



Digital Commons@

Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles Law Review

Volume 34
Number 1 *The Seventh Annual Fritz B. Burns
Lecture: The War Powers Resolution and
Kosovo*

Article 9

11-1-2000

Applying *Murphy Bros. V. Michetti Pipe Stringing, Inc* to Removal in Multiple-Defendant Lawsuits

Barbara A. Wiseman

Follow this and additional works at: <https://digitalcommons.lmu.edu/llr>



Part of the [Law Commons](#)

Recommended Citation

Barbara A. Wiseman, *Applying Murphy Bros. V. Michetti Pipe Stringing, Inc to Removal in Multiple-Defendant Lawsuits*, 34 Loy. L.A. L. Rev. 323 (2000).

Available at: <https://digitalcommons.lmu.edu/llr/vol34/iss1/9>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

APPLYING *MURPHY BROS. V. MICHETTI PIPE STRINGING, INC.* TO REMOVAL IN MULTIPLE-DEFENDANT LAWSUITS

I. INTRODUCTION

Sections 1441¹ and 1446² of the Judicial Code were enacted to allow defendants to remove a federal claim from state court to federal court. Congress “seem[ed] to believe that the defendant’s right to remove a case . . . is at least as important as the plaintiff’s right to the forum of his choice.”³ While the plaintiff has the right to choose the initial forum, § 1446 provides the defendant with an opportunity to remove a claim with proper federal jurisdiction to a federal court. This statutory right protects the defendant from any unfairness a state forum may create, such as local state prejudice.⁴ As such, the removal statute’s purpose is and always has been focused on fairness and equity of forum choice to all parties.

Section 1446(b) grants the defendant a thirty-day time limitation for removal. The wording of § 1446(b), however, has caused confusion over the years and has resulted in a sharp split among courts as to when the thirty-day limitation begins.⁵ A recent Supreme Court case, *Murphy Bros. v. Michetti Pipe Stringing, Inc.*,⁶ clarified the issue of removal in single-defendant suits, but there is still a

1. 28 U.S.C. § 1441 (1994).

2. *Id.* § 1446.

3. *McKinney v. Bd. of Trs.*, 955 F.2d 924, 927 (4th Cir. 1992).

4. *See Ehrlich v. Oxford Ins. Co.*, 700 F. Supp. 495, 497 (N.D. Cal. 1988).

5. *See Reece v. Wal-Mart Stores, Inc.*, 98 F.3d 839, 841-42 (5th Cir. 1996) (finding that the thirty-day limitation begins with even a “courtesy copy” of the complaint, rather than official service of process); *cf. Bowman v. Weeks Marine, Inc.*, 936 F. Supp. 329, 333 (D.S.C. 1996) (holding that removal begins only upon official service of process).

6. 526 U.S. 344 (1999).

discrepancy regarding tolling times when two or more defendants are served on different days.⁷

In light of the statutory construction of § 1446(b), congressional intent, and fairness, tolling among multiple defendants is most logically read in favor of the later-served defendants. In other words, each defendant should be accorded thirty days in which to decide to remove the case, starting at the time that the specific defendant considering removal is officially served.

This Comment will analyze the historical purpose of the removal statute, as well as the interpretations that have surfaced among courts. The Comment will further propose a solution to this multiple-defendant discrepancy after exploring the analyses of different circuits on this issue. Part II of this Comment will delve into the statutory history and provisions of § 1446(b). Part III will critique the relevant case law on this issue. It will take a closer look at the Fifth Circuit's approach to this dilemma, as well as the analyses of the Fourth and Sixth Circuits. Part IV will focus on the recent Supreme Court decision in *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, which has clarified single-defendant removal suits. Part V will analyze how the problem should be corrected. Finally, Part VI will outline a proposed solution to best conform to the statutory language, congressional intent, and fairness to all parties.

II. STATUTORY BACKGROUND AND HISTORY OF § 1446

Section 1441 is the general removal statute. It explains that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction may be removed by the defendant or the defendants, to the district court of the United States"⁸

While § 1441 authorizes removal, § 1446 limits this procedure. Specifically, § 1446(a) states that "[a] defendant or defendants

7. See *McKinney*, 955 F.2d at 924 (holding that each individual defendant has thirty days from the time he or she is officially served); *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1263 (5th Cir. 1988) (finding that the failure of the first-served defendant to file or consent to a notice of removal within thirty days of service of process precludes all subsequently-served defendants from removal)

8. 28 U.S.C. § 1441(a) (1994).

desiring to remove any civil action . . . from a State court shall file . . . 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."⁹ Section 1446(b) adds further requirements by stating that

[t]he 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.¹⁰

Section 1446(b)'s wording has made it difficult for courts to determine the correct removal procedure. By stating that the thirty-day limitation period begins after "receipt by the defendant, through service or otherwise,"¹¹ a myriad of interpretations have developed as to the time the clock begins to tick.¹² Because the statute's "plain meaning" is not clear, it is necessary to look at the congressional intent behind § 1446(b)'s enactment.¹³

In 1948, Congress amended § 1446(b) to state that "the petition for removal of a civil action or proceeding may be filed within twenty days¹⁴ after commencement of the action or service of

9. *Id.* § 1446(a).

10. *Id.* § 1446(b).

11. *Id.*

12. *See* *Brierly v. Aluisse Flexible Packaging, Inc.*, 184 F.3d 527, 532 (6th Cir. 1999); *Reece v. Wal-Mart Stores, Inc.*, 98 F.3d 839, 841-42 (5th Cir. 1996); *McKinney v. Bd. of Trs.*, 955 F.2d 924, 928 (4th Cir. 1992); *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1263 (5th Cir. 1988); *Bowman v. Weeks Marine, Inc.*, 936 F. Supp. 329, 330 (D.S.C. 1996).

13. *See* *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 355 (1999) (stating that the Seventh Circuit's ability to read "or otherwise" differently in separate cases undermines the position that the phrase has an inevitable plain meaning); *see also* *Apache Nitrogen Prods., Inc. v. Harbor Ins. Co.*, 145 F.R.D. 674, 679 (D. Ariz. 1993) (holding that if the wording had a plain meaning, the cases would not be split over its interpretation).

