at 271. The court cited in support the Tenth Circuit’s decision in *Chrysler Credit Corp v Country Chrysler, Inc*, 928 F2d 1509, 1516 (10th Cir 1991). According to the court in *Chrysler Credit*, “[t]he transferee court’s powers are coextensive with those of the transferor court; it may issue any order or render any judgment that could have been made in the transferor court had the transfer never taken place.” *Id.*

¹¹⁷ See, for example, *Lexecon Inc v Milberg Weiss Bershad Hynes & Lerach*, 523 US 26, 43 (1998) (prohibiting considerations of efficiency and economy from trumping the text of a jurisdictional statute); *Badaracco v Commissioner*, 464 US 386, 398 (1984) (“Courts are not authorized to rewrite a statute because they might deem its effects susceptible of improvement.”).

¹¹⁸ See, for example, *Duncan v Walker*, 533 US 167, 174 (2001) (positing courts’ duty to avoid treating statutory terms as surplusage); *United States v Nordic Village, Inc*, 503 US 30, 36 (1992) (same); *Moskal v United States*, 498 US 103, 109–10 (1990) (same).

¹¹⁹ *Lexecon*, 523 US at 40.

III. RECONCILING THE REMAND STATUTES

Recent cases like *Federal-Mogul* and *Allied Signal* make it clear that district courts are uncertain about how to interpret the remand provisions, and that appellate courts are providing little guidance. This Part offers an interpretation that makes sense of the statutes and would prove simple for judges to administer. It first considers the various ways in which courts could justify permitting or prohibiting cross-jurisdictional remands, given the text of the statutes and Supreme Court case law. It then argues that these sources are best understood as prohibiting cross-jurisdictional remands. Finally, it answers potential objections to that view.

A. Permitting Cross-Jurisdictional Remands

Cross-jurisdictional remands may be premised on either the general remand provision contained in Section 1447(c), or the bankruptcy removal provision of 1452(a). To cross-jurisdictionally remand under the general remand provision, courts must avoid *Things Remembered*'s requirement that the statutes be reconciled. To allow cross-jurisdictional remands under Section 1452(b), courts must ignore the provision's text. Neither of these options is ultimately satisfying.

1. Interpreting Section 1447(c) to allow cross-jurisdictional remands.

A court that wishes to allow cross-jurisdictional remands under Section 1447(c) must first distinguish *Things Remembered*. In *Things Remembered*, the Supreme Court held that Section 1447(d) applies to all remand orders, regardless of whether the case or claim was removed under the general removal statute, Section 1441, or the bankruptcy removal statute, Section 1452(a).¹²⁰ Strictly speaking, *Things Remembered* requires only that Section 1447(d)—and not Section 1447(c)—apply in the bankruptcy context. Yet the reason for the Court's decision was that neither remand statute indicates that it is exclusive of the other. The Court's reasoning applies with equal force to Section 1447(c): There is no more reason to infer from Section 1447(c) than from Section 1447(d) "that Congress intended to exclude bankruptcy cases from its coverage."¹²¹ And, certainly, there remains "no express indication in [Section] 1452 that Congress intended that statute to be the exclusive provision governing removals and remands in bankruptcy."¹²²

¹²⁰ See *Things Remembered*, 516 US at 128.

¹²¹ *Id.* at 129.

¹²² *Id.*

One way to distinguish *Things Remembered* is to claim that there is a reason that Sections 1447(c) and 1452 cannot comfortably coexist in the bankruptcy context: the latter contains a textual proscription against cross-jurisdictional remands not present in the former. On this view, *Things Remembered*'s reconciliation requirement applies only when reconciliation is possible, and it is impossible in the context of cross-jurisdictional remand. This assumes, however, that Section 1447(c) must be read to allow cross-jurisdictional remand. In fact, Section 1447(c) need not be—and, for reasons discussed below, is not best—read that way.¹²³

