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CIVIL PROCEDURE — REMAND — FOURTH CIRCUIT HOLDS THAT REMAND ORDERS MAY BE VACATED UNDER RULE 60(B)(3). — *Barlow v. Colgate Palmolive Co.*, 772 F.3d 1001 (4th Cir. 2014) (en banc).

Allowing cases to move between federal and state courts through removal and remand gives parties a chance to vie for the forum that best meets their needs. Removal and remand, however, may also waste judicial resources if too much time is spent selecting the court in which to litigate before the merits of the action are even reached. In order to prevent cases from “ricochet[ing] back and forth” between federal and state courts and unnecessarily depleting judicial resources,<sup>1</sup> Congress prohibited appellate review of remand orders.<sup>2</sup> Under 28 U.S.C. § 1447(d), “[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise.”<sup>3</sup> There are, however, several statutory<sup>4</sup> and court-made<sup>5</sup> exceptions to this bar on appellate review. Recently, in *Barlow v. Colgate Palmolive Co.*,<sup>6</sup> the Fourth Circuit sitting en banc held that § 1447(d) does not prevent a district court from vacating a remand order that was obtained through misrepresentation.<sup>7</sup> The Fourth Circuit’s limited expansion of the circumstances in which a remand order may be vacated is reasonable and strikes the right balance between preserving the

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<sup>1</sup> Three J Farms, Inc. v. Alton Box Bd. Co., 609 F.2d 112, 115 (4th Cir. 1979) (quoting *In re La Providencia Dev. Corp.*, 406 F.2d 251, 252 (1st Cir. 1969)).

<sup>2</sup> See *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 346–48 (1976) (describing the statutory history of the prohibition of appellate review, which Congress first introduced in 1887). Commentators have suggested that the prohibition of appellate review had less to do with providing finality for litigants and more to do with lessening the Supreme Court’s appellate caseload, which had greatly expanded in the years following the Civil War. See, e.g., G. Eric Brunstad, Jr., *Appeals of Remand Orders in Bankruptcy: Limiting Litigation over Where to Litigate and Some Lessons on Statutory Construction*, 5 J. BANKR. L. & PRAC. 323, 330–32 (1996); Michael E. Solimine, *Removal, Remands, and Reforming Federal Appellate Review*, 58 MO. L. REV. 287, 291–92 (1993); Rhonda Wasserman, *Rethinking Review of Remands: Proposed Amendments to the Federal Removal Statute*, 43 EMORY L.J. 83, 95, 101 (1994).

<sup>3</sup> 28 U.S.C. § 1447(d) (2012).

<sup>4</sup> See, e.g., *id.* (allowing appellate review of remand orders in suits involving federal officers and in certain civil rights cases); *id.* § 1453(c)(1) (allowing appellate review of remand orders in suits removed under the Class Action Fairness Act).

<sup>5</sup> See, e.g., *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 638–39 (2009) (holding that remands of state claims over which the district court has supplemental jurisdiction are not barred from appellate review); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (“[O]nly remands based on grounds specified in § 1447(c) are immune from review under § 1447(d).” (quoting *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995)) (internal quotation mark omitted)); cf. *In re Amoco Petroleum Additives Co.*, 964 F.2d 706, 708 (7th Cir. 1992) (Easterbrook, J.) (“‘Straightforward’ is about the last word judges attach to § 1447(d) these days . . .”). See generally S. Vance Wittie, *Appealing Remand Orders*, 22 APP. ADVOC. 111 (2009).

<sup>6</sup> 772 F.3d 1001 (4th Cir. 2014) (en banc).

<sup>7</sup> *Id.* at 1010.

goals of § 1447(d) and preserving the integrity of federal judicial proceedings.

In 2011, plaintiffs Clara Mosko and Joyce Barlow, who were represented by the same counsel,<sup>8</sup> separately filed lawsuits against the Colgate-Palmolive Company and numerous other defendants in Maryland state court, alleging that those defendants' products exposed them to asbestos.<sup>9</sup> After several months of discovery, Colgate removed the cases to federal district court under 28 U.S.C. § 1441, arguing that the district court had diversity jurisdiction over the cases under 28 U.S.C. § 1332 because the amounts in controversy exceeded \$75,000, there was complete diversity between the defendants and the plaintiff in each case, and any in-state defendants had been fraudulently joined for the purpose of avoiding federal jurisdiction.<sup>10</sup>

The plaintiffs moved to remand.<sup>11</sup> To support their argument that they had viable causes of action against some in-state defendants, both plaintiffs represented to the district court that there was circumstantial evidence that they had been exposed to asbestos at their workplaces as a result of conduct by the Maryland defendants.<sup>12</sup> Relying on these representations, the district court judges in the two cases issued remand orders.<sup>13</sup> Shortly thereafter, the plaintiffs moved to consolidate the two cases in state court.<sup>14</sup> In responding to Colgate's objections that the alternative possibilities for asbestos exposure made the cases too different to consolidate, the plaintiffs stated: "*[T]here is absolutely no evidence to indicate or even suggest that the Plaintiffs were exposed*

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<sup>8</sup> *Id.* at 1005 n.3.