14. Congress extended the period for removal from twenty days to thirty days in 1965. *See* Act of September 29, 1965, Pub. L. No. 89-215, § 1446(b), 79 Stat. 845, 887.

process, whichever is later."¹⁵ Prior to this enactment, § 1446(b) allowed removal to occur at any time before the defendant was required—by the laws of the state or the rule of the state court in which such suit was brought—to answer or plead.¹⁶ According to the House Report, the statute was amended to “give adequate time and operate uniformly throughout the Federal jurisdiction.”¹⁷

However, confusion, and a lack of uniformity, remained. State civil procedure requirements for personal service varied so greatly that vast differences in the timing of removal occurred.¹⁸ In addition, some states did not require a copy of the complaint to be sent to the defendant, creating even more uncertainty for the proper time limitation. In 1949, Congress amended this section again, to prevent “difficulty in States, such as New York, where suit is commenced by the service of a summons and the plaintiff’s initial pleading is not required to be served or filed until later.”¹⁹ Congress corrected this dilemma by providing that a petition for removal “need not be filed until twenty days after the defendant has received a copy of plaintiff’s initial pleading.”²⁰ Further, Congress noted that problems could also arise in other states where a copy of the pleading is not required to be served to the defendant.²¹ For example, in states where only an official summons, without receipt of the pleading, is required to commence a lawsuit, variances may also occur.

Thus, Congress clarified that the petition for removal within these states begins to run twenty days after service of the summons.²² Congressional hearings reinforced their intent. Congress stated that

[i]n some States suits are begun by the service of a summons or other process without the necessity of filing any pleading until later. As the section now stands, this places

15. Act of June 25, 1948, ch. 646, 62 Stat. 939, 939, *amended by* 28 U.S.C. § 1446(b) (1994).

16. *See generally* *Raymond’s, Inc. v. New Amsterdam Cas. Co.*, 159 F. Supp. 212, 214-15 (D. Mass. 1956) (discussing the 1949 revision of § 1446(b)).

17. H.R. REP. NO. 80-308, at A135 (1947).

18. *See, e.g.*, *Potter v. McCauley*, 186 F. Supp. 146, 148 (D. Md. 1960).

19. 28 U.S.C. § 1446(b) note (1994) (1949 Act Historical and Revision Note).

20. H.R. REP. NO. 81-352, at 14 (1949).

21. *See* S. REP. NO. 81-303, at 6 (1949).

22. *See* S. REP. NO. 80-308, at A135 (1947).

the defendant in the position of having to take steps to remove a suit to Federal court before he knows what the suit is about. As said section is herein proposed to be rewritten, a defendant is not required to file his petition for removal until 20 days after he has received . . . a copy of the initial pleading filed by the plaintiff setting forth the claim upon which the suit is based and the relief prayed for. It is believed that this will meet the varying conditions of practice in all the States.²³

A clear reading of the statute, in light of this intent, gives rise to four separate scenarios. In fact, almost every type of case will fall within these scenarios. First, if a copy of the complaint is served at the same time as the summons, the twenty-day period is deemed to commence at this time. Second, if the complaint is served on the defendant after service of process, the defendant receives twenty days from receipt of the complaint. Third, if the state does not require that the defendant receive a copy of the complaint, but the complaint was filed in court prior to service of process, the defendant is afforded twenty days after service of process. Lastly, if the service of process occurs in a state in which a copy of the complaint to the defendant is not required, and the complaint was not filed in court prior to service of process, the defendant is afforded twenty days from the date the complaint is filed in state court.²⁴

Courts, however, have read this amended statute erroneously.²⁵ Since Congress clarified that tolling for removal in states without a requirement to deliver to the defendant a copy of the complaint begins upon receipt of service of process, many districts interpreted the need for service of process as required only within these specific

23. S. REP. NO. 81-303, at 6.

24. *See* Potter v. McCauley, 186 F. Supp. 146, 149 (D. Md. 1960).

25. *Compare* Reece v. Wal-Mart Stores, Inc., 98 F.3d 839, 841 (5th Cir. 1996) (holding that removal period begins with receipt of a copy of the initial pleading through any means, not just service of process), *and* Roe v. O'Donohue, 38 F.3d 298, 303 (7th Cir. 1994) ("Once the defendant possesses a copy of the complaint, it must decide promptly in which court it wants to proceed."), *with* Bowman v. Weeks Marine, Inc., 936 F. Supp. 329, 333 (D.S.C. 1996) (holding that removal begins only upon proper service of process), *and* Baratt v. Phoenix Mut. Life Ins. Co., 787 F. Supp. 333, 336 (W.D.N.Y. 1992) (holding that proper service is a prerequisite to commencement of removal period).

states. This resulted in two alternative methods for computing the tolling of the thirty-day limitation. In the first scenario, notice must be filed within thirty days of receipt of a copy of the initial pleading, through service or otherwise. In the second scenario, notice must be filed within thirty days after the service of summons. If the initial pleading has been filed in court, service to the defendant is not required.²⁶

In the recent Supreme Court case of *Murphy Bros. v. Michetti Pipe Stringing, Inc.*,²⁷ the Court clarified the statute's meaning in relation to the first scenario. The Court stated that service of process was still required in all states.²⁸ The Court found that Congress's description of tolling after receipt of the initial pleading did not infer that service of process was not a necessary pre-requisite.²⁹ Instead, the Court determined that Congress's clarification for "atypical state commencement and complaint filing procedures, [never] intended to dispense with the historic function of service of process as the official trigger for responsive action by an individual or entity named defendant."³⁰

This clarification of congressional intent has aided in a better understanding of the meaning of § 1446(b). Congress has twice amended this statute to *prevent a time variance* in defendants' ability to remove to federal court.³¹ In 1948, the amendment was intended to prevent variable time allowances for a defendant to remove between different states.³² Similarly, Congress felt it was important enough to amend a second time, again to prevent discrepancy among timing in states where no initial pleading under state law needs to be served.³³ Thus, the congressional intent of § 1446(b) has each time been to maintain a uniform and fair system of removal for defendants

26. See 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 8.06 (3d ed. 1999).

27. 526 U.S. 344 (1999).

28. See *id.* at 352-53.

29. See *id.*

30. *Id.* at 353.

31. See *Raymond's Inc. v. New Amsterdam Cas. Co.*, 159 F. Supp. 212, 214-15 (D. Mass. 1956).

32. See *id.*

33. See H.R. REP. NO. 81-352, at 14 (1949).

in state actions that could also be brought in federal courts.³⁴ Thus, Congress has protected the original purpose of § 1446(b), namely, to provide each defendant with a specific amount of time to remove, and to protect defendants against variable time allotments.³⁵

The problem that must now be addressed is how § 1446 should be interpreted in multiple-defendant lawsuits. Multiple defendants produce an even greater plethora of dilemmas: (1) If the complaint is filed, and only the first defendant has been served, is this sufficient to begin the thirty-day tolling for all future defendants who have not yet been served?; (2) Does the later-served defendant's tolling time to *join* in another's removal petition begin to tick on the service of the first defendant, rather than his or her own service date?; and (3) Can the later-served defendant initiate a petition for removal within thirty days of his or her service, or will the rule of unanimity, discussed below, preclude any removal after the first-served's tolling time expires, thereby thwarting the possibility for any defendant served more than thirty days after the first to petition to remove? These questions all stem from the confusion over whether later-served defendants have any removal rights within a lawsuit. Congress's intent behind its statutory amendments should be closely examined when interpreting each defendant's right to remove in a multiple-defendant lawsuit.