It is not simply possible to reconcile Section 1447(c) with the bankruptcy remand provision, but it is easier than the reconciliation of Section 1447(d) that the Supreme Court required in *Things Remembered*. If Section 1447(d) can and must “comfortably coexist” with Section 1452(b), then so must Section 1447(c).¹²⁴ For instance, Section 1447(d) bars review of remand orders by “appeal or otherwise,” with a single substantive exception for certain types of civil rights cases.¹²⁵ However, Section 1452(b) bars review of bankruptcy remands “by appeal or otherwise by the courts of appeals under section 158(d), 1291, or 1292 of [Title 28] or by the Supreme Court of the United States under section 1254 of [Title 28].”¹²⁶ In other words, Section 1452(b) enumerates the provisions under which review is precluded, and it omits any mention of the All Writs Act,¹²⁷ which authorizes issuance of writs of mandamus. Thus, it is unclear whether the bar on appellate review in Section 1452(b) precludes review of bankruptcy remands by way of mandamus.¹²⁸ The text of Section 1452(b) does not appear to bar mandamus review, while the text of Section 1447(d) appears to sweep in all forms of review, including mandamus. The relevant point is that Section 1447(c) is no harder to reconcile with the bankruptcy remand provision than Section 1447(d); indeed, it is easier, since the text of 1447(c) is not in direct conflict with the text of the bankruptcy remand provision.

Of course, rather than distinguish *Things Remembered*, a court that wishes to allow cross-jurisdictional remand in non-bankruptcy cases might rely on the general principle, articulated in *Allied Signal*,

¹²³ See Part III.B.

¹²⁴ *Things Remembered*, 516 US at 129.

¹²⁵ 28 USC § 1447(d).

¹²⁶ 28 USC § 1452(b).

¹²⁷ 28 USC § 1651 (2000).

¹²⁸ Contrast *In re Dow Corning Corp.*, 113 F3d 565, 569 (6th Cir 1997) (permitting review by way of mandamus based on the identical language of 28 USC § 1334(d)), with *In re Federal-Mogul Global, Inc.*, 300 F3d 368, 389 (3d Cir 2002) (precluding review of bankruptcy remand orders by way of mandamus); *Matter of US Brass Corp.*, 110 F3d 1261, 1266 (7th Cir 1997) (noting that Section 1452(b)'s bar on appellate review “seem[s] to take in mandamus”).

that “a transferee court is deemed to inherit all the authority of a transferor court.”¹²⁹ If the federal court to which a case is removed may remand the case to state court, then so may any subsequent federal court to which the case is transferred.¹³⁰ There are two versions of this argument, neither of which is persuasive.

On the one hand, if federal courts derive their general remand powers from Section 1447(c), then the argument is just another way of asking whether Section 1447(c) permits cross-jurisdictional remand. If Section 1447(c) does not grant to federal courts the power to remand a case cross-jurisdictionally, then that power cannot be inherited by a transferee court—and the transferor court’s power to remand directly cannot be converted into a power to remand cross-jurisdictionally simply because the case is transferred.

On the other hand, the claim might be that courts have some inherent, extra-statutory remand powers quite apart from Section 1447(c). This would allow courts to order cross-jurisdictional remands in bankruptcy cases and still remain faithful to *Things Remembered*: While 1447(c) could be interpreted to prohibit cross-jurisdictional remands, such remands would constitute an exercise of courts’ inherent powers. What this would not allow courts to do, however, is to insulate cross-jurisdictional remand orders from appellate review. To the extent that district courts rely on inherent powers to order cross-jurisdictional remand, their authority is not derived from Section 1447(c) or 1452(b), and thus their orders are not subject to the bars on appellate review in Sections 1447(d) and 1452(b).¹³¹

2. Interpreting Section 1452(b) to allow cross-jurisdictional remands.

As the Ninth Circuit held in *U.S. Refining*, Section 1452(b) authorizes remand by “[t]he court to which such claim or cause of action is removed,”¹³² and not by any subsequent district court to which the claim or cause of action is transferred. Perhaps, though, this is too slender a reed on which to rest one’s argument. There is no special reason why Congress would prohibit cross-jurisdictional remands in the bankruptcy context. Rather than bringing Section 1447(c) into harmony with Section 1452(b) by prohibiting cross-jurisdictional re-

¹²⁹ *Allied Signal*, 298 F3d at 271.