<sup>9</sup> *Id.* at 1004.

<sup>10</sup> Notice of Removal ¶¶ 9–18, Barlow v. John Crane-Houdaille, Inc., No. 12-cv-01780 (D. Md. June 15, 2012); Notice of Removal ¶¶ 9–20, Mosko v. John Crane-Houdaille, Inc., No. 12-cv-01781 (D. Md. June 15, 2012). Although the presence of an in-state defendant prevents removal based on diversity jurisdiction, *see* 28 U.S.C. § 1441(b)(2) (2012) (“A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”), federal courts can ignore the presence of such a defendant if they determine that the plaintiff joined the in-state defendant solely to prevent removal and that the plaintiff does not actually have a possible cause of action against it, Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 ALA. L. REV. 779, 788–89 (2006) (“Under the fraudulent joinder doctrine, federal courts may disregard a nondiverse party in determining complete diversity of citizenship where it can be established that the plaintiff does not have a valid cause of action against that party. The court then decides whether to keep the case or remand for lack of diversity based on the remaining parties.” (footnote omitted)). As used in this context, “fraudulent” joinder does not imply a sanctionable fraud of the type discussed later in this comment.

<sup>11</sup> *Barlow*, 772 F.3d at 1005.

<sup>12</sup> *Id.* at 1005–06.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1006.

to asbestos in any form other than [Colgate's products].”<sup>15</sup> The judge then asked the plaintiffs' counsel: “It is a one-defendant case, right?,” to which the counsel replied: “Yes.”<sup>16</sup>

Surprised by this about-face regarding the existence of viable claims against in-state defendants, Colgate filed motions for sanctions in the federal district court<sup>17</sup> and requested that the court vacate the remand orders under Rule 60(b)(3) of the Federal Rules of Civil Procedure.<sup>18</sup> Relying on *In re Lowe*,<sup>19</sup> in which the Fourth Circuit confirmed that § 1447(d) prohibits reconsideration of remand decisions by district courts as well as by appellate courts,<sup>20</sup> the district court held that “such relief is not available, as this Court has no jurisdiction to grant that request.”<sup>21</sup> Colgate appealed to the Fourth Circuit.<sup>22</sup>

The panel affirmed.<sup>23</sup> Writing for the majority, Judge Davis<sup>24</sup> reasoned that considering the effect of the fraudulent statements on the district court's decision to remand would necessarily require the court to revisit the merits of that decision.<sup>25</sup> Since reconsideration runs counter to § 1447(d), the panel held that the district court did not have jurisdiction to vacate the order.<sup>26</sup> Given the broad statutory language prohibiting review “on appeal or otherwise”<sup>27</sup> and the policy goals of § 1447(d) to preserve judicial resources, Judge Davis did not think it

<sup>15</sup> *Id.* (quoting Joint Appendix at A476, *Barlow*, 772 F.3d 1001 (Nos. 13-1839, 13-1840) (emphasis added)).

<sup>16</sup> *Id.* (quoting Joint Appendix, *supra* note 15, at A494) (internal quotation marks omitted). The state court judge noted: “I can't believe you actually told Judge Nickerson and Judge Quarles one thing and tell me another.” *Id.* (quoting Joint Appendix, *supra* note 15, at A494) (internal quotation marks omitted).

<sup>17</sup> *Id.* Colgate requested that the district court “impos[e] monetary penalties, refer[] [plaintiff's counsel] to the state bar, and award[] any other relief that [it] deemed appropriate.” *Id.*

<sup>18</sup> *Id.* at 1007. Rule 60(b)(3) allows a court to vacate an order or final judgment if that order or judgment was obtained through fraud, misrepresentation, or misconduct. FED. R. CIV. P. 60(b)(3). The Rule has been interpreted to require the movant to show such fraud, misrepresentation, or misconduct by clear and convincing evidence. See, e.g., *Square Constr. Co. v. Wash. Metro. Area Transit Auth.*, 657 F.2d 68, 71 (4th Cir. 1981).