As mentioned above, the purpose of the congressional amendments is to afford defendants with a fair, uniform amount of time to remove.³⁶ It is unlikely that Congress would have intended to allow for one defendant's removal rights to be stripped based on the time that another defendant is served by the plaintiff. In fact, serving only one defendant and binding many others in a suit is the same type of unfairness Congress tried to prevent in single-defendant lawsuits by twice amending § 1446(b).

III. THE SPLIT AMONG CIRCUIT COURTS OVER § 1446(b) AND MULTIPLE-DEFENDANT LAWSUITS

Several circuit courts have applied the time limitation for removal in multiple-defendant lawsuits differently. Specifically, the

34. See H.R. REP. NO. 80-308, at A135 (1947).

35. See *id.*

36. See *id.*

Fourth, Fifth, and Sixth Circuits have addressed this issue.³⁷ The analyses of the Fourth and Sixth Circuits are in agreement, and both have developed a fair interpretation of the statute.³⁸ The Fifth Circuit, however, took a different approach.

The Fifth Circuit concluded that proper service or delivery of the complaint to one defendant, as required by § 1446(b), was sufficient to commence the tolling time for removal of every potential defendant in the suit.³⁹

The Fourth and Sixth Circuits, however, rejected this mentality and required that each defendant be individually afforded the proper § 1446(b) requirement of thirty days before their time for removal expires.⁴⁰ Because many circuits have not yet addressed this issue, it is important to closely scrutinize these first-impression cases and clarify which circuit's analysis is most akin to the statute's construction, Congress's intent, and fairness to all parties.

A. *The Limiting Approach of the Fifth Circuit*

1. The Fifth Circuit's decision in *Getty Oil*⁴¹

The Fifth Circuit has held that removal for multiple defendants under § 1446(b) must occur within thirty days of the first-served defendant.⁴² *Getty Oil* is the Fifth Circuit's leading case on this issue.

In *Getty Oil*, the court had to decide whether a later-served defendant is allowed thirty days after receipt of service to join in the

37. See *Brierly v. Alusiusse Flexible Packaging, Inc.*, 184 F.3d 527, 532 (6th Cir. 1999) (stating that this issue was one of first impression for the Sixth Circuit and was one that has divided sister courts); *McKinney v. Bd. of Trs.*, 955 F.2d 924, 926 (4th Cir. 1992) (indicating that "[t]here are very few reported cases on point, and [that] only [the Fifth Circuit] ha[d] addressed [the] issue"); *Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir. 1986) (stating that "[n]o appellate court has yet decided whether defendants who have waived the right to seek removal directly are also precluded from joining in a removal petition").

38. See *Brierly*, 184 F.3d at 533 (noting that the policy considerations of the Fourth Circuit are equally applicable to the facts before the Sixth Circuit).

39. See *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254 (5th Cir. 1988).

40. See *Brown*, 792 F.2d at 481.

41. *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254 (5th Cir. 1988).

42. See *id.* at 1263.

first-served defendants' petition for removal, or whether that later-served defendant must join within the first served's thirty-day time limitation.⁴³

Plaintiffs filed an action against three separate defendants. The first defendant, Insurance Company of North America (INA), was served on September 3, 1986. The second defendant, Companies Collective (CC), was served on September 5 of the same year, and the third defendant, NL Industries, Inc. (NL), was served on September 24.⁴⁴ On September 26, 1986, both INA and CC filed to remove to federal court. The last-served defendant, NL, joined this petition on October 24, 1986.⁴⁵ Thus, NL joined in the removal thirty days after it was served, but fifty-one days after the *first* defendant was officially served.⁴⁶

The plaintiffs argued that the removal attempt was improper under § 1446(b), since NL joined fifty-one days after the first-served defendant.⁴⁷ Plaintiffs contended that under the wording of § 1446(b), defendants only have thirty days to remove from the time the first defendant is served.⁴⁸ Defendants argued to the contrary. They interpreted § 1446(b) to afford a thirty-day time period from the time *each individual defendant* is served, not merely the first served in the matter.⁴⁹

The court ruled in favor of the plaintiffs.⁵⁰ It stated that “[i]n cases involving multiple defendants, the thirty-day period begins to run as soon as the *first* defendant is served”⁵¹ The court expressed that this rule “promotes unanimity among the defendants without placing undue hardships on subsequently served defendants.”⁵² In addition, the court emphasized that fairness to the defendants is even more protected since the later-served defendant may

43. *See id.* at 1262.

44. *See id.* at 1256.

45. *See id.*

46. *See id.* at 1262 n.11.

47. *See id.* at 1261.

48. *See id.* at 1261-62.

49. *See id.* at 1262.

50. *See id.* at 1263.

51. *Id.* at 1262-63 (emphasis added); *see also* *Brown v. Demco, Inc.*, 792 F.2d 478, 481-82 (5th Cir. 1986) (applying the same “first served defendant” rationale).

52. *Getty Oil Corp.*, 841 F.2d at 1263.

always remand the case if the first-served defendant decided to remove it.⁵³

The fact that the circuit court believed that the defendant's ability to remand was fair tends to minimize its rationale. If it is fair for the later-served defendant to remand a case after he or she has been brought into the suit, it would follow that a later-served defendant's ability to remove would also promote such fairness.

Instead, the court interpreted the statute to apply only to the first-served defendant in the matter.⁵⁴ The court seemed to hide behind the idea of strict statutory construction in support of its decision. The court stated that "by restricting removal to instances in which the statute clearly permits it, the rule is consistent with the trend to limit removal jurisdiction and with the axiom that the removal statutes are to be strictly construed against removal."⁵⁵

While strict statutory construction is always important, it should not be cited as a rationale for promoting an illogical conclusion. The idea of strict construction of the statute is only to insure that removal does not frivolously occur.⁵⁶ However, the congressional intent of § 1446(b) is to give adequate time for removal to defendants, and this intent should carry a heavier weight than any idea of narrow construction.⁵⁷ In truth, had the Fifth Circuit applied a strict construction of the statute, they would have never been able to add the word "first" before "defendant."