¹³⁰ Note that the Third Circuit made just such an argument in the context of Section 1452(b) in *Allied Signal*, and permitted a common law principle to trump the clear text of the bankruptcy remand provision. See Part II.B.2. However, applying the principle to a general remand would not do violence to the text of Section 1447(d).

¹³¹ See text accompanying note 109 (explaining why cross-jurisdictional remand orders based on courts’ inherent powers are not barred from appellate review).

¹³² 28 USC § 1452(b).

mands across the board, courts could loosen the textual prohibition in Section 1452(b).

The judicial creation of exceptions to statutory text is not without precedent in the interpretation of jurisdictional statutes. Although Section 1447(c) states that a case “shall be remanded” if it lacks federal jurisdiction, some courts have developed the so-called “futility exception” to permit dismissal rather than remand.¹³³ The exception “allows a district court to dismiss an action rather than remand it to the state court when remand would be futile because the state court also would lack jurisdiction over the matter.”¹³⁴

In like fashion, courts could allow cross-jurisdictional remand rather than retransfer when retransfer would mean only an eventual remand anyway. However, such exceptions do not affect only the functioning of the judicial system, as courts have claimed.¹³⁵ They also affect the substantive rights of litigants—who are deprived of the opportunity to present state law claims to a state court, in the case of the futility exception, or who are faced with an unreviewable remand order rather than a reviewable retransfer order, in the case of cross-jurisdictional remand. Whatever the merits of these judicially engineered exceptions to statutory text, those debates are properly left to Congress instead of the courts.¹³⁶

B. Prohibiting Cross-Jurisdictional Remands

The determination that Section 1447(c) does not allow for cross-jurisdictional remand has a number of advantages: In addition to reconciling the remand statutes as required by *Things Remembered*, it comports with the text of the statutes and prevents undue judicial discretion.

¹³³ Compare *Bell v City of Kellogg*, 922 F2d 1418, 1424–25 (9th Cir 1991) (applying the futility exception in upholding the district court’s dismissal of a removed case); *Asarco, Inc v Glenara, Ltd*, 912 F2d 784, 787 (5th Cir 1990) (same), with *Bromwell v Michigan Mutual Insurance Co*, 115 F3d 208, 213 (3d Cir 1997) (rejecting the futility exception based on the plain meaning of Section 1447(c)); *Roach v West Virginia Regional Jail and Correctional Facility Authority*, 74 F3d 46, 49 (4th Cir 1996) (same); *Smith v Wisconsin Department of Agriculture, Trade and Consumer Protection*, 23 F3d 1134, 1139 (7th Cir 1994) (same). It should be noted that the Supreme Court in *International Primate Protection League v Administrators of Tulane Educational Fund*, 500 US 72, 87–89 (1991), came close to rejecting the futility exception.

¹³⁴ *Bromwell*, 115 F3d at 213.

¹³⁵ See, for example, *Bell*, 922 F2d at 1424–25 (“We do not believe Congress intended to ignore the interest of efficient use of judicial resources.”); *In re Federal-Mogul Global, Inc*, 282 BR 301, 317 (Bankr D Del 2002) (“The logic of the statutory structure suggests that [the two-step transfer and remand procedure], with its attendant waste of judicial energy, is unnecessary.”).

¹³⁶ See, for example, *Lexecon Inc v Milberg Weiss Bershad Hynes & Lerach*, 523 US 26, 40 (1998).

1. Making sense of the *corpus juris*.

Since the remand provisions must be harmonized under *Things Remembered*, courts face a simple choice: read Section 1447(c)'s ambiguous text as precluding what it does not clearly permit, or read Section 1452(b)'s text as permitting what it quite clearly precludes. Choosing the former is preferable for a number of reasons. Not only does it avoid doing violence to the text of Section 1452(b), but, as discussed below, it comports with the text of Section 1447(c) and thus "make[s] sense rather than nonsense out of the *corpus juris*" as a whole.¹³⁷ It also creates an easily administrable system for judges, litigants and clerks of the courts, because cases are returned from federal to state court along the same route by which they came. In essence, this is a simple solution to a straightforward problem: If courts must "give effect to both" remand provisions in bankruptcy cases, despite their differences, then courts should read the ambiguous general remand provision in light of the unambiguous bankruptcy remand provision. At the least, courts should not ignore the text of the bankruptcy remand provision; even if the general remand statute authorizes cross-jurisdictional remand, courts still have erred in permitting cross-jurisdictional remand in bankruptcy cases.

