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Recocking the Removal Trigger

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RECOCKING THE REMOVAL TRIGGER*

HOWARD B. STRAVITZ**

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I. INTRODUCTION

Most plaintiffs prefer to litigate in state court and most defendants prefer to litigate in federal court. Their reasons are personal, practical, and tactical,¹

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1. These preferences vary from jurisdiction to jurisdiction, case to case, and lawyer to lawyer. First, plaintiffs’ lawyers generally are more familiar with procedure and are more comfortable in state court. Second, federal courts are more likely to grant summary judgment to defendants. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (stating that summary judgment is not a disfavored procedural shortcut); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (agreeing that the standard for summary judgment mirrors the directed verdict standard); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 595-96 (1986) (finding that the absence of a motive to price fix is relevant to summary judgment’s genuine-issue-

and, based on recent scholarly research, also empirical.² These preferences are brought into sharp conflict when a plaintiff files a civil action in state court that

for-trial standard). Compare FED. R. CIV. P. 56 (allowing defending party to move for summary judgment) with J. Palmer Lockard, *Summary Judgment in Pennsylvania: Time for Another Look at Credibility*, 35 DUQ. L. REV. 625, 654 (1997) (discussing how Pennsylvania summary judgment standards are more stringent than federal standards). Apart from the Court's enthusiastic endorsement, summary judgment is more common in federal court for a more practical reason. Federal judges are assigned individual cases when they are originally filed in or removed to a federal court. Consequently, if the judge grants summary judgment, the case disappears from the judge's docket. With few exceptions, state court cases in contrast, are assigned to individual judges only when ready for trial. Hearing an application for summary judgment in a general motions part, a state judge has little personal incentive to grant the motion, which requires a written opinion subject to immediate appellate review, because some other judge will likely be assigned to try the case later if the motion is denied. Third, federal courts are more likely to bifurcate a trial into liability and damages phases, which tends to increase the plaintiff's burden and which favors the defendant, especially in products liability and medical malpractice litigation. See FED. R. CIV. P. 42(b) (permitting separate trial on any individual issue for convenience, economy, expedition, or to avoid prejudice). Fourth, federal judges strictly supervise pretrial preparation, including rigorously enforcing deadlines to complete discovery. See, e.g., FED. R. CIV. P. 16 (providing for extensive scheduling and management of pretrial process). Fifth, defendants' lawyers perceive increased neutrality and competence in federal judges, especially in diversity cases brought against nonresident corporate defendants and in federal question cases generally. See LARRY W. YACKIE, *FEDERAL COURTS* 23-26 (1999) (summarizing the views of major commentators on both sides of the parity debate); Thomas B. Marvell, *The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation*, WIS. L. REV. 1315, 1356-58 (1984) (asserting that litigants choose to litigate in federal court because they perceive federal judges to be more knowledgeable about federal law and more sympathetic to federally-created rights); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1115-30 (1977) (presenting structural arguments for the superiority of federal courts).

2. An enormous volume of litigation is devoted to removal issues because of the perceived litigation advantages of a particular forum. These perceptions are buttressed by recent empirical research establishing that defendants win a substantially higher percentage of cases removed to federal court as opposed to cases initially filed in federal court. Although the study did not contrast outcomes on removal with outcomes of similar cases tried in state courts, logic suggests that plaintiffs prefer state courts because they have a better chance of prevailing there. This recent empirical research by Professors Clermont and Eisenberg concluded:

Removal of civil cases from state to federal court results in a precipitous drop in the plaintiffs' win rate. As we have previously reported, the overall win rate in federal civil cases is 57.97%, but in the subset of those cases that have been removed the win rate is only 36.77%. Apparently, the defendants' ability to choose the forum greatly augments their odds of success.

Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 593 (1998) (emphasis added) (footnote omitted). These percentages are based on 1979-1991 data, and "newer data . . . indicate a 53% win rate in all original cases and a 33% win rate in all removed cases." *Id.* at 593 n.42.

could have instead been filed in federal court.³ The defendant against whom the action is brought may remove⁴ the case and have it tried in federal court.⁵

Although not mentioned in the Constitution,⁶ the First Congress provided for removal jurisdiction in the Judiciary Act of 1789,⁷ and the procedure, with various modifications, has been part of federal practice since that time.⁸ The structure of the current statute dates from the 1948 version of the Judicial Code.⁹ Because the general removal statute is jurisdictional, courts strictly

3. Only cases that could originally have been filed in a federal court can be removed. 28 U.S.C. § 1441(a) (1994); ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 5.5, at 340-41 (3d ed. 1999); CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 38, at 226 (6th ed. 2002).

4. Only defendants may remove. 28 U.S.C. § 1441(a) (1994) (“[A]ny civil action . . . may be removed by the defendant or defendants.”); *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941). However, defendants sued on a state law claim in their home states by a nonresident plaintiff, may not remove. *See* 28 U.S.C. § 1441(b) (1994).

5. Removal is only permitted “to the district court of the United States for the district and division embracing the place where such action is pending.” 28 U.S.C. § 1441(a) (1994). While Congress appropriately limited removal to the specific federal district court embracing the geographic location of the pending state court action, remand is not similarly limited. There are very simple and compelling reasons for this distinction. If removal were not geographically limited, a defendant could improperly remove a case directly to a judicial district hundreds or even thousands of miles away from the location of the state court where the action was filed, and thus cause a plaintiff unreasonable burden and expense in moving to remand. On the other hand, remand cannot be geographically limited because a case may be improperly removed and transferred under 28 U.S.C. § 1404(a) (1994) before a jurisdictional defect is discovered. Whenever a jurisdictional defect is discovered, a federal court wherever located must remand or dismiss a removed case. *See id.* § 1447(c). If the initial removal court transfers the case without first deciding a remand motion and the initial removal is improper, the § 1404(a) transferee court must remand the case to the state court from which it was initially removed, regardless of whether that state court is located thousands of miles away.

Not geographically limiting remand is appropriate even if the initial removal is proper because subsequent litigation developments may leave claims lacking any independent basis for federal jurisdiction in federal court. For example, if a federal question and supplemental state claims are properly removed from a state court, and the federal question is dismissed or compromised, the federal court would ordinarily remand the state claims. *See, e.g., Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351 (1988) (reasoning that a court may remand rather than dismiss pendent state law claims if federally sufficient claim is discontinued); *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) (stating that a court has discretion to dismiss nondiversity state claims if the federal question is dismissed before trial); 28 U.S.C. § 1367(c) (1994) (providing factors to consider in exercising discretionary jurisdiction over supplemental claims).

6. CHERMERINSKY, *supra* note 3, at 339; 16 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* § 107.03, at 20 (3d ed. 1997).

7. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73 (providing for removal by alien defendants, by out-of-state citizens, and in certain land grant cases involving more than \$500).

8. 14B CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3721, at 288-90 (3d ed. 1998).

9. *See generally* 16 MOORE ET AL., *supra* note 6, § 107App. (containing the complete legislative history of the removal statute since 1948).

construe and enforce it.¹⁰ Although the timing provisions of § 1446(b) are not jurisdictional, courts also strictly enforce these provisions because removal of a case properly pending in a state court raises federalism concerns.¹¹ Removal jurisdiction has spawned more litigation and contains more pitfalls for a litigant than almost any other area of federal practice.¹²

The timing provision of the removal statute has been the subject of much of this litigation and the source of one of the statute's principal pitfalls. In relevant part, it provides that a defendant must remove a case by filing a notice of removal

within thirty days after the *receipt* by the defendant, *through service or otherwise*, of a copy of the initial pleading setting forth the claim for relief . . . or within thirty days after the service of the summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.¹³

10. The removal statute incorporates general subject-matter jurisdictional limitations by permitting removal of cases falling only within the original jurisdiction of the federal courts. *See* 28 U.S.C. § 1441(a) (1994). Indeed, there is a presumption that a "court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists." *WRIGHT & KANE, supra* note 3, § 7, at 27 (citing *Turner v. Bank of N. Am.*, 4 U.S. (4 Dall.) 8 (1799)).

11. *See, e.g., Maniar v. FDIC*, 979 F.2d 782, 784-86 (9th Cir. 1992) (holding that because untimely removal is a procedural defect and not a jurisdictional one, a motion to remand based on untimely removal must be filed within thirty days after the case is removed); *In re Pfohl Bros. Landfill Litig.*, 67 F. Supp. 2d 177, 181 (W.D.N.Y. 1999) (stating that because removal raises federalism issues, "removal statutes are narrowly construed and doubts are resolved against removal"); *Staino v. Matsushita Elec. Corp.*, No. 98 Civ. 8514 (SAS), 1999 WL 102757, at *2 (S.D.N.Y. Feb. 24, 1999) ("[T]he court must construe the thirty-day period narrowly, resolving any doubts against removability."); 1015 *Half Street Corp. v. Warehouse Concepts, Inc.*, No. Civ. A. 99-1174SSH, 1999 WL 1212885, at *4 (D.D.C. Oct. 26, 1999) ("[T]he basis of plaintiff's motion . . . is untimeliness, not lack of subject matter jurisdiction."); *Rosebud Holding, L.L.C. v. Burks*, 995 F. Supp. 465, 467 (D.N.J. 1998) (stating that the thirty-day period is not jurisdictional but may not be extended). *See generally* 16 *MOORE ET AL., supra* note 6, § 107.05, at 24 (stating that federal courts generally construe the statute to restrict removal); 14B *WRIGHT ET AL., supra* note 8, § 3721, at 340-51 & n.110 ("[T]here is ample case support . . . for the proposition that removal statutes will be strictly construed.").