The Fifth Circuit elaborated that this "first-served defendant rule" allowed unanimity to prevail without burdening any later-served defendant with undue hardship.⁵⁸ That, however, is not the case. Situations may now arise in which later-served defendants will be forced to decide on removal without a proper amount of time to consider it. Thus the Fifth Circuit's decision may now allow many unjust situations to occur.

For example, suppose that a plaintiff serves defendant-one on day one. The plaintiff then waits until day twenty-nine to serve

53. *See id.*

54. *See id.*

55. *Id.* at 1263 n.11 (quoting *Brown*, 792 F.2d at 482).

56. *See* 28 U.S.C. § 1446(b) note (1994) (1949 Act Historical and Revision Notes).

57. *Id.*

58. *See Getty Oil Corp.*, 841 F.2d at 1263.

defendant-two. While the first defendant has a full thirty days to decide whether he or she wants to remove from state to federal court, the second defendant is only afforded two days to make the same decision. If defendant-two does not join the first defendant's removal petition within those two days, his or her right to remove has been waived, and removal to federal court has thus been thwarted.⁵⁹ The plaintiff can therefore strategically choose to serve a second or third defendant late within the initial defendant's thirty-day time limitation, causing severe hardship to the later-served defendant's ability to decide whether they want to remove.

When the above situation is read in light of the clear congressional intent to provide "adequate time"⁶⁰ for defendants to remove, it is clear that the Fifth Circuit's decision goes blatantly against what Congress had intended. The idea that a statute is to be strictly construed should not be used as a rationale to contravene the statute's specific purpose.

Thus, the Fifth Circuit's analysis provides the plaintiff with a strategic federal forum-preclusion statute to thwart a defendant's attempt to remove to a federal forum if they so desire. Because later-served defendants are stripped of their rights under this analysis, the Fifth Circuit's ruling should not be followed by other circuits.

2. The Fifth Circuit's decision in *Brown v. Demco*

In *Brown*, decided two years before *Getty Oil*, the court decided whether a later-served defendant could initiate a petition to remove after the first-served defendant's thirty days have expired.⁶¹ The same policy concerns found in *Getty Oil* apply here.

In *Brown*, plaintiff Billy Brown was injured while working on an oil rig in Louisiana.⁶² Brown filed the action in state court in

59. For an in-depth discussion of the inadequacies of the Fifth Circuit's interpretation of § 1446(b), see generally Derek S. Hollingsworth, Comment, *Section 1446: Remediating the Fifth Circuit's Removal Trap*, 49 BAYLOR L. REV. 157 (1997).

60. See *McKinney v. Bd. of Trs.*, 955 F.2d 924, 928 (4th Cir. 1992); *supra* notes 31-35.

61. See *Brown*, 792 F.2d at 481.

62. See *id.* at 480.

1980.⁶³ Five years later, in 1985, Brown decided to add another defendant, FMC Corporation (FMC), to the lawsuit.⁶⁴

FMC quickly petitioned to remove to federal court within thirty days of service of process.⁶⁵ The tolling time for the previously served defendants, however, had well expired. It was far past thirty days from the initial defendant's time of service, back in 1980.⁶⁶ The plaintiff then filed a motion to remand the case back to state court, which the district court denied.⁶⁷ The Fifth Circuit Court of Appeal, however, reversed the trial court, and remanded the case back to Louisiana state court.⁶⁸

The court's rationale centered around the rule of unanimity.⁶⁹ The rule of unanimity provides that "for a notice of removal to be properly before the court, all defendants who have been served or otherwise properly joined in the action must either join in the removal, or file a written consent to the removal."⁷⁰ This rule has been interpreted to mean different things.⁷¹ This court held that, under this rule, a defendant who did not successfully petition within their thirty-day time allotment has in effect "waived" their ability to join or consent in another defendant's removal petition.⁷² Thus, the earlier-served defendants in this case were prevented from consenting to FMC's petition to remove. Since FMC needed all defendants to consent, their removal petition was defective, and thus could not be granted.

63. *See id.*

64. *See id.* (FMC manufactured the specific product that caused the injury).

65. *See id.*

66. *See id.* at 481.

67. *See id.* at 480.

68. *See id.* at 482.

69. *See id.* at 481-82.

70. *Brierly v. Alusiusse Flexible Packaging, Inc.*, 184 F.3d 527, 533 n.3 (6th Cir. 1999).

71. *See* 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3732 (3d ed. 1998) (recommending that a later-served defendant should receive thirty days to remove). *But see* 16 MOORE, *supra* note 26, ¶ 107.30[3][a] (recommending that the time limit should begin to run against all defendants from the time the first defendant is served).

72. *See Brown*, 792 F.2d at 481.

Under *Brown's* interpretation, no defendant served thirty days after the first defendant, without "exceptional circumstances,"⁷³ would be able to exercise his right to remove the case. The first-served defendant's inability to consent under the interpretation of the unanimity rule would prevent such removal. This analysis may promote unethical tactics by the plaintiffs. For example, under this interpretation, any plaintiff can serve the defendant least likely to consider removal first. The plaintiff can then wait for the thirty-day limitation to pass, and serve the second defendant who would potentially have a greater desire to remove to federal court. The plaintiffs are thereby ensured of a state court trial resulting from a "technicality."

The decision in *Brown*, similar to that in *Getty Oil*, strips the rights of later-served defendants. Such an interpretation of a statute goes against the congressional intent of the statute as well as any notion of fair play.

B. A More Reasonable Interpretation, as Provided by the Fourth Circuit

The Fourth Circuit was presented with the same multiple-defendant removal issue in 1992.⁷⁴ This circuit, however, realized the unfairness of the Fifth Circuit's analysis and chose to interpret § 1446 more favorably for the defendant.⁷⁵

In *McKinney v. Board of Trustees*, the plaintiffs consisted of a group of former employees of Mayland Community College.⁷⁶ They filed suit against the defendants alleging wrongful discharge from their job positions.⁷⁷ The plaintiffs served three out of the twelve defendants on April 25, 1988.⁷⁸ They served eight more defendants

73. *Id.* at 482. The term "exceptional circumstances" is not defined by this court. However, a time-limit exception for later-served defendants for exceptional circumstances is beyond the scope of this Comment.

74. *See McKinney v. Bd. of Trs.*, 955 F.2d 924 (4th Cir. 1992).

75. *See id.* at 928.

76. *See id.* at 925.