In fact, there is no evidence that Section 1447(c) contemplates cross-jurisdictional remands. Section 1447(c) states that if "the district court" lacks subject matter jurisdiction, the case must be remanded.¹³⁸

¹³⁷ *West Virginia University Hospitals, Inc v Casey*, 499 US 83, 101 (1991) (explaining that the Court's role when faced with ambiguous statutory terms is to construe those terms as consistent with the body of law).

¹³⁸ 28 USC § 1447(c). As codified in the 1948 revisions to Title 28, Section 1447(c) 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, and may order the payment of just costs." 28 USC § 1447(c) (1976 & Supp 1987). The straightforward interpretation of this pre-1988 version of Section 1447(c) is that Congress foresaw remand by "the district court" to which the case had been removed.

In 1988, Congress amended Section 1447(c) to 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 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. . . .

See Act of November 19, 1988, Pub L No 100-702, Title X, § 1016(c), 102 Stat 4642, 4670. The new language changed the wording of the grounds for removal and placed a thirty-day time limit on filing a motion to remand based on a procedural defect. There is no evidence, either from the new language or the legislative history surrounding its enactment, that Congress intended to address the practice of cross-jurisdictional remand. See Hrdlick, 82 Marq L Rev at 562 (cited in note 33) (showing that the time limit was merely procedural).

In 1996, Congress amended the statute yet again to read: "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 § 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." See

This same phrase, "the district court," appears in a number of other provisions dealing with removal and remand. For instance, both the general removal statute, 28 USC § 1441(a), and the bankruptcy removal statute, 28 USC § 1452(a), authorize removal only to "the district court" for the district where the state action is pending.¹³⁹ Moreover, Section 1447(a) states that "[i]n any case removed from a State court, the district court may issue all necessary orders and process to bring before it all proper parties,"¹⁴⁰ which apparently means "the district court" to which the case is removed. In a case that was removed and then transferred, Section 1447(a) presumably would not bar the transferee district court from bringing before it all proper parties. Nevertheless, these statutes all appear to contemplate a symmetrical scheme in which remand mirrors removal. Proceedings move back and forth between the state and federal judiciaries on an established path between a state court and the federal district court for the district and division embracing that state court.

These textual clues are not so much evidence that Congress intended to prohibit cross-jurisdictional remand, as that Congress simply did not consider transfer when drafting the removal and remand provisions. Rather, Congress conceived of removal and remand as mirroring each other; together they shuttle cases between state and federal courts in the same federal district. Once in federal court, if an action belongs in another district, it can be transferred, and if it does not belong in that district after all, it can be transferred back.¹⁴¹ Whether or not these textual clues would be strong enough to militate against cross-jurisdictional remand under Section 1447(c) in the absence of *Things Remembered*, reading the remand statutes to prohibit cross-jurisdictional remand is entirely consistent with their text.

Act of October 1, 1996, Pub L No 104-219, § 1, 110 Stat 3022. Again, nothing in the new language or its legislative history speaks to remand by a federal court other than that to which a case is removed. See Clarification of Rules for Removal of Cases to Federal Court, HR Rep No 104-799, 104th Cong, 2d Sess 2 (1996) (explaining that the purpose of the law is to clarify that the thirty-day limit does not apply to cases where the court lacks subject matter jurisdiction).

¹³⁹ 28 USC § 1441(a); 28 USC § 1452(a).

¹⁴⁰ 28 USC § 1447(a).