Structurally, removal does not impact federalism any more than do cases originally filed in federal court. Federalism is manifestly implicated when a defendant in a properly pending state court proceeding files an action in federal court against the state court plaintiff. Any relief awarded by a federal court in this circumstance may, and is usually intended by the federal plaintiff to, interfere with the ongoing state court proceeding. For discussion of federalism concerns when a federal court is asked to interfere with a previously filed, properly pending state proceeding, see Howard B. Stravitz, *Younger Abstention Reaches a Civil Maturity*: *Pennzoil Co. v. Texaco Inc.*, 57 *FORDHAM L. REV.* 997 (1989).

12. Carol E. Heckman, *Removal Jurisdiction: A Trap for the Unwary*, N.Y.L.J., Sept. 11, 2000, at 1.

13. 28 U.S.C. § 1446(b) (1994) (emphasis added).

Conflicting interpretations of this provision by lower federal courts have occurred in at least four circumstances. First, when a defendant receives a courtesy copy of a complaint before formal service of process, is the thirty-day period triggered by the earlier receipt of a copy of the complaint, or by the later service of process?¹⁴ The Supreme Court resolved this issue in favor of service of process in *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*¹⁵ Second, when service of process is made on a statutory agent¹⁶ instead of the named defendant, does the thirty-day period commence with the earlier service on the statutory agent or with the later receipt by the named defendant?¹⁷ Third, when a defendant in New York is served with a summons with notice of claim in lieu of complaint¹⁸ and demands service of the complaint,¹⁹ does the thirty-day period commence with the earlier service of the summons with notice of claim or with the later service and receipt of the actual complaint?²⁰ Fourth, if more than one defendant is named in an action or proceeding, does the thirty-day period run separately for each defendant or concurrently for all defendants, and, if concurrently, does it commence with the first or last served defendant?²¹

This Article analyzes each of these circumstances in which the removal timing provision has been subject to conflicting interpretations and suggests amendments to § 1446(b) to resolve the conflict. Part II describes the courtesy copy removal trap and its resolution by *Murphy Brothers*. Part III focuses on the three other removal timing problems and analyzes whether dicta in *Murphy Brothers* provides sufficient guidance to the lower federal courts to resolve these problems. Part III concludes that legislative modification of § 1446 is necessary. The centerpiece of the Article, Part IV, proposes an amendment to § 1446, codifying the holding and dicta in *Murphy Brothers*, and expressly addressing the other timing problems. Although adopting this proposal is not likely to end all § 1446(b) litigation, its adoption would substantially improve current practice.

14. See *infra* Part II.A-B.

15. 526 U.S. 344 (1999). For recent student commentary on *Murphy Brothers*, see D. Troy Blair, Recent Decisions, *Receipt of a Complaint, Prior to or Unattended by Formal Service of Process, Does Not Trigger a Defendant's Thirty-Day Period to Remove a Case*: *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 38 DUQ. L. REV. 663 (2000); Jerry Meade, Note, *Death of the Receipt Rule*: *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 39 BRANDEIS L.J. 493 (2000-2001); Jennifer N. Moore, Note, *Resolving the Conflict Between Receipt and Proper Service*: *Murphy Brothers v. Michetti Pipe Stringing, Inc.*, 51 MERCER L. REV. 775 (2000); Barbara A. Wiseman, Comment, *Applying Murphy Brothers v. Michetti Pipe Stringing, Inc. to Removal in Multiple Defendant Lawsuits*, 34 LOY. L.A. L. REV. 323 (2000).

16. See generally BLACK'S LAW DICTIONARY 65 (7th ed. 1999) ("An agent designated by law to receive litigation documents and other legal notices for a nonresident corporation. In most states, the secretary of state is the statutory agent for such corporations.").

17. See *infra* Part III.A.

18. See N.Y. C.P.L.R. 305(b) (McKinney 2001).

19. See *id.* 3012(b).

20. See *infra* Part III.B.

21. See *infra* Part III.C.

II. *MURPHY BROTHERS* SHUTS THE "COURTESY" COPY REMOVAL TRAPA. *The "Courtesy" Copy Removal Trap*

Prior to *Murphy Brothers* the lower federal courts²² and commentators²³ were deeply divided over whether the 1446(b) clock could start before formal service of process. The statute requires removal "within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading."²⁴ It appears to start the removal clock from receipt of the complaint even in the absence of formal service of process, which is necessary for a court to properly assert personal jurisdiction over a defendant.²⁵ Recognizing this point, lawyers representing plaintiffs, who instinctively prefer litigating in state court,²⁶ devised a scheme to impede defendants from timely exercising their right to remove.

After filing an action in a state court, the plaintiff would furnish to the defendant, by facsimile or other means not constituting formal service, a courtesy copy of the complaint. A suggestion that the parties attempt to resolve the dispute, and a warning that defendant would be served with formal process if settlement could not be reached, frequently accompanied the courtesy complaint. This tactic lulled the defendant into a false sense of security that no immediate action was required.²⁷ If settlement discussions broke down, or in the absence of any discussions, the plaintiff then served formal process on the defendant. Typically, the defendant then retained counsel, who promptly filed a removal notice. If the notice was filed more than thirty days after receipt of the courtesy copy of the complaint, the plaintiff argued that the removal was untimely because the clock started on receipt of the courtesy copy, and not when service of process transpired.

For at least ten years before the Supreme Court put a stop to this tactic, every court of appeals²⁸ and many district courts²⁹ that considered the issue

22. See *infra* notes 28 & 29.

23. Compare Robert P. Faulkner, *The Courtesy Copy Trap: Untimely Removal From State to Federal Court*, 52 MD. L. REV. 374 (1993) (advocating the receipt rule), with Donna Rohwer, Comment, *The Forty-Year Dispute: What Triggers the Start of the Removal Period Under 28 U.S.C. Section 1446(b)?*, 61 UMKC L. REV. 359 (1992) (advocating a service rule).

24. 28 U.S.C. § 1446(b) (1994) (emphasis added).

25. For discussion of personal jurisdiction and the Due Process Clause, see Howard B. Stravitz, *Sayonara to Minimum Contacts: Asahi Metal Industry Co. v. Superior Court*, 39 S.C. L. REV. 729, 731-83 (1988); see also Howard B. Stravitz, *Personal Jurisdiction in Cyberspace: Something More is Required on the Electronic Stream of Commerce*, 49 S.C. L. REV. 925 (1998) (discussing personal jurisdiction based on internet contacts).

26. See *supra* notes 1-2.

27. See, e.g., *White v. White*, 32 F. Supp. 2d 890, 891-92 (W.D. La. 1998) (providing a classic example of this tactic; defendant in receipt of letter stated in an affidavit that "the tone of the letter caused him to believe that he did not yet need a lawyer").

28. *Michetti Pipe Stringing, Inc. v. Murphy Bros., Inc.*, 125 F.3d 1396, 1398 (11th Cir. 1997), *rev'd*, 526 U.S. 344 (1999) (citing *Reece v. Wal-Mart Stores, Inc.*, 98 F.3d 839, 841 (5th Cir. 1996); *Roe v. O'Donohue*, 38 F.3d 298, 304 (7th Cir. 1994); and *Tech Hills II Assocs. v.*

adopted the “receipt” rule. Although the reasoning of these courts varied, three main arguments emerged to support the rule. First, the language of the statute appears unambiguous.³⁰ Its key phrase, “*receipt* by the defendant, through service or otherwise,”³¹ plainly makes receipt, not proper service, the triggering event.³² Viewed in a vacuum devoid of legislative history, the receipt rule appeared correct.

Second, part of § 1446(b)’s legislative history favored the receipt rule because Congress intended to establish a uniform federal standard for removal independent of state law.³³ Prior to 1948, removal wholly depended on state procedure because a defendant could remove only up until the time when state law required the filing of a responsive pleading.³⁴ In 1948, Congress adopted a uniform time period from a single triggering event.³⁵ Removal was permitted within twenty days after commencement of the action or service of process.³⁶ Within one year, Congress again amended the statute essentially to its current form, because New York permitted service of process by summons alone without a complaint.³⁷ A New York defendant served with a summons could

Phoenix Home Life Mut. Ins. Co., 5 F.3d 963, 968 (6th Cir. 1993) as previous courts of appeals’ decisions).