<sup>19</sup> 102 F.3d 731 (4th Cir. 1996).

<sup>20</sup> *Id.* at 734.

<sup>21</sup> Order, *Barlow v. John Crane-Houdaille, Inc.*, No. 12-cv-01780 (D. Md. June 26, 2013). The district court also noted that even if it had jurisdiction, it was “not convinced that counsel's conduct is sanctionable,” though plaintiffs' statements in federal and state court had “appear[ed] to be in sharp conflict.” *Id.*

<sup>22</sup> *Barlow v. Colgate Palmolive Co.*, 750 F.3d 437, 440–41 (4th Cir. 2014).

<sup>23</sup> *Id.* at 440.

<sup>24</sup> Judge Davis was joined by Judge Cogburn, a United States District Judge for the Western District of North Carolina, sitting by designation.

<sup>25</sup> *Barlow*, 750 F.3d at 443 (“[W]hether the plaintiffs fraudulently joined the nondiverse defendants . . . was the issue the first-time around.”).

<sup>26</sup> *Id.* at 444.

<sup>27</sup> *Id.* at 443 (emphasis omitted) (quoting 28 U.S.C. § 1447(d) (2012) (emphasis added)) (internal quotation mark omitted).

wise to create a judicially made exception.<sup>28</sup> Judge Floyd dissented, arguing that the decision to vacate would consider only matters collateral to the remand order, not its merits, and would therefore not fall under § 1447(d)'s prohibition on reviewing such orders.<sup>29</sup> Colgate successfully petitioned for rehearing en banc.<sup>30</sup>

The en banc Fourth Circuit reversed the district court.<sup>31</sup> Writing for the majority, Judge Floyd<sup>32</sup> expounded on the arguments made in his dissent to the panel's decision. Judge Floyd began by recognizing the significant policy reasons for the "strict treatment" of § 1447(d) — to prevent actions from "ricochet[ing] back and forth depending upon the most recent determination of a federal court"<sup>33</sup> — and noting that the case didn't fit into any of the limited exceptions.<sup>34</sup> Judge Floyd then considered whether the district court had jurisdiction to decide the Rule 11(b) motions for sanctions. Relying on on-point decisions from the Fourth Circuit and other circuits, Judge Floyd ruled unequivocally that the district court had such jurisdiction.<sup>35</sup> Judge Floyd acknowledged, however, that vacating the remand order would not be an appropriate form of relief for misrepresentation under Rule 11(b).<sup>36</sup>

Judge Floyd next turned to the question of whether Rule 60(b)(3)'s provision that a court may vacate an order obtained through fraud or misrepresentation applies to orders remanding cases to state court.<sup>37</sup> Dismissing three unpublished opinions from other circuits on the issue as "non-binding" and decided with "minimal analysis,"<sup>38</sup> Judge Floyd focused on the text of § 1447(d).<sup>39</sup> He noted that the statute prohibited "reviewing" a remand order, but said nothing about "vacating" it.<sup>40</sup> Judge Floyd emphasized that the motion to vacate asked the court to consider solely the *means* by which the remand order was obtained

<sup>28</sup> *Id.*

<sup>29</sup> See *id.* at 457 (Floyd, J., dissenting).

<sup>30</sup> *Barlow*, 772 F.3d at 1007 n.4.

<sup>31</sup> *Id.* at 1013.

<sup>32</sup> Judge Floyd was joined by Judges Niemeyer, King, Shedd, Duncan, and Diaz.

<sup>33</sup> *Barlow*, 772 F.3d at 1008 (quoting *Three J Farms, Inc. v. Alton Box Bd. Co.*, 609 F.2d 112, 115 (4th Cir. 1979)) (internal quotation mark omitted).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1008–09. Judge Floyd considered that in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990), the Supreme Court held that federal courts had jurisdiction to issue Rule 11 sanctions more than three years after a case had been voluntarily dismissed, *id.* at 389–90, 409, and in *Willy v. Coastal Corp.*, 503 U.S. 131 (1992), the Court held that a district court had jurisdiction to consider such motions, even if it did not have subject matter jurisdiction over the underlying action, because Rule 11 sanctions were "collateral to the merits," *id.* at 137.

<sup>36</sup> *Barlow*, 772 F.3d at 1010 n.8 ("[T]here is no basis in using Rule 11 as a means to vacate a remand order and to return a case to federal court.").