¹⁴¹ One exception might be Section 157(b)(5), which has been interpreted to permit *cross-jurisdictional removal*: A district court may transfer to itself personal injury and wrongful death claims directly from state courts in other districts (as well as its own). See *In re Pan Am Corp*, 16 F3d 513, 516 (2d Cir 1994) (permitting federal court in the Southern District of New York to transfer personal injury cases from Florida state court to itself). However, this interpretation is open to question. Section 157(b)(5) does not purport to be a jurisdictional grant to bankruptcy or district courts (as do other provisions in Section 157); it merely authorizes the district court in which the bankruptcy is pending to fix venue as between one of two federal courts. Section 157(b)(5) could be read to permit federal courts to fix venue for such claims, once the claims have been removed from state court under Section 1452(a).

2. Judicial administration.

In addition to making sense of the statutes, this view has at least one practical advantage over current practice: It prevents judges from insulating their decisions from appellate review. Consider the district court in *Federal-Mogul*. It was interpreting a widely influential decision¹⁴² of the Third Circuit regarding the scope of “related to” bankruptcy jurisdiction¹⁴³—an unsettled issue among the circuit courts.¹⁴⁴ Having decided that the thousands of claims lacked federal subject matter jurisdiction, rather than remanding the claims directly, the district court could have chosen to retransfer the claims for remand. The latter choice would have been reviewable; the remand order, at least according to the Third Circuit, was not.¹⁴⁵ By interpreting the statutes to allow district courts the choice between retransfer and cross-jurisdictional remand, district courts can determine the availability of appellate review. The closest analogy is certification for interlocutory review, but a district court’s refusal to certify a question for interlocutory review only delays, but does not prevent, eventual appellate review.¹⁴⁶ Of course, if district court judges should not enjoy the option of insulating their decisions from review, this only means that the current regime should be replaced by a more rule-bound approach; the rule could be either that district judges must retransfer cases or that they must cross-jurisdictionally remand them. The need to reconcile the remand statutes cuts in favor of the former over the latter, as does the potential inefficiency of cross-jurisdictional remand.¹⁴⁷

C. Potential Objections

The interpretation of the remand statutes proposed by this Comment holds that courts should not ignore the text of Section 1452(b), which prohibits remand by any federal court other than the one to which a case or claim is removed. The requirement that Sections 1447 and 1452 be reconciled thus dictates that Section 1447 be

¹⁴² See *Pacor, Inc v Higgins*, 743 F2d 984 (3d Cir 1984). See also *Celotex Corp v Edwards*, 514 US 300, 308 & n 6 (1995) (citing *Pacor* favorably and discussing its influence).

¹⁴³ See *Federal-Mogul Global, Inc*, 282 BR at 305–13 (excluding from the scope of “related to” bankruptcy jurisdiction mass-tort claims against nondebtors that could have resulted in eventual liability for the debtor).

¹⁴⁴ Compare *In re Dow Corning Corp*, 86 F3d 482, 494 (6th Cir 1996) (finding “related to” jurisdiction on the basis of the possibility of the debtor’s contribution or indemnification liability), with *Arnold v Garlock, Inc*, 278 F3d 426, 440–41 (5th Cir 2001) (denying motion to stay pending appeal partially due to weakness of the defendant’s theory of “related to” jurisdiction based on contribution liability).

¹⁴⁵ See *Federal-Mogul*, 300 F3d at 386–87.

¹⁴⁶ See 28 USC § 1292(b) (2000).

¹⁴⁷ See Part III.C.3.

read to prohibit cross-jurisdictional remand, which is entirely consistent with its text.

There are at least three possible objections to the view that the remand statutes are best understood as prohibiting cross-jurisdictional remand. The first two objections, one textual and the other purposive, involve opposing jurisdictional determinations in the same case by different federal courts, while the third objection concerns the alleged inefficiency of cross-jurisdictional remand.