29. See, e.g., *Boyles v. Junction City Foundry, Inc.*, 992 F. Supp. 1246, 1249 (D. Kan. 1997) (receipt rule); *Joiner v. Kaywal Transp., Inc.*, 979 F. Supp. 1252, 1254 (W.D. Ark. 1997) (same); *Spielman v. Standard Ins. Co.*, 932 F. Supp. 246, 248–49 (N.D. Cal. 1996) (same); *Colegio de Ingenieros y Agrimensores de Puerto Rico v. CNE Consulting, Inc.*, 896 F. Supp. 241, 243 (D.P.R. 1995) (same); *Greensmith Co. v. COM Sys. Inc.*, 796 F. Supp. 812, 813 (D.N.J. 1992) (same); *Gates Constr. Corp. v. Koschak*, 792 F. Supp. 334, 336 (S.D.N.Y. 1992) (same); *Tyler v. Prudential Ins. Co. of Am.*, 524 F. Supp. 1211, 1213 (W.D. Pa. 1981) (same). *But see* *Bowman v. Weeks Marine, Inc.*, 936 F. Supp. 329, 333, 343 (D.S.C. 1996) (service rule); *Bullard v. Am. Airlines, Inc.*, 929 F. Supp. 1284, 1286 (W.D. Mo. 1996) (same); *Apache Nitrogen Prods., Inc. v. Harbor Ins. Co.*, 145 F.R.D. 674, 680 (D. Ariz. 1993) (same); *Estate of Baratt v. Phoenix Mut. Life Ins. Co.*, 787 F. Supp. 333, 336–37 (W.D.N.Y. 1992) (same); *Hill v. City of Boston*, 706 F. Supp. 966, 968 (D. Mass. 1989) (same); *Love v. State Farm Mut. Auto. Ins. Co.*, 542 F. Supp. 65, 68 (N.D. Ga. 1982) (same).

30. See, e.g., *Tech Hills II Assocs.*, 5 F.3d at 968 (“The flaw in [the *Love*] line of reasoning is that it ignores the clear and unambiguous language of the statute.”) (alteration in original) (citation omitted); Respondent’s Brief at 4–8, *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999) (No. 97-1909).

31. 28 U.S.C. § 1446(b) (1994) (emphasis added).

32. See, e.g., *Roe*, 38 F.3d at 303 (“Via the ‘or otherwise’ language, § 1446(b) starts the clock with actual receipt.”).

33. See, e.g., *Michetti Pipe Stringing, Inc.*, 125 F.3d at 1398 (“To homogenize practice from state to state, in 1948 Congress . . . add[ed] a twenty-day (later thirty) deadline.”), *rev’d*, 526 U.S. 344 (1999) (footnote omitted); *Tech Hills II Assocs.*, 5 F.3d at 967–68 (“The purpose of the 1949 amendment was to promote national uniformity in the triggering of the removal period by relying on receipt of the initial pleading instead of formal service of process, which varied from state to state.”) (citations omitted); Respondent’s Brief at 11, *Murphy Bros., Inc.*, 526 U.S. at 344 (1999) (No. 97-1909) (“Congress chose language that ‘will meet the varying conditions of practice in all the States.’”) (citations omitted).

34. See 16 MOORE ET AL., *supra* note 6, § 107 App.01[2], at 8.

35. See *id.*

36. *Id.* at 3 (reprinting the original version of § 1446(b)).

37. *Id.* § 107App.02[2], at 12.

demand later service of the complaint, which, under the 1948 statute, might not occur until after the running of the removal period triggered by the summons.³⁸ As one court noted, the 1949 “receipt . . . through service or otherwise,”³⁹ language was necessary to avoid the removal clock’s running “before the complaint landed in the defendant’s hands.”⁴⁰ Adopting the receipt rule, the Eleventh Circuit viewed this legislative history as putting all defendants “on the same footing as those in New York: they have thirty days to remove after they see the filed complaint.”⁴¹ Apart from uniformity, other courts read the legislative history to require promptness and efficiency in removal, which in their view could only be achieved by the receipt rule.⁴²

Third, the receipt rule courts relied on the general axiom that removal statutes are to be construed strictly, narrowly, and when there is any doubt about their proper application, against removal.⁴³

B. *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*

Joining three other circuits⁴⁴ and several district courts,⁴⁵ the Eleventh Circuit adopted a receipt rule for section 1446(b). When a named defendant receives a faxed copy of a filed complaint, the thirty-day removal period begins to run, even if the defendant has not been served with process.⁴⁶ Reversing the Eleventh Circuit, the Supreme Court held that “a named defendant’s time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, ‘through service or otherwise,’ after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service.”⁴⁷

Writing for a 6-3 majority, Justice Ginsburg supported the holding with four rationales. First, service of process is traditionally “fundamental to any

38. See *Murphy Bros., Inc.*, 526 U.S. at 351.

39. 28 U.S.C. § 1446(b) (1994).

40. *Michetti Pipe Stringing, Inc.*, 125 F.3d at 1399, *rev’d*, 526 U.S. 344 (1999) (emphasis omitted).

41. *Id.*

42. See, e.g., *Reece v. WalMart Stores, Inc.*, 98 F.3d 839, 842 (5th Cir. 1996) (stating that “the receipt rule is consistent with ‘Congress’ intent to resolve swiftly removal issues.”).

43. See, e.g., *Roe v. O’Donohue*, 38 F.3d 298, 304 (7th Cir. 1994) (suggesting that “[w]hatever (slight) ambiguity § 1446(b) poses in application to an ordinary case . . . may be resolved by the principle that doubts should be resolved against removal.”) (citing *Shamrock Oil & Gas Co. v. Sheets*, 313 U.S. 100, 108-09 (1941) and *Healy v. Ratta*, 292 U.S. 263, 270 (1934)); *Tech Hills II Assocs. v. Phoenix Home Life Mut. Ins. Co.*, 5 F.3d 963, 968 (6th Cir. 1993) (stating that the receipt “rule is consistent with the longstanding principle that the removal statutes are to be construed strictly, narrowly and against removal”).

44. See *supra* note 28.

45. See *supra* note 29.

46. *Michetti Pipe Stringing, Inc. v. Murphy Bros., Inc.*, 125 F.3d 1396, 1398-99 (11th Cir. 1997), *rev’d* 526 U.S. 344 (1999).

47. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48 (1999).

procedural imposition on a named defendant.”⁴⁸ A court may not ordinarily exercise personal jurisdiction over a defendant named in a complaint without service of process.⁴⁹ Consequently, a named defendant’s procedural and substantive rights may not be affected in the absence of “service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend.”⁵⁰

Second, the legislative history of § 1446(b) provides no support for the proposition that Congress “intended to dispense with the historic function of service of process as the official trigger for responsive action by an individual or entity named [as a] defendant.”⁵¹ Filing a removal notice plainly constitutes “responsive action” implicating a defendant’s procedural right to have a case tried in a federal court as opposed to a state court. The Court found that the purpose of the pertinent language “receipt . . . through service or otherwise,” was specifically to address the unique procedural system found in New York.⁵² At that time an action could be commenced in New York by the mere service of a summons without a complaint or any other document stating the nature of the claim against, or the relief sought from, the defendant.⁵³ Moreover, the complaint was not required to be filed in court within a specified period of time.⁵⁴ Under the 1948 version of § 1446(b), a case had to be removed “within twenty days after commencement of the action or service of process, whichever is later.”⁵⁵ Since the service of the summons constituted both commencement of the action and service of process, the removal period might expire before a New York defendant received—through further service or otherwise—a copy of the complaint.⁵⁶ Without the complaint a defendant could not determine if the case was removable.

Third, the Court disparagingly rejected the Eleventh Circuit’s view that § 1446(b) was unambiguous.⁵⁷ The Eleventh Circuit stated that “the phrase ‘through service or otherwise’ opens a universe of means besides service for putting the defendant in possession of the complaint.”⁵⁸ Justice Ginsburg’s opinion queried: “What are the dimensions of that ‘universe?’”⁵⁹ Finding that the words “or otherwise” fail to answer that question, she concluded that “[t]he

48. *Id.* at 350.

49. *Id.*

50. *Id.*

51. *Id.* at 353.

52. *See id.* at 351-52.

53. *See Murphy Bros., Inc.*, 526 U.S. at 351.

54. *See* N.Y. C.P.L.R. 304.

55. 28 U.S.C. § 1446(b) (1948), *reprinted in* 16 MOORE ET AL., *supra* note 6, § 107App.01[1], at 3.

56. *See Murphy Bros., Inc.*, 526 U.S. at 351.

57. *See id.* at 353-54.

58. *Michetti Pipe Stringing, Inc. v. Murphy Bros., Inc.*, 125 F.3d 1396, 1398 (11th Cir. 1997), *rev’d*, 526 U.S. 344 (1999).

59. *Murphy Bros., Inc.*, 526 U.S. at 353.