77. *See id.*

78. *See id.*

twenty-four days later, on May 19.⁷⁹ One of the later-served defendants did not join in the removal until June 20.⁸⁰

The plaintiffs filed a motion to remand the case based on untimeliness under § 1446(b).⁸¹ The issue in question was whether that defendant had to file for removal by May 25—six days after personally being served, but thirty days after the first defendant had been served.⁸²

The district court denied the plaintiff's motion for remand.⁸³ The district court noted that the language of the statute did not refer to the defendants collectively, but rather only spoke to individual defendants.⁸⁴ The court went on to state that Congress was "quite capable of using the plural when that is what it meant, as it did in § 1441(a)'s reference to 'the defendant or defendants'."⁸⁵ From this, the court decided that the statute should be read as viewing "receipt by the defendant in question."⁸⁶ While clarifying that the statute does not refer to defendants collectively, the court also emphasized that it would be awkward to read the statute to state "receipt by the defendant first served,"⁸⁷ as was done in *Getty Oil*.⁸⁸ Thus, the court decided the plaintiff's motion to remand, viewing the question in light of the "receipt by the defendant in question" requirement, and denied the motion.⁸⁹

79. *See id.*

80. *See id.*

81. *See id.*

82. *See id.* at 925 n.2. It is important to note that because this defendant was served on May 19, his thirty-day time limitation would have expired on June 18. However, this date fell on a Saturday, and thus the defendant had until the following Monday, June 20, to remove.

83. *See id.* at 925.

84. *See id.* at 926.

85. *Id.*

86. *Id.*

87. *Id.*

88. *See id.* at 927; *see also* *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1253, 1263 (5th Cir. 1988) (holding that the thirty-day period begins to run as soon as the first defendant is served); *McKinney v. Bd. of Trs.*, 713 F. Supp. 185, 188-89 (W.D.N.C. 1989) (stating that the word "defendant" refers only to notice to an individual defendant).

89. *McKinney*, 713 F. Supp. at 190.

The Court of Appeals in *McKinney* affirmed the district court's decision.⁹⁰ They did not, however, wholly adopt the district court's analysis. The appellate court did not agree that the inclusion of multiple defendants within the rule was clear enough to state that "Congress was quite capable of using the plural when that is what it meant."⁹¹ Rather, they found that the language of § 1446(b) does not answer the question presented.⁹²

To determine the issue at hand, the court therefore correctly referred to other authority. While legislative history did not explicitly address the question of multiple defendants being served on different days,⁹³ the court was willing to look to the congressional intent to determine the rationale for § 1446(b).⁹⁴ The legislative history indicated that "Congress created the removal process to protect defendants."⁹⁵ For example, the court mentioned the recent amendment to § 1446(a) that allowed Rule 11 of the Federal Rules of Civil Procedure to now apply.⁹⁶ The appellate court found this amendment to be another indication of Congress's intent in amending the statute. The court stated that under this new amendment, to follow the "first-served" defendant rule would possibly subject the later defendants to Rule 11 sanctions.⁹⁷ The court further stated that "Congress surely did not intend to impose such a Hobson's choice on later served defendants."⁹⁸

The court next looked at the only applicable case law on point. In *Getty Oil*, the court ruled that strict construction of the statute incorporated the word "first" in front of the word "defendant" to determine how the statute specifically applied.⁹⁹

90. See *McKinney*, 955 F.2d at 928.

91. *Id.* at 926.

92. See *id.*

93. See *id.*

94. See *id.* at 927-28.

95. *Id.* at 928.

96. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016(b), 102 Stat. 4642, 4669 (1988); *McKinney*, 955 F.2d at 928 (stating that if a later-served defendant is given only a few days to join in a removal, the defendant would be subjecting himself to an increased risk of sanctions under Rule 11).

97. See *McKinney*, 955 F.2d at 928.

98. *Id.*

99. See *Getty Oil*, 841 F.2d at 1262-63.

The court in *McKinney* addressed the analysis used in the *Getty Oil* decision as follows:

We do not find the *Getty Oil* conclusion to be logical. While the first served defendant clearly must petition for removal within thirty days, section 1446(b) does not imply in any way that later served defendants have less than thirty days in which to act. Although the *Getty Oil* court stated that its rule “promotes unanimity among the defendants”, “unanimity” appears to be an inappropriate word choice. Rather, in establishing one fixed deadline for defendants served as much as thirty days apart, a better term for what the *Getty Oil* rule could lead to is “inequity.” We do not think that Congress in providing for removal to federal court, intended to allow inequitable results. Nor do we believe that it is appropriate for a court to add a word to a statute, as the *Getty Oil* opinion does by in effect inserting “first” before the word “defendant.”¹⁰⁰

The court in *McKinney* instead held that the thirty-day time limitation under § 1446(b) meant that each individual defendant has thirty days from the time he or she is individually served to petition for removal.¹⁰¹ Thus, the defendant properly joined in the removal on June 20, within the thirty-day time limit.

In coming to this decision, the *McKinney* court took a much more deliberate approach to interpreting § 1446(b). First, the court addressed the concern that a thirty-day limitation running only from the service of the first defendant would promote tactical service of process by the plaintiffs.¹⁰² The court explained that

[t]he rule that the plaintiffs advance would make it possible for a great injustice to take place The rights of defendants . . . could be . . . easily overcome by tactical maneuvering by plaintiffs. . . . This cannot be what Congress had in mind. Congress created the removal process to protect

100. *McKinney*, 955 F.2d at 926-27 (citation omitted) (explaining that this Fifth Circuit case is the only persuasive authority to this court, and because the court is not persuaded, it does not have to follow its logic and may instead look to policy concerns).

101. *See id.* at 927-28.

102. *See id.*

defendants. It did not extend such protection with one hand, and with the other give plaintiffs a bag of tricks to overcome it.¹⁰³

The Fourth Circuit clearly understood the procedural trap that the Fifth Circuit's argument would create and ruled appropriately.

C. The Sixth Circuit's Interpretation of Tolling for Later-Served Defendants

The Sixth Circuit was presented with the exact same issue in *Brierly v. Alusuisse Flexible Packaging, Inc.*¹⁰⁴ Paul Brierly was killed in an explosion in defendant's packaging plant in 1993, and his estate brought a wrongful death action in state court.¹⁰⁵ Alusuisse and David Ellison were named as defendants in the suit.¹⁰⁶ Alusuisse was served on the same day the complaint was filed, but Ellison was not served until late October, 1995.¹⁰⁷ Alusuisse unsuccessfully tried to remove the case within his thirty-day time limit.¹⁰⁸

After being served with an amended complaint in November, 1995, Ellison attempted to remove the action to federal court, with Alusuisse's consent, twenty days after being served.¹⁰⁹ The district court denied the motion to remand, and the decision was appealed.¹¹⁰ The appellate court affirmed the district court's decision.¹¹¹

The appellate court relied on the Fourth Circuit's ruling in *McKinney* to affirm.¹¹² Although the facts in *McKinney* dealt with the later-served defendant's *joinder* in a removal petition, the court felt that the underlying policy reasons were exactly the same.¹¹³

The court in *Brierly* focused on the Fourth Circuit's reference to § 1446(a)'s amendment to support its conclusion. In 1988, Congress amended § 1446(a) to allow for removal petitions to be subject to

103. *Id.* (quoting the district court's wording in its opinion).