1. Textual objection.

There is a textual objection to retransferring rather than cross-jurisdictionally remanding cases: Section 1447(c) says that a case "shall be remanded" if at any time before final judgment the district court believes that it lacks subject matter jurisdiction.¹⁴⁸ The stronger version of this objection would be that Section 1447(c) requires an immediate remand rather than a retransfer: A court must cross-jurisdictionally remand a case that has been removed and transferred. For reasons already discussed, this objection need not carry the day. "[T]he district court" can be read to mean only the courts to which cases are removed, and this reading is supported by the text of the various statutes.¹⁴⁹

The weaker version of the objection, though, is concerned not with the timing of the remand, but with its eventuality. For instance, suppose that in *Federal-Mogul* one of the claims had been removed from Illinois state court. The Delaware district court now opts to retransfer the claim to Illinois federal court for remand. What prevents the Illinois federal court from reconsidering the Delaware district court's jurisdictional ruling?¹⁵⁰ This could cycle the claim between federal courts and would mean that the case has not been remanded as Section 1447(c) demands.¹⁵¹

The straightforward answer to this objection is that, even if the law of the case doctrine does not bar reconsideration of the jurisdictional determination, Section 1447(c) does when it states that the case

¹⁴⁸ 28 USC § 1447(c).

¹⁴⁹ See Part III.B.1.

¹⁵⁰ The Supreme Court has counseled that, under the law of the case doctrine, such reconsideration should be reserved for situations of clear error, see *Christianson v Colt Industries Operating Corp*, 486 US 800, 819 (1988), but this is precisely the problem. The Illinois federal court is only likely to reconsider jurisdiction if it intends to reverse the Delaware district court and keep the case (or transfer it elsewhere in the federal system).

¹⁵¹ Another example is transfer by the Delaware district court to a federal district court in the Sixth Circuit. Were the latter court able to reexamine the jurisdictional question, its inquiry would be controlled by the Sixth Circuit's decision in *In re Dow Corning Corp*, 86 F3d 482, 494 (6th Cir 1996), which upheld federal jurisdiction in similar circumstances.

“shall be remanded”;¹⁵² the statute trumps the common law doctrine of law of the case. When the Delaware district court sends back the claim for lack of jurisdiction, Section 1447(c) commands the Illinois district court to remand the claim. The transfer order remains reviewable, and the case is remanded as Section 1447(c) demands. This may seem to beg the question: How can Section 1447(c) require only the Illinois, and not the Delaware, district court to remand? Yet the Delaware district court, since it lacks the power to remand cross-jurisdictionally, effects remand by funneling the claim through the Illinois court, which is foreclosed by Section 1447(c) from reexamining subject matter jurisdiction.

2. Purposive objection.

There is another argument in favor of cross-jurisdictional remand over retransfer that rests not on statutory text, but rather on congressional purpose. The purpose of immunizing remand orders from appellate review is “to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues.”¹⁵³ In this sense, a cross-jurisdictional remand is just a decision by the transferee court that the case does not belong in federal court. As such, it is no different from a remand decision in a case that is only removed (and not transferred), which would be barred from review by Section 1447(d). It seems odd that litigants could secure review simply by transferring cases between federal courts prior to any remand.

However, there is an important wrinkle in a case that is removed and transferred, namely, the prospect that two (or more) federal courts have made jurisdictional determinations in the case. This differs from the situation contemplated by the remand provisions, in which the federal court to which a case is removed is the same court that makes the jurisdictional determinations and orders any remand.¹⁵⁴

The spectre of multiple—and potentially conflicting—judgments on the federal level should give us pause. On the one hand, a number of cases hold that if federal subject matter jurisdiction is questionable, the case should be remanded to state court; for if the case continued to judgment in federal court, only to have it determined on appeal that jurisdiction was lacking, judicial resources would be wasted on a retrial in state court.¹⁵⁵ On the other hand, the unreviewability of remand orders militates against a pro-remand presumption, because the

¹⁵² 28 USC § 1447(c).

¹⁵³ *Thermtron*, 423 US at 351.

¹⁵⁴ See Part III.B.1.