Eleventh Circuit's opinion is uninformative."⁶⁰ She buttressed this conclusion with the deceptively simple, but incisive view of one district judge, who wrote that "[i]f in fact the words 'service or otherwise' had a plain meaning, the cases would not be so hopelessly split over their proper interpretation."⁶¹

The Court found additional support for rejecting a plain meaning approach in the Seventh Circuit's inconsistent interpretation of that same language in Federal Rule of Civil Procedure 81(c).⁶² When a case is removed before an answer is submitted, Rule 81(c) requires an answer within twenty days "after receipt through service or otherwise" of the complaint, or twenty days after service of a summons on a previously filed complaint, or five days after removal, "whichever period is longest."⁶³ Affirming the district court's refusal to enter a default judgment against a removing defendant not properly served with process, the Seventh Circuit held that Rule 81(c) does not require an answer in the absence of proper service of process, even if identical language in § 1446(b) compels a similarly situated defendant to remove on mere receipt of a complaint.⁶⁴ Accordingly, Justice Ginsburg cogently concluded that the Seventh Circuit's conflicting reading of the same "receipt through service or otherwise" language in Rule 81(c) and § 1446(b) "undercuts the . . . position that the phrase has an inevitably 'plain meaning.'"⁶⁵

Finally, the Court expressed concern that foreign defendants might be substantially disadvantaged by the receipt rule, because a copy of a complaint could be instantaneously transmitted, but service abroad could take more than the thirty days allotted by the 1446(b) removal clock.⁶⁶

Although it ended the courtesy copy removal trap, *Murphy Brothers* neither expressly addressed nor decisively resolved other § 1446(b) issues that

60. *Id.*

61. *Id.* at 353-54 (quoting *Apache Nitrogen Prods., Inc. v. Harbor Ins. Co.*, 145 F.R.D. 674, 679 (D. Ariz. 1993)).

62. *Id.* at 354-55 (using the Seventh Circuit's inconsistent reading of the same language in § 1446(b) and rule 81(c) as a basis for undermining the Eleventh Circuit's position).

63. Federal Rule of Civil Procedure 81(c) provides, in relevant part:

In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under these rules within 20 days after the *receipt through service or otherwise* of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest.

FED. R. CIV. P. 81(c) (emphasis added).

64. *Silva v. City of Madison*, 69 F.3d 1368, 1375-76 (7th Cir. 1995).

65. *Murphy Bros., Inc.*, 526 U.S. at 355.

66. *Id.* at 356. This frequently invoked concern for foreign defendants is unwarranted because foreign defendants, who are generally sophisticated, can just as instantaneously communicate with and retain domestic counsel to protect their substantive and procedural rights. *Cf. Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987) (suggesting courts should exercise prudence before subjecting alien defendants to personal jurisdiction).

divided the lower federal courts.⁶⁷ However, its holding, buttressed by its underlying policy rationale—that a defendant’s substantive and procedural rights may not be abridged absent the notice provided by a summons and the information provided by a complaint—strongly suggested a proper resolution of these other issues.⁶⁸

III. OTHER SECTION 1446 PROBLEMS

A. Service on a Statutory Agent

If an action is commenced by substituted service of process⁶⁹ on a statutory agent, does the time for removal run from the completion of service of process under state law,⁷⁰ or from its receipt by the named defendant after transmission by the statutory agent? Although older cases were divided on the question,⁷¹ with one notable exception,⁷² more recent cases both prior to⁷³ and following⁷⁴ *Murphy Brothers*, held that the § 1446(b) period is triggered by the named defendant’s receipt of the complaint.

These cases reached the correct result for two reasons. First, state law is ordinarily disregarded when removal is considered, including state law

67. See *supra* notes 15-21 and accompanying text.

68. See *Murphy Bros., Inc.*, 526 U.S. at 356.

69. See generally BLACK’S LAW DICTIONARY 1372 (7th ed. 1999) (defining substituted service as “[a]ny method of service allowed by law in place of personal service, such as service by mail.—Also termed *constructive service*”).

70. Ordinarily, service of process is complete under state law when the statutory agent is served. See, e.g., *Fidelity Funding, Inc. v. Pollution Research & Control Corp.*, No. Civ. A. 3:98-CV-1691-P, 1999 WL 20955, at *2 (N.D. Tex. Jan. 7, 1999) (“Under Texas state procedural law, service is complete when the Secretary of State is served, not when a defendant receives notice.”); *Medina v. Wal-Mart Stores, Inc.*, 945 F. Supp. 519, 520 (W.D.N.Y. 1996) (holding that service is complete under New York business corporation law in civil actions when the Secretary of State has been served).

71. See, e.g., 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3732, at 288 & n.10 (3d ed. 1998) (collecting and comparing older statutory agent service-of-process cases).

72. *Bodden v. Union Oil Co.*, 82 F. Supp. 2d 584, 588-89 (E.D. La. 1998).

73. See, e.g., *Monterey Mushrooms, Inc. v. Hall*, 14 F. Supp. 2d 988, 991 (S.D. Tex. 1998) (stating that removal period begins on defendant’s receipt of process, not when service is made on statutory agent); *Skidway Assocs., Ltd. v. Glens Falls Ins. Co.*, 738 F. Supp. 980, 982 (D.S.C. 1990) (same). Cf. *Fidelity Funding, Inc.*, 1999 WL 20955, at *2-*4 (holding removal period ran from time defendant refused Secretary of State’s transmission of process, not when Secretary of State received process).

74. See, e.g., *Hibernia Cmty. Dev. Corp. v. U.S.E. Cmty. Servs. Group, Inc.*, 166 F. Supp. 2d 511, 511 (E.D. La. 2001) (refusing to follow *Bodden*); *Auguste v. Nationwide Mut. Ins. Co.*, 90 F. Supp. 2d 231, 232-33 (E.D.N.Y. 2000) (stating defendant can remove only after examining the complaint); *Baum v. Avado Brands, Inc.*, No. Civ. A. 3:99-CV-0700G, 1999 WL 1034757, at *2-*3 (N.D. Tex. Nov. 12, 1999) (analyzing receipt by the defendant rule); 1015 Half St. Corp. v. Warehouse Concepts, Inc., No. Civ. A. 99-1174 SSH, 1999 WL 1212885, at *1-*2 (D.D.C. Oct. 26, 1999) (following majority rule); *In re Pfohl Bros. Landfill Litig.*, 67 F. Supp. 2d 177, 182-83 (W.D.N.Y. 1999) (concluding service on statutory agent is insufficient to trigger removal period).

technicalities for completing service of process and securing personal jurisdiction.⁷⁵ These issues can and should be raised after removal.⁷⁶ Second, without receipt of the complaint, a defendant cannot intelligently ascertain if a case is removable. The notice of removal, which must be signed pursuant to Rule 11 of the Federal Rules of Civil Procedure, must contain “a short and plain statement of the grounds for removal.”⁷⁷ Only after receiving a copy of the complaint can a defendant determine that proper grounds exist for removal. A statutory agent’s function is limited to accepting substituted service and transmitting documents to the nonresident defendant. Obviously, a secretary of state, insurance commissioner, or other statutory agent has no substantive basis or authority to remove a case for the named defendant.⁷⁸ Moreover, as one court aptly noted, “the defendant’s right to a federal forum ought not to depend upon the rapidity and accuracy with which statutory agents inform their principals of the commencement of litigation against them.”⁷⁹

Murphy Brothers, in which the defendant received the complaint before service, adopted a service rule to end the courtesy copy removal trap.⁸⁰ Its holding requires either simultaneous service of a summons and complaint or receipt of the complaint after and apart from official service of process before the removal period begins.⁸¹ It prohibits receipt of the complaint unattended by any formal service of process from starting the removal clock.⁸² However, its dicta plainly authorizes removal based on receipt of the complaint after official service of process.⁸³ This sequence of events—service followed by receipt—generally occurs when service is made on a statutory agent. Accordingly, *Murphy Brothers*’ dicta, supported by its policy predicate that procedural rights cannot be abridged without the information provided by a complaint, manifestly require that removal run from receipt by the named defendant and not from service on the statutory agent.

75. See 14C WRIGHT ET AL., *supra* note 71, § 3732, at 290 & n.12 (collecting cases).

76. *Id.* § 3738, at 398-402 & n.17. Defendants generally prefer to have objections to personal jurisdiction and service of process determined by a federal judge. If motions to dismiss on these grounds are asserted in the state court, the thirty-day removal period is likely to run before these motions are decided. Accordingly, a defendant sued in a state court lacking personal jurisdiction should remove and move to dismiss under Federal Rule of Civil Procedure 12(b)(2).

77. 28 U.S.C. § 1446(a) (1994).

78. See, e.g., *Kurtz v. Harris*, 245 F. Supp. 752, 754 (S.D. Tex. 1965) (“[T]he [thirty]-day period permitted for removal under Section 1446(b) does not begin until the defendant or his own appointed agent actually receives process. Neither the Chairman nor the Secretary of State has authority to remove.”); see also *Clark v. Wey*, No. 92 Civ. 9179 (MBM), 1993 WL 313043, at *2 (S.D.N.Y. Aug. 11, 1993) (recognizing statutory agent has no duty other than forwarding process).