104. 184 F.3d 527 (6th Cir. 1999).

105. *See id.* at 529.

106. *See id.*

107. *See id.* at 531.

108. *See id.*

109. *See id.*

110. *See id.*

111. *See id.*

112. *See id.* at 536.

113. *See id.*

Rule 11 of the Federal Rules of Civil Procedure.¹¹⁴ The court pointed out that in light of the amendment, the later-served defendant must be granted thirty days from the time of summons to decide whether or not to remove to federal court. If not given that reasonable amount of time, later-served defendants would be forced to either join hurriedly in the first-served defendant's petition for removal and face Rule 11 sanctions, or forego any chance for removal.¹¹⁵ The court also argued that if the plaintiff were to know early in the proceedings whether the case will be heard in state or federal court, they can "make sure that all defendants are served at about the same time."¹¹⁶

The court in *Brierly* not only relied on the Fourth Circuit's cogent policy reasons, but also relied on strict construction of the statute itself.¹¹⁷ Unlike the "strict construction" applied in *Getty Oil*, the court did not add any words to the statute. The court stated that to measure tolling for removal only from the time the first defendant is being served, one would have to voluntarily insert the word "first" in front of "defendant" within the statute.¹¹⁸ The court was unwilling to relegislate the statute in that matter. The court explained that if Congress intended for tolling to be allowed only at the onset of the first defendant's service, it could have provided such instruction.¹¹⁹

Brierly's decision held that "as a matter of fairness to later-served defendants," all defendants must have thirty days from the date of their service to remove to federal court.¹²⁰ Looking strongly toward fairness, as is seen also in the Supreme Court decision of *Murphy*, the Congress's rationale, and the Fourth Circuit's prior decision, *Brierly* correctly ruled that later-served defendants should have the same removal tolling rights as any other defendant.

114. *See id.* at 533.

115. *See McKinney v. Bd. of Trs.*, 955 F.2d 924, 928 (4th Cir. 1992). For further discussion on Rule 11's application to removal, see Hollingsworth, *supra* note 59, at 157.

116. *Brierly*, 184 F.3d at 533.

117. *See id.*

118. *See id.*

119. *See id.*

120. *Id.*

IV. THE CLARIFICATION BROUGHT TO § 1446(b) AND SINGLE-DEFENDANT LAWSUITS

To understand the contention with § 1446(b) in multiple-defendant lawsuits, it is important to first understand its implications in single-defendant lawsuits. An inquiry into the Court's rationale for single defendants can better explain how § 1446(b) should best be interpreted when more than one defendant is involved, in accord with congressional intent.

The most involved case on this issue is *Murphy Bros. v. Michetti Pipe Stringing, Inc.*¹²¹ In this case, the United States Supreme Court reaffirmed that Congress's intent was never to hold that a copy of the initial pleading alone was sufficient to trigger a defendant's tolling time. Service of process was still a necessary factor.¹²²

Michetti Brothers Pipe Stringing, Inc. ("Michetti"), a Canadian company, brought suit against Murphy Brothers ("Murphy") for breach of contract and fraud.¹²³ Michetti filed the complaint on January 26, 1996. On January 29, the plaintiffs sent a "courtesy copy" of the complaint to the defendant via facsimile.¹²⁴ It was not until February 12 that the plaintiffs were officially served with the summons.¹²⁵ On March 13, thirty days after the official service and forty-four days after the "courtesy copy," defendant removed the case to federal court.¹²⁶ Plaintiff filed a motion to remand, contending that the defendant did not remove within the thirty-day time limitation period.¹²⁷

The district court denied plaintiff's motion to remand.¹²⁸ It stated that official service of process was still a necessary component to trigger the removal time limitation.¹²⁹ The court held that the phrase "receipt by defendant, through service of otherwise, of a copy of the initial pleading settling forth the claim" within § 1446(b)

121. 526 U.S. 344 (1999).

122. *See id.* at 350.

123. *See id.* at 344.

124. *See id.*

125. *See id.*

126. *See id.*

127. *See id.*

128. *See id.* at 349.

129. *See id.*

applied only to states where an action is commenced by service of a summons, with no requirement to serve a complaint.¹³⁰ Since Alabama was not a state that allowed the commencement of a lawsuit without a copy of the complaint being served on the defendant, this phrase had no "field of operation" in the suit.¹³¹

On interlocutory appeal, however, the court reversed, and instructed the district court to remand the case back to state court.¹³² The appellate court's rationale was much different than the rationale of the district court. Specifically, the court held that the "clock starts to tick upon the defendant's receipt of a copy of the filed initial pleading" because of the wording of the statute.¹³³ In the words of the appellate court, their analysis "beg[an] and end[ed] with the words 'receipt . . . or otherwise.'"¹³⁴ In the court's view, "the term 'receipt' is the nominal form of 'receive', which means broadly 'to come into possession of' or 'to acquire'."¹³⁵ From this "plain meaning" the court held that the interpretation of § 1446(b) does not include the service of process.¹³⁶

Interestingly, the differing opinions between the district court and the interlocutory appellate court represent the division among courts over how to resolve the wording of § 1446(b) in single-defendant lawsuits.

The United States Supreme Court granted certiorari to clarify the situation.¹³⁷ The Court began its analysis by discussing the importance of service of process within the judiciary. The Court emphasized that service of process is fundamental to any procedural imposition by the courts.¹³⁸ In fact, in the absence of service of process, the court can exercise no power over that party.¹³⁹ The Court

130. *See id.*

131. *See id.*

132. *See id.*

133. *See id.*

134. *Michetti Pipe Stringing, Inc. v. Murphy Bros.*, 125 F.3d 1396, 1398 (11th Cir. 1997).

135. *Id.*

136. *See id.*

137. *See Murphy Bros.*, 526 U.S. at 349.

138. *See id.* at 350.