<sup>37</sup> *Id.* at 1010.

<sup>38</sup> *Id.* at 1011.

<sup>39</sup> *Id.* at 1010.

<sup>40</sup> *Id.* (internal quotation marks omitted).

and not the *merits* of the remand.<sup>41</sup> The Fourth Circuit also found support in an Eleventh Circuit opinion that held that vacating a remand order for “reasons that do not involve a reconsideration or examination of its merits” did not count as review of that order.<sup>42</sup> Because vacatur was not review, an order to vacate would not fall within § 1447(d)’s prohibition, and the district court would have jurisdiction to issue it.<sup>43</sup> The en banc Fourth Circuit remanded the case to the district court to reconsider its decision on the Rule 11 motion for sanctions and on the Rule 60(b)(3) motion to vacate the remand order in light of the Fourth Circuit’s opinion.<sup>44</sup>

Judge Davis dissented.<sup>45</sup> Judge Davis objected to what he termed an instruction to the district judge “to redo his ‘mid-term exam’ on removal jurisprudence and sanctions law.”<sup>46</sup> Judge Davis agreed with the district court that vacating a remand order under Rule 60(b)(3) “contravenes the mandate of § 1447(d)” and argued that the en banc decision elevated a Federal Rule of Civil Procedure above a statutory prohibition.<sup>47</sup> He critiqued the majority’s textual interpretation of “review” as “linguistic jiu-jitsu”<sup>48</sup> and noted that there was no authority for the decision<sup>49</sup>: the Eleventh Circuit case that the majority had found persuasive was inapposite to the case at hand.<sup>50</sup> Judge Wynn also wrote an opinion, concurring in part and dissenting in part.<sup>51</sup>

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1011 (quoting *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1288 (11th Cir. 1999)) (internal quotation marks omitted).

<sup>43</sup> *Id.* at 1012.

<sup>44</sup> *Id.* at 1012–13.

<sup>45</sup> *Id.* at 1015–19 (Davis, J., dissenting).

<sup>46</sup> *Id.* at 1015. Judge Davis also noted that the Rule 11 analysis was the “reddest of red herrings” because even the en banc majority agreed that vacating the remand order was not an appropriate sanction under Rule 11. *Id.* at 1016. Judge Davis believed that the district court had understood that it had jurisdiction to impose Rule 11 sanctions after remand; it had simply decided that the facts of the case did not merit such sanctions. *Id.* at 1018.

<sup>47</sup> *Id.* at 1018.

<sup>48</sup> *Id.* at 1016.

<sup>49</sup> See *id.* at 1017–18.

<sup>50</sup> *Id.* Judge Davis argued that the Eleventh Circuit in *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279 (11th Cir. 1999), had not expanded the circumstances in which a court could vacate a remand order; it had simply applied a well-known, but very limited, exception allowing appellate courts to review decisions that “lead to, but are separate from, orders of remand,” *Barlow*, 772 F.3d at 1017 (Davis, J., dissenting) (quoting *Aquamar*, 179 F.3d at 1286), and vacate remands only if “necessary to give effect to [the court’s] judgment,” *id.* (quoting *Aquamar*, 179 F.3d at 1289).

<sup>51</sup> *Barlow*, 772 F.3d at 1013–15 (Wynn, J., concurring in part and dissenting in part). Judge Wynn argued that the district court knew it had jurisdiction to impose sanctions but had determined that the “conduct did not warrant sanctions.” *Id.* at 1013–14. He concurred, however, with the majority’s decision to remand the case to the district court because he felt that the district court had not adequately explained its reasons for denying the motion for sanctions. *Id.* at 1014.

Although the en banc Fourth Circuit's decision extends the circumstances in which a court may vacate an order remanding a case to state court, it is a reasonable interpretation of the doctrine. If carefully applied, the decision will address serious concerns regarding the integrity of remand proceedings without significantly impairing the policy goal of preserving judicial resources.