79. *Cygielman v. Cunard Line, Ltd.* 890 F. Supp. 305, 307 (S.D.N.Y. 1995). Although most statutory agents promptly forward process to the named defendant, there have been occasional long delays. See, e.g., *Auguste*, 90 F. Supp. 2d at 232 (delay of twenty-four days).

80. *Murphy Bros., Inc., v. Machetti Pipe Stringing, Inc.*, 526 U.S. 334, 347-48 (1999).

81. *Id.*

82. *Id.*

83. See *id.*

Interpreted in this light, current § 1441(b) adequately deals with the statutory agent service issue. Nevertheless, the number of recent cases raising the issue,⁸⁴ including cases decided after *Murphy Brothers*,⁸⁵ plainly points to the need for a definitive resolution of the issue by Congress. Additionally, because *Murphy Brothers* endorsed a service over a receipt rule (when receipt precedes service) a wooden reading of the case might lead a court to conclude that service is always the triggering event. An amendment understandably would prevent such a reading.

B. *New York Summons and Notice*

In New York, an action is commenced either by filing a summons and complaint or a summons with notice.⁸⁶ When the summons with notice is used to commence an action, New York law currently provides that the summons, or notice attached to the summons, shall state the nature of the action and the relief sought, including the sum of money for which judgment may be taken in the event of default.⁸⁷ A defendant served with a summons and notice may demand, within the time for an appearance,⁸⁸ service of the complaint.⁸⁹ A plaintiff has twenty days from service of the demand to serve the complaint.⁹⁰ In the absence of a demand, a plaintiff must serve the complaint within twenty days after service of a notice of appearance by a defendant.⁹¹ In either instance, service of the complaint may be substantially delayed if the summons and notice is used to commence an action.⁹²

When an action is commenced by a summons with notice, is the removal period triggered by the earlier service of the summons with notice, or by the later service of the complaint? Not surprisingly this issue divided federal district courts in New York both before⁹³ and after⁹⁴ *Murphy Brothers*. The

84. See *supra* notes 72-73.

85. See *supra* note 74.

86. N.Y. C.P.L.R. 304 (McKinney 2001). Service of the summons and complaint or the summons with notice generally must be made within 120 days of filing. See *id.* 306-b.

87. See *id.* 305(b).

88. See *id.* 320.

89. *Id.* 3012(b).

90. See *id.*

91. See *id.*

92. See, e.g., *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 199 (2d Cir. 2001) (over two-month delay); *Rios v. New York Marriott Marquis*, No. 01 Civ. 5536 (NRB), 2001 WL 863425, at *1 (S.D.N.Y., July 30, 2001) (over nine-month delay); *Brooklyn Hosp. Ctr. v. Diversified Info. Techs., Inc.* 133 F. Supp. 2d 197, 199-200 (E.D.N.Y. 2001) (almost three-month delay).

93. See *Am. Telecasting, Inc.*, 261 F.3d at 202-03.

94. Compare *Rios*, 2001 WL 863425, at *1-*2 (concluding that the removal clock began with defendant's receipt of the summons and notice since defendant could ascertain removability at the time), with *Whitaker v. Fresno Telsat Inc.*, No. 99 Civ. 6059 (SAS), 1999 WL 767432, at *1-*2 (S.D.N.Y., Sept. 28, 1999) (applying *Murphy Bros., Inc.* to start removal clock when defendant received complaint).

Second Circuit recently resolved this issue in *Whitaker v. American Telecasting, Inc.*⁹⁵

Although *Murphy Brothers* uses the term “complaint” to refer to the document asserting a claim,⁹⁶ § 1446(b) uses the phrase “the initial pleading setting forth the claim for relief.”⁹⁷ The term “initial pleading” is more inclusive and applies to any document—whether denominated “complaint,” “petition,”⁹⁸ or any other term under state law—providing notice of the claims against a defendant.

In *Whitaker*, the Second Circuit succinctly summarized the reasoning of those district courts holding that only the complaint can constitute an initial pleading under § 1446(b):

These courts have rejected the notion that a summons with notice can constitute the initial pleading because: (a) the summons with notice is not defined as a pleading under N.Y.C.P.L.R. § 3011; (b) the notice has no legal effect under New York law except in cases of default; and (c) the legislative history of section 1446(b) appears to point to service of the complaint alone as the relevant event for triggering the removal period.⁹⁹

These reasons seem persuasive at first blush, but when measured against the policies underlying the removal statute, they place form over substance. The essential function of the “initial pleading” is to provide notice of the claims against a defendant.¹⁰⁰ In the removal context, the initial pleading must provide sufficient information for a defendant to determine that a case is removable. Under current New York practice, a summons with notice generally contains this information.¹⁰¹ Accordingly, the Second Circuit concluded that a summons with notice may constitute an initial pleading under § 1446(b).¹⁰² This conclusion is sound because it recognized that the information provided, and not the document’s denomination under state law, is crucial for determining removability. Moreover, a defendant may not always be able to determine

95. *Am. Telecasting, Inc.*, 261 F.3d at 206.

96. *See supra* notes 46-56 and accompanying text.

97. 28 U.S.C. § 1446(b) (1994).

98. *See, e.g.*, N.Y. C.P.L.R. 304 (McKinney 2001) (“A special proceeding is commenced by filing a notice of petition or order to show cause and a petition.”).

99. *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 202-03 (2d. Cir. 2001).

100. *See id.* at 204 (“The legislative history reflects a clear concern for ensuring that a defendant ‘know[s] what the suit is about’ before triggering the removal clock.”) (quoting *Murphy Bros., Inc. v. Machetti Pipe Stringing, Inc.*, 526 U.S. 334, 352 (1999)).

101. *See id.* (“Because the summons with notice generally provides information from which a defendant can ascertain removability, this document is often consistent with the 1949 Congressional conception of an initial pleading.”).

102. *Id.* (“[Summons and notice] may constitute an initial pleading for purposes of the federal removal statute.”).

removability from even a state court complaint. Frequently, state court complaints omit information regarding citizenship, principal place of business, and the amount in controversy, all of which may be crucial for determining diversity jurisdiction.¹⁰³ The receipt of any document under state law providing sufficient information to determine if a case is removable, triggers the defendant's time to remove, provided that formal service of process precedes or accompanies the document.¹⁰⁴ This view is bolstered by the traditional policy favoring removal sooner rather than later. Parties must know which court to go to for emergency or other initial pretrial relief.

The Second Circuit's resolution of this issue is not likely to be reviewed by the Supreme Court. The summons-with-notice procedure is apparently unique to New York, and the Second Circuit has ruled that a summons with notice can constitute an initial pleading for purposes of starting the removal clock.¹⁰⁵ Therefore, the issue appears settled and there is no need for a specific amendment to § 1446(b). However, New York is the world's most important financial center, media and entertainment capital, and commercial trade zone. Consequently, its courts generate an enormous volume of litigation particularly involving corporate, financial, entertainment, and intellectual property law. Notwithstanding *Whitaker's* sound resolution of the issue, the post-*Murphy Brothers* split in district court authority¹⁰⁶ suggests lingering doubt and reasonable differences of opinion. Consequently, since this Article proposes a major revision to § 1446(b), Congress should definitively resolve the issue. Although the summons-with-notice procedure affects only New York, the issue of what constitutes an initial pleading is a national problem.¹⁰⁷

103. See 14B WRIGHT ET AL., *supra* note 8, § 3723, at 568-69; 14C WRIGHT ET AL., *supra* note 71, § 3725, at 79-80.

104. Acknowledging the difficulty in determining what constitutes an initial pleading for purposes of removal, one leading treatise concluded:

Given the pervasive anti-removal perspective, doubts as to what constitutes an initial pleading should be resolved in favor of an earlier filing of the notice of removal. Given the further pervasive anti-diversity perspective, it is entirely likely that what constitutes an initial pleading in a diversity case is different, and perhaps less formal, than an initial pleading in a federal question case.

16 MOORE ET AL., *supra* note 6, §107.30[3][b], at 179 (footnote omitted). If a pre-complaint pleading, such as a motion for a temporary restraining order or other extraordinary relief, establishes a basis for removal, it has been held to trigger the time for removal. *Id.*; accord *Dublin Worldwide Prods. (USA), Inc. v. Jam Theatricals, Ltd.*, 162 F. Supp. 2d 275, 277-78 (S.D.N.Y. 2001) (holding a pre-action order to show cause seeking discovery in aid of an action triggered removal); cf. *Sprague v. Am. Bar Ass'n*, 166 F. Supp. 2d 206, 208-09 (E.D. Pa. 2001) (holding a summons and civil action cover sheet with insufficient information to show diversity and amount in controversy did not constitute an initial pleading).

105. See *supra* note 102 and accompanying text.

106. See *supra* note 94.

107. See, e.g., *supra* note 104 & *infra* note 145 (collecting cases and authorities discussing removability of cases commenced by a summons and other documents apart from a complaint).