139. *See id.*; *see also* *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987) (stating that a federal court has no personal jurisdiction over a defendant who has not been officially served); *Miss. Publ'g Corp.*

further added that it is not possible to force a party who has not been officially brought under the power of the court to decide whether or not to remove a case.¹⁴⁰ As such, the Court explicitly called the summons the “sine qua non” which requires a party to participate in a civil action.¹⁴¹

Thus, without service of process, a court has no power over a person named within a lawsuit, and as such, that party cannot be made to act within that suit. It is hardly fair that a party who is outside the court’s jurisdiction be forced to decide whether or not to remove to federal court when they are not an official party in the eyes of the court.

To make its point, the Supreme Court moved beyond the rationale of procedure and into the congressional intent of § 1446(b). The Court stated that Congress had no intent to change the traditional understanding of § 1446 with its 1949 amendment.¹⁴² The inclusion of the phrase “or otherwise” after “service” was not placed there to minimize the necessity of service of process. Rather, it was only included for the benefit of those states which did not require the filing of the complaint before the summons for the lawsuit to officially commence.¹⁴³ Congress felt that it was still necessary for the defendant to receive some notice of the complaint before his time to remove the suit began to run.¹⁴⁴

Since the Court found that there was no legislative intent to abolish service of process as the trigger for tolling time, the Court interpreted the statute to incorporate service of process as an essential element in the tolling of defendant’s time to remove.¹⁴⁵

Thus, the Court clarified the rationale of § 1446(b) by looking both to the procedural rationale, as well as Congress’s intent behind

v. Murphree, 326 U.S. 438, 444-45 (1946) (stating that service of summons is the procedure required for a court to assert jurisdiction over the person of the party served).

140. *See Murphy Bros.*, 526 U.S. at 350.

141. *See id.* at 351.

142. *See id.* at 352-53.

143. *See id.* at 351.

144. *See id.* at 352 (stating that within the Senate report, Congress expressed its concern that in such states, the defendant may not be assured access to the complaint before being asked to act under § 1446(b)); *see also* S. REP. NO. 81-303, at 6 (1949).

145. *See Murphy Bros.*, 526 U.S. at 353.

its amendment. Through both inquiries, the Court found that service of process was still needed before a court could mandate a defendant's petition to remove within a thirty-day limitation. The Court completed its analysis by citing to *Potter v. McCauley*.¹⁴⁶ The Court clarified the removal statute to the extent that it explicitly writes out the four potential situations for service of process as discussed in *Potter*.¹⁴⁷

Since the Court in *Murphy Bros.* clarified the tolling situation in single-defendant lawsuits, this case may be used to better understand the application of § 1446(b) to lawsuits involving multiple defendants. In applying the *Murphy Bros.* reasoning to multiple-defendant lawsuits, Congress's intent, which "assure[s] defendants adequate time to remove an action to federal court,"¹⁴⁸ will not be misinterpreted.

V. INCORPORATING *MCKINNEY*, *BRIERLY*, AND *MURPHY* TO DETERMINE THE BEST APPROACH TO REMOVAL IN MULTIPLE-DEFENDANT LAWSUITS

Several themes run through the above-mentioned decisions that indicate why the Sixth Circuit's rationale is the best interpretation of the statute. All of these cases, as well as Congress, speak to the importance of statutory construction, congressional intent, and most importantly, fairness to all parties involved.

A. *Statutory Construction*

Statutory construction is an issue mentioned in all the different interpretations of § 1446. The Supreme Court has noted that the language of any given statute is the "sole repository of congressional intent" when the language of the statute is clear and can be interpreted without commanding an absurd result.¹⁴⁹ When the language

146. 186 F. Supp. 146, 148 (D. Md. 1960).

147. See H.R. REP. NO. 80-308, at A135 (1947).

148. *Murphy Bros.*, 526 U.S. at 354.

149. *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 100-01 (1991); *Free v. Abbott Labs.*, 51 F.3d 524, 529 (5th Cir. 1995) (citing *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994)).

is unclear, however, or produces unjust results, courts are asked to view the legislative history when making an interpretation.¹⁵⁰

The Fourth Circuit's approach specifically states that § 1446(b)'s "statutory language by itself does not answer [the] question . . . because [it] only contemplates one defendant."¹⁵¹ Since the language of the statute is unclear, the court instead relied on past case law and congressional intent to determine the best interpretation. In addition, the court criticized the Fifth Circuit's interpretation of the statute in *Getty Oil*, specifically its willingness to add words to § 1446(b).¹⁵² The court stated that it was "inappropriate" for any court to arrive at an opinion by, in effect, inserting a word into a statute. *Getty Oil* should never have inserted the word "first" before "defendant"; it goes against any idea of strict statutory construction. Similarly, the court in *Brierly* did not want to contort the language of the statute. "[A]s a matter of statutory construction, holding that the time for removal commences for all purposes upon service of the first defendant would require us to insert "first" before "defendant" into the language of the statute. Furthermore, we are naturally reluctant to read additional words into the statute."¹⁵³ Instead, the court read the statute as it is written, which does not address the problem of tolling in multiple-defendant lawsuits. The court in *Brierly* also stated that "if Congress had intended the thirty-day removal period to commence upon service of the first defendant, it could have easily so provided."¹⁵⁴ Both *Brierly* and *McKinney* correctly abstained from adding words into a statute to facilitate a decision, and instead relied on the actuality that the statute does not clearly address the problem in its wording.

Clearly, this strict statutory construction demands the courts to look more closely into congressional intent to determine the correct interpretation. These cases all show that Congress's intent is to allow each defendant thirty days from the time of their individual service of process.

150. See *McKinney v. Bd. of Trs.*, 955 F.2d 924, 926 (4th Cir. 1992).

151. *Id.*

152. See *id.*

153. *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999).

154. *Id.*

B. Congressional Intent

Congress's main intent, as viewed through these cases, has been to prevent the time limitation from allowing unjust results. For example, the Fourth Circuit rejected the *Getty Oil* decision for one thirty-day deadline by stating that they "do not think that Congress, in providing for removal to federal court, intended to allow inequitable results."¹⁵⁵ Congress, in fact, did not intend for inequity to occur, but instead expressed that their intent was to give an adequate time for removal and for it to operate uniformly.¹⁵⁶ This is proven by Congress's actions. It took two separate amendments to the statute in attempts to reach such uniformity.¹⁵⁷ In 1948, the amendment's purpose was to create a uniform time of removal that could be followed by all the states.¹⁵⁸

Another amendment occurred a year later specifically because uniformity in tolling did not prevail.¹⁵⁹ The laws of some states created a timing loophole that allowed different states' removal statutes to have less than thirty days. Congress went to the trouble, only one year after the first amendment, to ensure that the defendants in all states had at least thirty days.¹⁶⁰ If Congress went to such trouble to afford each defendant in different states thirty days to consider removal, it clearly follows that the congressional intent for each defendant within a single lawsuit was to provide the same right.