The en banc majority's reasoning that Rule 60(b)(3) involves simply vacating, and not reviewing, a remand order is supported by the way courts apply Rule 60(b)(3) in practice. Under Rule 60(b)(3), a "court may relieve a party . . . from a final judgment, order, or proceeding for . . . fraud . . . , misrepresentation, or misconduct by an opposing party."<sup>52</sup> In *Schultz v. Butcher*,<sup>53</sup> the Fourth Circuit held that to successfully petition for vacatur of a judgment under Rule 60(b)(3), "(1) the moving party must have a meritorious defense; (2) the moving party must prove misconduct by clear and convincing evidence; and (3) the misconduct [must have] prevented the moving party from fully presenting its case."<sup>54</sup>

Admittedly, determining whether misconduct has prevented the moving party from fully presenting its case requires the court to examine some of the same facts it considered when making its initial decision. However, Rule 60(b)(3) requires these facts to be analyzed through a different lens. Instead of reevaluating the decision in light of the misrepresentation or fraud, the court need only determine the collateral issues of whether misconduct occurred and whether it was relevant to the case — the misconduct "does not have to be result altering" for a court to vacate its judgment.<sup>55</sup> For example, in *Schultz*, the Fourth Circuit held that a district court should have vacated a judgment under Rule 60(b)(3) where the plaintiff withheld a report during discovery that substantiated the claim that the defendant had not been negligent and that a third party was responsible for the plaintiff's injuries.<sup>56</sup> The court reasoned that the defendant's argument that it was not responsible for the plaintiff's injuries was a valid de-

<sup>52</sup> FED. R. CIV. P. 60(b)(3).

<sup>53</sup> 24 F.3d 626 (4th Cir. 1994).

<sup>54</sup> *Id.* at 630 (citing *Square Constr. Co. v. Wash. Metro. Area Transit Auth.*, 657 F.2d 68, 71 (4th Cir. 1981)). The Fourth Circuit is not alone in adopting this formulation. See 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2860 (3d ed.) (Westlaw) (last visited May 8, 2015) ("Many other cases support the propositions that the burden of proof of fraud is on the moving party and that fraud must be established by clear and convincing evidence. Further, the fraud must have prevented the moving party from fully and fairly presenting his case. It also must be chargeable to an adverse party; the moving party cannot get relief because of the party's own fraud." (footnotes omitted)). After these elements have been proven, the court must weigh the benefits of finality against the interest of justice to determine whether relief is appropriate in that particular case. *Schultz*, 24 F.3d at 630.

<sup>55</sup> *Schultz*, 24 F.3d at 631.

<sup>56</sup> *Id.* at 629, 631.

fense, that the plaintiff committed misconduct by withholding the report, and that the defendant was prevented from fully presenting its case because the report may have pointed toward “additional evidence that supported the report’s findings and conclusions, which [were] favorable to [the defendant].”<sup>57</sup> The court did not, however, consider whether it would have made a different decision regarding the defendant’s liability before vacating the original judgment.

Applying this interpretation of Rule 60(b)(3) to motions to vacate remand orders suggests that the moving party need only convince the district court of three things: that it had a valid argument against remand, that the nonmoving party misrepresented evidence relevant to that argument, and that this misrepresentation prevented the moving party from fully litigating its claims. Once those threshold elements are established, the district court need not further evaluate whether it would still have issued the remand had the misconduct not occurred. This application of the Rule 60(b)(3) doctrine supports the en banc majority’s contention that the analysis performed by the district court in determining whether to vacate its remand order, although involving some of the same facts as those considered in making the remand decision, is independent from the kind of analysis it would perform if it were to fully reconsider the remand. It is therefore reasonable to conclude that Rule 60(b)(3) analysis is not precluded by § 1447(d).

The Fourth Circuit’s application of Rule 60(b)(3) to vacate a remand order also accords with jurisprudence regarding the jurisdictional effects of § 1447(d). First, federal courts retain jurisdiction over matters collateral to the case, such as Rule 11 sanctions, even after remand to state court.<sup>58</sup> Second, although not settled law, several circuits have vacated remand orders after reversing decisions antecedent to those remand orders.<sup>59</sup> If the underlying decisions were incorrectly decided,

<sup>57</sup> *Id.* at 630.

<sup>58</sup> See, e.g., *Bryant v. Britt*, 420 F.3d 161, 163 (2d Cir. 2005) (per curiam); *Lazorko v. Pa. Hosp.*, 237 F.3d 242, 247 (3d Cir. 2000).