C. Multiple-Defendant Actions

All pertinent sections of the removal statute contemplate cases with more than one defendant, except for § 1446(b).¹⁰⁸ This conspicuous omission has created the most serious statutory construction problem when removal is sought in multidefendant actions. It has also generated a substantial volume of scholarly commentary, mostly critical of the approach adopted by the Fifth Circuit to solve the problem.¹⁰⁹ Most significantly, this omission causes the § 1446(b) problem least susceptible to judicial resolution, even in the wake of *Murphy Brothers*.

Three possible interpretations of § 1446(b)'s timing provision have emerged from the lower federal courts. They are the first-served¹¹⁰ and last-served¹¹¹ defendant rules, which require the removal period to run simultaneously for all served defendants, and the individual-defendant rule,¹¹² which requires the period to run separately for each defendant served.

108. Compare 28 U.S.C. § 1446(b) (1994) ("after receipt by the defendant"), with 28 U.S.C. § 1441(a) (1994) ("by the defendant or the defendants"), 28 U.S.C. § 1441(b) (1994) ("without regard to the citizenship or residence of the parties" and "only if none of the parties"), 28 U.S.C. § 1446(a) (1994) ("defendant or defendants"), 28 U.S.C. § 1447(a) (1994) ("all proper parties"), 28 U.S.C. § 1447(e) (1994) ("to join additional defendants"), 28 U.S.C. § 1448 (1994) ("any one or more of the defendants" and "any defendant"). Cf. 28 U.S.C. § 1441(c) (1994) (permitting removal of a separate and independent claim under 28 U.S.C. § 1331 if "joined with one or more otherwise non-removable claims on causes of action," and contemplating both multiclient and multidefendant actions). But see 28 U.S.C. § 1441(d) (1994) (applying to multidefendant actions against a foreign state and other defendants although drafted in the singular).

109. See, e.g., 14C WRIGHT ET AL., *supra* note 71, § 3732, at 336-41 (criticizing the first-served defendant rule); C. Todd Hagins, *Sands in an Hourglass: Solving the Puzzle of Time Limits for Removal to Federal Court*, 68 DEF. COUNS. J. 421, 423-31 (2001) (advocating a *McKinney-Brierly* type of last-served defendant rule); Derek S. Hollingsworth, Comment, *Section 1446: Remediating the Fifth Circuit's Removal Trap*, 49 BAYLOR L. REV. 157, 168-72 (1997) (criticizing Fifth Circuit authority upholding a first-served defendant rule); Wiseman, *supra* note 15, at 330-35, 349 (criticizing first-served rule and proposing a type of last-served defendant rule).

The student commentator last cited would not permit an earlier-served defendant to initiate removal after its individual thirty-day period ran, but would permit an earlier-served defendant to join in a later-served defendant's notice of removal. See *id.* at 349. The removal statute only provides for a defendant to file a notice of removal. It does not authorize a defendant's joining in or consenting to another defendant's notice of removal. See *id.* The inherent defect in § 1446(b), which only contemplates a single defendant case, is the obvious reason for this lack of authority. Because the effect of consenting or joining in a later-served defendant's removal notice is the same as if the statute permitted the earlier-served defendant to file its own notice of removal after the expiration of its time for removal, this Article draws no distinction between the procedures, and proposes a true last-served defendant rule under which the time for removal of served defendants runs until the expiration of the latest ending thirty-day period calculated separately for each defendant. See *infra* Parts III.C. & IV.

110. See *infra* notes 113-15 and accompanying text.

111. See *infra* notes 126-32 and accompanying text.

112. See *infra* notes 116-25 and accompanying text.

The Fifth Circuit articulated the first-served defendant rule in *Brown v. Demco, Inc.*,¹¹³ and reiterated and refined it in *Getty Oil Corp. v. Insurance Company of North America*.¹¹⁴ When a complaint names more than one defendant, and all defendants are served before removal is attempted, the thirty-day period runs simultaneously for all defendants from the first date on which any defendant is served. Assume a complaint names two defendants, *A* and *B*, and is filed in a state court on November 30 of a particular year. *A* is served on December 1 and *B* is served on December 10. *A*'s thirty-day period to remove expires on December 31. If *B* were sued separately, *B* would have until January 9 to remove, but because *B* was named as a defendant along with *A*, *B* must also remove by December 31. Under these facts, *B* has nine fewer days to remove than § 1446(b) would allow in a single defendant action. The result under this hypothetical is unfortunate but raises only mild fairness concerns. Suppose instead of being served on December 10, *B* is served on December 31. Now *B*'s time to remove under the first-served defendant rule is cut to hours or minutes, or perhaps is eliminated altogether if service is made on a statutory agent or *B*'s designated agent for service of process. The agent is not likely to transmit the complaint to *B* until after the removal time for *A* has run. Similarly, *B*'s right to remove would be eliminated if *B* were served after December 31.¹¹⁵

Disagreeing with the Fifth Circuit's approach, the Fourth Circuit in *McKinney v. Board of Trustees* held that § 1446(b)'s removal clock runs separately for each defendant.¹¹⁶ If one applies *McKinney* to the hypothetical above, *A* would have until December 31, and *B* would have until January 9 to remove. However, if *A* failed to remove by December 31, *B*'s right to remove would be eliminated.¹¹⁷ The Fourth Circuit supported its separate-defendant rule on four grounds. First, it found fault with *Getty Oil*'s first-served defendant

113. 792 F.2d 478, 481-82 (5th Cir. 1986). *Brown* was particularly inappropriate for articulating a first-served defendant rule because the case, removable by the original defendants, was pending for over four years in the state court before the plaintiff filed an amended complaint naming a new defendant. *See id.* at 480. This added defendant promptly removed. *Id.* Hearing an interlocutory appeal under 28 U.S.C. § 1292(b) (1994), the Fifth Circuit reversed the district court's denial of remand, holding that a first-served defendant may waive removal for subsequently served defendants and concluding that its holding "follows logically from the unanimity requirement, the thirty-day time limit, and the fact that a defendant may waive removal by proceeding in state court." *Id.* at 482.

114. 841 F.2d 1254, 1262-63 (5th Cir. 1988).

115. The hypothetical presented by service on a second defendant near or after the thirty-day deadline, might justify an exceptional-circumstances exception to the first-served defendant rule, even in the Fifth Circuit. *See id.* at 1263 n.12; *Brown*, 792 F.2d at 482; *White v. White*, 32 F. Supp. 2d 890, 893-94 (W.D. La. 1998). *But see* Hagins, *supra* note 108, at 425 (quoting Prescott v. Memorial Med. Ctr.-Livingston, No. 9:00 CV-0025, 2000 WL 532035, at *5 (E.D. Tex. Mar. 25, 2000)) (implying that exceptional circumstances are rarely found, and are never found in the Fifth Circuit).

116. 955 F.2d 924, 928 (4th Cir. 1992).

117. *See id.* at 926 n.3 ("[I]f *A* does not petition for removal within 30 days, the case may not be removed.") (citation omitted).

rule, which in effect inserted the word “first” before the word “defendant” in § 1446(b),¹¹⁸ because the statute only contemplates one defendant.¹¹⁹ Second, the court disagreed with *Getty’s Oil’s* policy justification for the first-served defendant rule; the Fifth Circuit believed that its rule promoted unanimity among defendants, but the Fourth Circuit felt the rule promoted inequity by “establishing one fixed deadline for defendants served as much as thirty days apart.”¹²⁰ Third, responding to the policy concern that plaintiffs are entitled to know at the earliest possible time whether their case will proceed in state or federal court, the court stated that plaintiffs can limit the time for removal by serving all defendants at or about the same time.¹²¹ In addition, the court believed that § 1446(b) balances a plaintiff’s right to an early determination of the forum with a defendant’s right to a federal forum.¹²² The Fourth Circuit is undoubtedly correct that the first-served defendant rule unfairly shifts this balance in favor of plaintiffs. Fourth, noting that § 1446(a) was amended after *Getty Oil* to make Rule 11 of the Federal Rules of Civil Procedure applicable to removal notices, the court was concerned that under the first-served defendant rule, “later served defendants will either have to forego removal or join hurriedly in a petition for removal and face possible Rule 11 sanctions.”¹²³

Although the Fourth Circuit’s individual-defendant rule is inherently more fair than the Fifth Circuit’s first-served defendant rule, it potentially allows an earlier-served defendant to cut off entirely a later-served defendant’s right to remove. If *A*, in our hypothetical, fails to timely remove, *B* cannot remove even if *B*’s separate thirty-day period has not expired. This result has been justified by the removal statute’s unanimity requirement.¹²⁴ All defendants must agree to remove because § 1446(a) states that “[A] defendant or defendants desiring to remove . . . shall file . . . a notice of removal.”¹²⁵

However, neither § 1446(a) nor § 1446(b) contemplates a scenario in which defendants are served as much as thirty days apart, or in which an unsophisticated defendant is served first and a more sophisticated defendant is served later. In these instances, the second-served defendant should be able to timely remove and persuade the first-served defendant to join the removal.