The congressional amendment to § 1446 (a), as interpreted in both *Brierly* and *McKinney*, also lends credence to the idea that Congress intended each separate defendant to have a thirty-day tolling period. Under this amendment, Rule 11 of the Federal Rules of Civil Procedure was made applicable to § 1446.¹⁶¹ According to *Brierly* and *McKinney*, this amendment by Congress suggests that there is no way Congress intended for later-served defendants to receive a lesser

155. *McKinney*, 955 F.2d at 927.

156. *See supra* notes 30-35.

157. *See supra* note 31.

158. Act of June 25, 1948, ch. 646, 62 Stat. 939, 939, *amended by* 28 U.S.C. § 1446(b) (1994).

159. *See* H.R. REP. NO. 80-308, at A135 (1947).

160. *See supra* notes 31-35.

161. *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016(b), 102 Stat. 4642, 4669 (1988) (making improvements to the former removal procedure).

amount of time to remove. To do so would force that defendant, through no fault of his or her own, to join in a first-defendant's petition, potentially before even being served, or join hurriedly after being served. Either way, that defendant may face potential Rule 11 sanctions.¹⁶²

That Congress included § 1446 within the purview of Rule 11 further indicates that there was never an intent for the Fifth Circuit's staunch approach to apply.

The analysis by the Supreme Court in *Murphy Bros.* also brings us to the same conclusion. In *Murphy Bros.*, the Court interpreted the phrase "service or otherwise" found within § 1446(b).¹⁶³ The Court had to decide whether a courtesy copy of the complaint without a summons was sufficient to begin the tolling period for removal. The Court interpreted this phrase as added by Congress for states that did not require a filing of the complaint.¹⁶⁴ The Court stated that Congress simply added the wording "or otherwise" to create a uniform system for the tolling period.

There is nothing to make it appear that on the one hand, Congress would recreate a statute twice to ensure thirty days for defendants in all states, and would, on the other hand, intend for a later-served defendant to be deprived of that same right.

C. Fairness

As seen throughout the judicial system, fairness is one of the biggest factors in statutory interpretation. The Supreme Court in *Murphy Bros.* relied on the idea of fairness to determine that a defendant should be forced to consider removal before being officially served in the lawsuit. The Court based its decision on the fact that it is not possible to force a party, who has not officially been brought under the power of the court, to decide whether or not to remove a case.¹⁶⁵ Although this decision related to single-defendant lawsuits, the same rationale is at issue. If the Supreme Court believes that a single defendant should not be forced to consider removal when

162. *See id.*; *Brierly*, 184 F.3d at 533; *McKinney*, 955 F.2d at 928.

163. *See* *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999).

164. *See id.* at 353.

165. *See id.* at 350.

outside the court's jurisdiction, then surely the Court would find that a later-served defendant should also not be forced to consent or join in the first-served defendant's notice of removal, or file her own petition for removal, before she has officially been served. The same fairness considerations should apply. The Supreme Court's ruling in this case clearly suggests that the Court believes each defendant is required to have their own tolling period when considering a petition to remove.

Courts have also addressed the unanimity rule in discussing fairness to defendants within this process.¹⁶⁶ The unanimity rule states that all defendants must join in removal or consent to removal in order for it to be proper.¹⁶⁷ Many courts have restricted their removal opinions by an erroneous interpretation of this rule.¹⁶⁸ Many districts have interpreted this rule to find that if the first defendant does not attempt to remove within their thirty-day time period, they have in essence waived their right to remove and thus cannot consent to a later defendant's desire to remove.¹⁶⁹ This, however, is not the result the rule was intended to produce. Rather, the rule of unanimity *only* refers to the need for all defendants to unanimously agree that removal should occur. As the court in *Brierly* correctly concluded:

a first-served defendant can consent to a later-served defendant's removal petition, despite having already failed in its own efforts to remove . . . holding otherwise would vitiate the removal application of the later-served defendants and thereby nullify our holding that later-served defendants are entitled to thirty days to remove a case.¹⁷⁰

The Sixth Circuit clarified the meaning of unanimity and again stripped it of the clouded and untrue shroud that many courts have dressed it with.

Through the rationales of fairness, congressional intent, and statutory construction, it is clear that the Fourth and Sixth Circuits have construed the most plausible interpretation of § 1446(b). As

166. See, e.g., *Brierly*, 184 F.3d at 527; *Brown v. Demco, Inc.*, 792 F.2d 478, 478 (5th Cir. 1986).

167. See *Brierly*, 184 F. 3d at 533 n.3.

168. See, e.g., *Brown*, 792 F.2d at 478.

169. See *id.*

170. *Brierly*, 184 F.3d at 533 n.3 (citations omitted).

such, all circuits should follow this approach, and therefore allow each defendant thirty days from the time service is effectuated upon them, to remove to federal court. Even if the first-served defendant did not petition for removal, or was denied removal during his or her thirty-day limitation, the rule of unanimity does not require that the expiration of such time precludes him or her from consenting to a later-served defendant's removal petition.

VI. A PROPOSAL

As a result of a close introspection into these issues, a more clear rationale emerges. In terms of § 1446(b), courts should use a clear and uniform interpretation of the statute to attain the most equitable results. The courts thus must afford each defendant thirty days to remove starting from the time service of process is effected on that individual defendant. In order to work correctly, this requires that any previously-served defendant be allowed to consent to join in removal even after the expiration of their own thirty-day time limitation. This is not to infer that these earlier-served defendants have no time limitation for removal. Rather, once their thirty days has expired, the first-served defendants are no longer allowed to initiate a petition for removal. The rule of unanimity thus allows defendants to join or consent at any time another defendant is bringing suit. The only requirement under this rule is that all defendants sign onto the removal petition.

The application of section 1446(b) should provide defendants with the uniform time and uniform rights that it was intended to give. Under this construction, the congressional intent is satisfied, and fairness to all parties involved prevails. Until the Fifth Circuit and others follow this proposal, the courts will remain plagued by confusion, inconsistency, and injustice over the proper removal procedure.

*Barbara A. Wiseman**

* J.D. candidate, May 2001. I would like to thank Professor Georgene Vairo for her invaluable guidance not only with this Comment, but also throughout law school. I wish to thank my mother, Phyllis Wiseman, and the rest of my family, Mark, Judy, Kevin, and Eric Wiseman for their love and continuous support. I would also like to thank Fara Blecker for being such a great friend during this law school experience. This Comment is dedicated to

the memory of my father, Patrick F. Wiseman. I know he's with me every step of the way.