<sup>59</sup> See, e.g., *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1289, 1300 (11th Cir. 1999); *Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1028, 1032 (5th Cir. 1998). The en banc majority found particularly persuasive the Eleventh Circuit’s *Aquamar* decision, see *Barlow*, 772 F.3d at 1011, in which that court overturned the dismissal of an administrative department in Ecuador’s government, whose presence as a party to the case was the only basis for federal jurisdiction, and subsequently vacated the remand. *Aquamar*, 179 F.3d at 1282, 1300. *Aquamar* is part of a line of cases beginning with *Waco v. U.S. Fidelity & Guaranty Co.*, 293 U.S. 140 (1934), in which the Supreme Court allowed review of a decision antecedent to the order of remand, *id.* at 143. See *Aquamar*, 179 F.3d at 1285–86. Other circuits, however, have limited the remedy upon reversal. For example, after reversing the district court’s dismissal of a defendant (the dismissal led the district court to remand the case), a Seventh Circuit panel did not vacate the remand, but rather treated the defendant as if he “remain[ed] a defendant in the action remanded.” *Allen v. Ferguson*, 791 F.2d 611, 616 (7th Cir. 1986). There doesn’t seem to be a clear doctrinal answer on this point. Commentators have argued that the review of antecedent orders should be interpreted to fall outside the bar of § 1447(d), rather than be viewed as an exception to that bar. See,

the remand would be vacated as an “essentially ministerial task.”<sup>60</sup> These examples suggest that while § 1447(d) does limit a court’s ability to review remand orders, it does *not*, in contrast to Fourth Circuit precedent, “divest[] the district court of all jurisdiction . . . and preclude[] it from entertaining any further proceedings of any character.”<sup>61</sup>

Finally, policy considerations also favor the Fourth Circuit’s ruling allowing the vacatur of remands when a party has committed fraud or intentionally misrepresented facts before the court. After all, even in the usual case where it is applied to nonremand orders, Rule 60(b)(3) unsettles the finality of judgments and prolongs litigation. The rule codifies the “‘historic power of equity to set aside fraudulently begotten judgments,’ [which] is necessary to the integrity of the courts.”<sup>62</sup> If courts refuse to consider meritorious Rule 60(b)(3) motions under circumstances such as those in *Barlow*, they will be inviting misrepresentation during remand proceedings from opportunistic parties taking advantage of the nonreviewability of remand orders and the limits of Rule 11 sanctions. As a result of this misrepresentation, the other party would permanently lose its ability to litigate in a venue to which it has a right.<sup>63</sup> Allowing vacatur of remands under Rule 60(b)(3) would deter such conduct and protect the integrity of remand proceedings. In addition, by limiting the vacatur of remand orders to situations where there is clear and convincing evidence of misconduct, courts will vacate remands only infrequently.<sup>64</sup> Such limited vacaturs will leave mostly intact the policy behind § 1447(d) to prevent undue delay and preserve judicial resources.<sup>65</sup>

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e.g., 15A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3914.11 (2d ed.) (Westlaw) (last visited May 8, 2015).

<sup>60</sup> *Barlow*, 772 F.3d at 1017 (Davis, J., dissenting) (quoting *Aquamar*, 179 F.3d at 1289) (internal quotation marks omitted).

<sup>61</sup> *Three J Farms, Inc. v. Alton Box Bd. Co.*, 609 F.2d 112, 115 (4th Cir. 1979).

<sup>62</sup> *Chambers v. Nasco, Inc.*, 501 U.S. 32, 44 (1991) (citation omitted) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1944)); cf. *Square Constr. Co. v. Wash. Metro. Area Transit Auth.*, 657 F.2d 68, 72 (4th Cir. 1981) (“[T]he policy of deterring misconduct which threatens the fairness and integrity of the fact finding process must outweigh considerations of finality.”).

<sup>63</sup> The loss of rights to the moving party is, however, a lesser concern here than when applying Rule 60(b)(3) to final judgments: the moving party still has the opportunity to litigate the merits of the case in state court and might still be able to pursue sanctions in state court for the misrepresentation. See *Barlow*, 772 F.3d at 1015 (Wynn, J., concurring in part and dissenting in part).

<sup>64</sup> By strictly policing the use of Rule 60(b)(3), courts can avoid incentivizing parties without meritorious Rule 60(b)(3) claims from trying to use this procedure to get back into federal court.

<sup>65</sup> Some commentators have suggested that because litigation practice has changed significantly since the prohibition against reviewing remand orders was first introduced in 1887, the policy rationales behind § 1447(d) are now less salient and the nonreviewability of remand orders should be reconsidered altogether. See, e.g., Jerome I. Braun, *Reviewability of Remand Orders: Striking the Balance in Favor of Equality Rather than Expediency*, 30 SANTA CLARA L. REV. 79, 93–94 (1990); Solimine, *supra* note 2, at 323–28; Wasserman, *supra* note 2, at 132–41; Robert T. Markowski, Note, *Remand Order Review After Thermtron Products*, 1977 U. ILL. L.F. 1086, 1106, 1112.