118. *Id.* at 927.

119. *See id.* at 926.

120. *Id.* at 926-27.

121. *Id.* at 927.

122. *See McKinney*, 955 F.2d at 927-28.

123. *Id.* at 928.

124. *See, e.g.*, 28 U.S.C. § 1446(a) (1994) (“defendant or defendants”); *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1263-64 (5th Cir. 1988) (“This rule . . . promotes unanimity among the defendants without placing undue hardships on subsequently served defendants.”) (footnote omitted) (citation omitted); *Brown v. Demco, Inc.*, 792 F.2d 478, 482 (5th Cir. 1986) (“The rule follows logically from the unanimity requirement”); 16 MOORE ET AL., *supra* note 6, § 107.30[3][a][i], at 161 (“[T]he failure of the first-served defendant to file a removal notice within 30 days of service prevents all subsequently served from later removing the action. . . . [a principle] predicated on the ‘unanimity rule.’”).

125. 28 U.S.C. § 1446(a) (1994).

Otherwise, the first-served defendant abridges the second-served defendant's procedural right to a federal forum. If the first-served defendant makes a conscious choice not to remove, the second-served defendant has to accept that choice. But the second-served defendant should have a reasonable opportunity to consult with the first-served defendant regarding possible removal. Consultation is practically impossible if service on the second defendant occurs near the end of or after the first defendant's thirty-day removal period has expired.

In *Brierly v. Aluisse Flexible Packaging, Inc.*¹²⁶ the Sixth Circuit permitted a later-served defendant to remove after an earlier-served defendant's time to remove had expired and allowed the earlier-served defendant to join in the later defendant's timely removal.¹²⁷ The court recognized that its case was factually distinguishable from *McKinney* because

the earlier-served defendants in *McKinney* had a valid petition for removal pending at the time the later-served defendant joined in the removal petition, whereas the earlier-served defendant in the case at bar had failed in its attempts to remove the case when the later-served defendant filed a new removal petition.¹²⁸

Without analyzing whether the factual distinctions were sufficiently material to compel a different result, the Sixth Circuit precipitously concluded that "the policy considerations articulated by the Fourth Circuit in *McKinney* are equally applicable to the facts before this court."¹²⁹ It then held that "a later-served defendant has 30 days from the date of service to remove . . . with the consent of the remaining defendants."¹³⁰ This holding is unremarkable and materially indistinguishable from *McKinney*. It endorses, without directly saying so, the individual or separate-defendant rule.

In a footnote tacked to the conclusion of its § 1446(b) analysis, the Sixth Circuit provided some support for a true last-served defendant rule. The court recognized that its holding raises the issue whether an earlier-served defendant, who attempts but fails to remove within its own thirty-day period, may join in the timely removal of a later-served defendant.¹³¹ It concluded that the earlier-served defendant may do so.¹³² The first-served defendant's intent and desire

126. 184 F.3d 527 (6th Cir. 1999).

127. *See id.* at 530-33.

128. *Id.* at 533.

129. *Id.*

130. *Id.*

131. *Id.* at 533 n.3.

132. *Brierly*, 184 F.3d at 533 n.3 (citing *Freeman v. Bechtel*, 936 F. Supp. 320, 325-26 (M.D.N.C. 1996) ("holding first-served defendants could consent to later-served defendant's removal despite having already waived their right to removal"). *But see* *Holder v. City of Atlanta*, 925 F. Supp. 783, 785 (N.D. Ga. 1996) ("holding that later-served defendants cannot obtain

to remove were manifested during its own thirty-day removal period in *Brierly*. Nevertheless, in allowing removal, the Sixth Circuit provided tacit support for a true last-served defendant rule.

Suppose hypothetically that a first-served defendant simply fails to remove for no apparent reason. Should such a defendant be permitted to join in the timely removal of a later-served defendant? If a court permits removal in this situation, its opinion would constitute direct authority for a true last-served defendant rule.¹³³

The lower federal courts are deeply divided over the proper application of § 1446(b) to multidefendant cases. In denying certiorari in *Brierly*, the Supreme Court avoided an opportunity to resolve the existing conflict among the circuits.¹³⁴ A future case may allow for a resolution. Nevertheless, as both the Fourth and Sixth Circuits aptly recognized, § 1446(b) contemplates only a single defendant.¹³⁵ Accordingly, unless Congress amends the statute to take account of multidefendant cases, the lower federal courts are likely to continue to be hopelessly split. Any single case is unlikely to raise all the permutations possible in complex multiparty litigation.

IV. PROPOSED AMENDMENTS TO SECTION 1446

A. History

Since 1948, § 1446(b) has provided a uniform time period for removal of civil actions. Under the 1948 version of the statute, a civil action had to be removed “within twenty days after commencement of the action or service of process, whichever is later.”¹³⁶ This language proved unworkable because different states commenced actions by different methods, particularly New York and Kentucky, which did not require (and in the case of New York, still does not require) the complaint to accompany service of process.¹³⁷ A New York defendant might not have had access to the complaint until after the

consent from defendants who failed to remove within their own thirty-day period”); *Scialo v. Scala Pacing Co.*, 821 F. Supp. 1276, 1278 (N.D. Ill. 1993) (“refusing to allow later-served defendants whose petition to remove had failed because of noncompliance with § 1446(b) to consent to first-served defendant’s petition for removal”).

133. *Cf. Freeman*, 936 F. Supp. at 322 (noting later-removing defendant was the Secretary of Agriculture asserting a federal question).

134. *See* 528 U.S. 1076 (2000) (denying cert. to *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527 (6th Cir. 1999)).

135. *See Brierly*, 184 F.3d at 532; *McKinney v. Bd. of Trustees*, 955 F.2d 924, 926 (4th Cir. 1992).

136. 16 MOORE ET AL., *supra* note 6, § 107App.01[1], at 3 (providing text of 1948 version of § 1446(b)).

137. *See id.* § 107App.02[2], at 12. *See also* Ky. R. Civ. P. 4.01(1)(a) & (b) (embodying a revision that now requires simultaneous service of the summons and complaint); N.Y. C.P.L.R. 305(b) (*McKinney* 2001) (providing that the summons and notice procedure commences an action).

twenty-day period expired. Consequently, § 1446(b) was amended in 1949 essentially to its current form to correct that and other more minor problems.¹³⁸ Congress enlarged the removal period to thirty days in 1965.¹³⁹

B. Current Statute

In relevant part, § 1446 currently provides as follows:

Section 1446. Procedure for Removal.

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.¹⁴⁰

(b) The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.¹⁴¹

138. 16 MOORE ET AL., *supra* note 6, § 107App.02[2], at 12-13.

139. *Id.* § 107App.05[2], at 17-18.

140. 28 U.S.C. § 1446(a) (1994).

141. *Id.* § 1446(b).

C. *Proposed Amendment*

1. *Section 1446(a)*

Congress should amend § 1446(a) by inserting the following clause after the word “removal,” and before the word “together”:

including the basis for the court's jurisdiction and compliance with subsection (b) below.

This change clarifies the defendant's obligation to establish federal subject-matter jurisdiction. In addition, it requires the defendant to show procedural compliance with the timing provision of § 1446(b). By requiring a defendant to certify compliance with § 1446(b), the proposed amendment will help avoid litigation over this troublesome issue and will assist a court in resolving a dispute if remand is sought for untimely removal.

2. *Section 1446(b)*

Congress should amend § 1446(b) by repealing the current statute and enacting the following language in its place:

(b)(1)(A) When a civil action or proceeding is commenced in a state court by the service on the defendant of the summons together with the initial pleading setting forth the claim for relief, the notice of removal shall be filed within thirty days after such service on the defendant.

(B) When a civil action or proceeding is commenced in a state court by the service of the summons without the initial pleading setting forth the claim for relief, but the summons, or other document served with the summons, contains sufficient information from which the defendant may ascertain if the case is removable, the notice of removal shall be filed within thirty days after service of the summons, or summons and other document.

(C) When a civil action or proceeding is commenced by service of the summons without the initial pleading setting forth the claim for relief, and such initial pleading is not required to be filed in the state court, the notice of removal shall be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief.

(D) When a civil action or proceeding is commenced by service of the summons without the initial pleading setting forth the claim for relief, and such initial pleading is required to be filed in the state court after service of the summons, the notice of removal shall be filed within thirty days of the date on which the initial pleading is filed in the state court, or is received by the defendant after service, whichever period is shorter.

(E) When a civil action or proceeding is commenced by service of the summons without the initial pleading setting forth the claim for relief, but such initial pleading is required to be filed in the state court before service of the summons, the notice of removal shall be filed within thirty days after the service of the summons.

(F) When a civil action or proceeding is commenced in a state court by service of process on a statutory agent, the notice of removal shall be filed within thirty days after receipt by the defendant of a copy of the initial pleading setting forth the claim for relief.