¹⁵⁵ See Wright, Miller, and Cooper, 14C *Federal Practice and Procedure: Jurisdiction* § 3739 at 446–50 (cited in note 16).

parties may have lost a federal forum to which they are statutorily entitled.¹⁵⁶

Whatever the trade-off between these conflicting urges, the objection that cross-jurisdictional remand comports with congressional purpose rests on the view that Congress has already made the trade-off in the remand statutes. However, there is no reason to assume this. One statute is best read as prohibiting the practice of cross-jurisdictional remand, and the other quite explicitly forbids it. Congress clearly felt that appellate review of garden-variety remand orders was unnecessary, but the purposive objection extends Congress's conviction, assuming in effect that Congress would have reached the same view had it only considered cases that have been removed and then transferred. Yet imagine a removed case in which the transferor court decides that jurisdiction is proper, but the transferee court reverses that determination and remands the case cross-jurisdictionally. Certainly Congress might decide that the remand order should be unreviewable. Yet it might also decide that the difference in the courts' determinations signals that the parties may be in danger of losing a warranted federal forum, and that the usual bar to review of remand orders should be relaxed. The purposive objection holds that Congress has already addressed these concerns, even though neither of the remand statutes contemplates cross-jurisdictional remand.

3. Efficiency objection.

A third objection in favor of cross-jurisdictional remand is that it is more efficient than retransfer: It accomplishes in the one step of cross-jurisdictional remand what would otherwise require the two steps of retransfer and remand. If Congress did not even contemplate cross-jurisdictional procedures when drafting the removal and remand provisions, one ought not resolve whatever statutory ambiguity exists by opting for the least efficient interpretation. At the least, courts might read *Things Remembered* narrowly to avoid the reconciliation requirement,¹⁵⁷ so that *only* bankruptcy remands cannot be cross-jurisdictionally remanded.

This efficiency objection has already been answered on formal grounds,¹⁵⁸ but on functional grounds, the objection may be less determinate than it seems. Sending cases back the way that they have come

¹⁵⁶ See *id.* at 450. This is an important right. For instance, the Supreme Court long ago held that a party's right to a federal forum cannot be defeated by an opposing party's fraudulent joinder. See *Alabama Great Southern Railway Co v Thompson*, 200 US 206, 218 (1906) ("[T]he Federal courts may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals.").

¹⁵⁷ But see Part III.A.1 (explaining why *Things Remembered* is difficult to distinguish).

¹⁵⁸ See Part II.B.2.a (discussing the Ninth Circuit's interpretation in *U.S. Refining*).

creates a system of bright-line rules for judges and clerks of the courts to follow. The bright-line rule could be that courts may either cross-jurisdictionally remand or retransfer, but the rarity of cross-jurisdictional remand may mean that it causes more confusion than it is worth. In addition, permitting cross-jurisdictional remand may give rise to unintended consequences that temper any gains in efficiency.¹⁵⁹ For instance, the Delaware district court in *Federal-Mogul*, once it had decided to remand the claims before it, was statutorily required to mail certified copies of its remand order to the state courts from which the claims were originally removed.¹⁶⁰ Faced with mailing hundreds, and more probably thousands, of certified copies of its remand order, the court instead posted the order on its website.¹⁶¹ Complying with Section 1447(c)'s mailing requirement would have meant surrendering much of the gain in efficiency that supposedly justified the remand in the first instance. In short, the practice of cross-jurisdictional remand is rare but increasingly common, and it is too early to draw conclusions about its efficiency.

CONCLUSION

Remand across jurisdictional lines is a practice in search of a justification. Courts have permitted cross-jurisdictional remands under statutes that either clearly preclude or do not clearly endorse the practice, and no court has ever attempted to reconcile these statutes. This Comment offers an interpretation that renders the statutes coherent and congruous, suggesting that courts should not allow cross-jurisdictional remands.

¹⁵⁹ See, for example, Petition for Writ of Certiorari, *In re Federal-Mogul Global, Inc.*, No 02-661, *23 (US filed Oct 29, 2002) (alleging that Delaware district court's cross-jurisdictional remand has led to "substantial confusion . . . as files have been stranded in the federal courts to which claims were removed, and other federal courts have proceeded to remand the claims anyway notwithstanding the Delaware court's . . . cross-jurisdictional remand").

¹⁶⁰ See 28 USC 1447(c) ("A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.").

¹⁶¹ See Order Denying the Motions to Transfer the "Friction Products Claims" and Remanding the Friction Products Claims, *In re Federal-Mogul Global*, (Bankr D Del 2002 filed Feb 8, 2002) online at <http://www.deb.uscourts.gov/wolin2.pdf> (visited Feb 28, 2003).