(b)(2) If a case stated by the initial pleading in a state court is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, or, if there is more than one defendant, by each defendant, through service or otherwise, of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.

(b)(3)(A) Except for removal under section 1441(c), if a civil action or proceeding is commenced in a state court against more than one defendant, the thirty-day period for filing a notice of removal shall be determined separately for each served-defendant under subsection (b)(1), and each served-defendant must file a separate removal notice, or join in a previously or subsequently filed removal notice, within the time provided by the separate thirty-day period ending latest.

(B) If an action is removed by fewer than all defendants prior to the commencement of the thirty-day period under subsection (b)(1) for any defendant, further service on, and objections to removal by, unserved defendants shall be made and determined under section 1448.

D. Statutory Notes for Section 1446(b)

The proposed amendment to § 1446(b) codifies the holding and dicta in *Murphy Brothers* and resolves the statutory agent, New York summons with notice, and multidefendant problems discussed above.¹⁴²

Section (b)(1)(A) codifies the principal dictum in *Murphy Brothers* “that a named defendant’s time to remove is triggered by simultaneous service of the summons and complaint.”¹⁴³ This statement was technically dictum because the defendant in *Murphy Brothers* received a courtesy copy of the complaint prior to formal service.¹⁴⁴ The actual holding of *Murphy Brothers* is that receipt of

142. See *supra* Part III.

143. *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48 (1999).

144. *Id.* at 348.

a complaint prior to service of process does not start the § 1446(b) removal clock.

Section (b)(1)(B) resolves the New York summons with notice problem. It should also solve problems occurring in other states that permit commencement of an action by summons alone, when the summons, or other document served with the summons, provides sufficient information for a defendant to ascertain that a case is removable.¹⁴⁵

Sections (b)(1)(C), (D) and (E) codify the three categories of state service laws, other than simultaneous service of the summons and complaint, summarized in *Murphy Brothers*.¹⁴⁶

Section (b)(1)(F) resolves the statutory agent problem.

Section (b)(2) is the second paragraph of current § 1446(b), which concerns removal when a case commenced in a state court is not initially removable. It contains a minor amendment to reflect the changes in proposed section (b)(3), covering multiple defendants. The proposal adds the words, “or, if there is more than one defendant, by each defendant,” after the word “defendant” to codify current law that each defendant in a multidefendant action that becomes removable subsequent to initial commencement must join in the removal.¹⁴⁷ In a pending case all originally joined and served defendants will likely receive at or about the same time “a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.”¹⁴⁸ Consequently, the problems encountered in initially filed multidefendant cases are not likely to be encountered in cases that become removable later. However, the proposed amendment provides that each defendant has thirty days to file a notice of removal from receipt of the document that first establishes removability. Additionally, defendants in pending cases are likely to communicate with each other on a regular basis, ensuring prompt consideration of removal.

Section (b)(3)(A) resolves the multidefendant problem specifically for initially-filed cases. In this type of case, plaintiffs have substantial opportunities for tactical maneuvering aimed at thwarting defendants’ removal rights. The proposal adopts a true last-served defendant rule. Each defendant has until the end of the latest ending thirty-day period calculated separately for each defendant. If a defendant’s separate thirty-day period has not commenced because none of the triggering events in section (b)(1) have occurred for that

145. See, e.g., *Sprague v. Am. Bar Ass’n*, 166 F. Supp. 2d 206, 208 (E.D. Pa. 2001) (citing Third Circuit authority that permits removal if documents, which are later filed with pleadings, are served with the summons, and provide adequate notice of federal jurisdiction). The court noted that *Murphy Brothers* did not consider this issue. See *id.* at 208. See generally 16 MOORE ET AL., *supra* note 6, § 107.30[3][a][iv][A.1], at 173-74 (discussing whether cases initiated by summons and other documents, including correspondence among attorneys can trigger the thirty-day requirement).

146. See *Murphy Brothers*, 526 U.S. at 354.

147. See *supra* note 125 and accompanying text.

148. 28 U.S.C. § 1446(b) (1994).

defendant, the case may be removed without that defendant. Current § 1448 provides for service of process on, and remand motions by, defendants served after removal.

Four main reasons support the proposal of a true last-served defendant rule. First, the current statutory language is perverted by the Fifth Circuit's first-served defendant rule, which potentially thwarts the procedural rights of later-served defendants.¹⁴⁹ Second, although the Fourth Circuit's individual-served defendant rule in *McKinney* is less troublesome, it may nevertheless permit abridgement of later-served defendants' procedural rights. When a plaintiff first serves an unsophisticated defendant not likely to remove and waits until that defendant's thirty-day period is almost expired to serve a sophisticated defendant who is likely to remove, the latter-served defendant's removal right is vitiated if the earlier-served defendant fails to remove.¹⁵⁰

Third, a true last-served defendant rule provides opportunities for consultation by all served defendants, which would allow a later-served defendant an opportunity to persuade an earlier-served defendant whose thirty-day period expired to join in the removal. Fourth, only a true last-served defendant rule adequately protects a later-served defendant's procedural rights from abridgement prior to service of process and receipt of the complaint.

However, by adopting this proposal, Congress may significantly enlarge the time for removal in multi-defendant actions. In states, including New York,¹⁵¹ that have statutes or rules analogous to Rule 4(m) of the Federal Rules of Civil Procedure, which requires service of the summons and complaint on all named defendants within 120 days after the filing,¹⁵² the period for removal could be extended to a maximum of 151 days. A plaintiff has 120 days from the date of filing to effectuate service on all defendants. If day one is the day of filing, day 121 is the 120th day after filing. Thus, day 121 is the last day on which a plaintiff can serve process on a defendant or otherwise trigger the commencement of the thirty-day removal period under proposed section (b)(1). A defendant has thirty days from the triggering event to remove, *i.e.*, day 151. The time period can be compressed if a plaintiff serves all defendants at or about the same time. The true last-served defendant rule proposed here

149. See *supra* notes 113-15 and accompanying text.

150. See *supra* notes 116-25 and accompanying text. But see *White v. White*, 32 F. Supp. 2d 890, 893-94 (W.D. La. 1998) (finding exceptional circumstances in plaintiff's attempted forum manipulation by serving, before *Murphy Brothers* was decided, an unsophisticated defendant with a courtesy copy of the complaint more than thirty days prior to serving the second defendant, who promptly removed).

151. See N.Y. C.P.L.R. 306-b (*McKinney* 2001) (120 days). Accord ALASKA R. CIV. P. (4)(i) (120 days); ARIZ. R. CIV. P. (4)(i) (120 days); FLA. R. CIV. P. 1.070(j) (120 days). Other states have shorter periods to effectuate service. See MASS. R. CIV. P. (4)(j) (ninety days); MO. R. CIV. P. 54.21 (thirty days which can be extended to ninety days by court order); N.C. R. CIV. P. 4(c) (60 days). Still other states provide slightly longer periods. See IDAHO R. CIV. P. 4(a)(2) (six months); OHIO CIV. R. 4(e) (six months). But see S.C. R. CIV. P. 4 (no stated limit).

152. See FED. R. CIV. P. 4 (m) (1994). For good cause shown, a court may extend the 120 day period. *Id.*

encourages a plaintiff to accomplish service on all defendants as soon as possible after filing. Simultaneous or near simultaneous service will prevent, or at least discourage, tactical maneuvering to prevent removal, which has been a problem under the current statute.

In our simple hypothetical, assume again that the Plaintiff files on November 30 and serves Defendant *A* on December 1. If this case were only against *A*, *A* would have to remove by December 31. Let us assume further that the initial complaint also names Defendant *B* and that Plaintiff cannot effect service on Defendant *B* until March 31 of the following year, 120 days after filing the complaint. Defendant *B* has thirty days to remove, or until April 30. Under the Fifth Circuit's first-served defendant rule, removal would be impossible, unless Defendant *A* contacted and persuaded Defendant *B* to join in the removal prior to December 31. Also, if Defendant *A* failed to remove by December 31, under the Fifth Circuit's rule, Defendant *B*'s procedural right to remove would be vitiated.

Under the Fourth Circuit's individual-defendant approach, Defendant *B* would have the same amount of time to remove as Defendant *A* has under the proposed true last-served defendant rule, because each defendant's removal time is calculated separately. However, if Defendant *A* failed to remove by December 31, Defendant *B*'s right to remove would be cut off. Accordingly, the only rule that balances plaintiff-oriented policies of unanimity and timelessness with a defendant's procedural right to remove is the true last-served defendant rule proposed above.

V. CONCLUSION

Section 1446(b) was last substantially revised over fifty-two years ago in 1949. The lower federal courts have been hopelessly divided, both before and after *Murphy Brothers*, when applying its removal timing provision, especially in multi-defendant cases.¹⁵³ Accordingly, the only way to end this division and the time-consuming, expensive litigation it generates, is for Congress to recock the § 1446(b) removal trigger in the manner proposed.

153. As of February 11, 2002, federal courts have decided 2,402 cases involving § 1446(b) issues since 1948, according to Westlaw KeyCite.