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# The Timeliness of Removal and Multiple-Defendant Lawsuits

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## THE TIMELINESS OF REMOVAL AND MULTIPLE-DEFENDANT LAWSUITS

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*Although the procedure for removing cases from state to federal court has existed for nearly 225 years, removal remains one of the most controversial aspects of federal jurisdictional law. Each year, more than 30,000 civil cases are removed from state to federal court, and many of those cases involve more than one defendant. One of the most frequently litigated issues in these cases has involved when the notice of removal must be filed. Prior to a recent amendment, the statute governing removal, 28 U.S.C. § 1446(b), required that a notice of removal be filed within thirty days of service on “the defendant.” Case law also requires all defendants to join in the notice of removal. The issue thus arose: when must the notice of removal be filed if the case involves multiple defendants who were served on different dates? The federal appellate courts have been sharply divided on this issue, with three very differing interpretations of the statute.*

*This article offers a critical analysis of all three strands of the case law, including three 2011 decisions by federal courts of appeals that take opposing views on the issue. After examining the rationale for each approach, I argue that the rule adopted by the Fourth Circuit—the so-called intermediate rule—offers the best fit with the statute’s language and policy and should be followed in any case governed by former Section 1446(b).*

*I also examine legislation recently enacted by Congress, the Federal Courts Jurisdiction and Venue Clarification Act of 2011, which has amended Section 1446(b) and codified one of the competing rules, the last-served defendant rule. I identify problems that permanent adoption of this rule will bring about, including significant delays that will occur in some cases in resolving the proper forum. I also identify ambiguities that the new law may create and suggest ways the courts might address those new interpretative issues.*

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## I. INTRODUCTION

Removal of cases from state to federal court is one of the most controversial and contentious aspects of federal jurisdictional law.<sup>1</sup> In recent years, one of the most divisive—and most litigated—issues regarding removal has concerned when a notice of removal must be filed in a case featuring more than one defendant.<sup>2</sup> The federal courts of appeals have been hopelessly divided on this issue, with three very different rules in play.<sup>3</sup> In just 2011 alone, three circuits weighed in on the issue, with the Third Circuit and the Ninth Circuit adopting one rule<sup>4</sup> and the Fourth Circuit, in a divided en banc ruling, maintaining its support for a much different rule.<sup>5</sup>

This divide and impasse arose from the language of 28 U.S.C. § 1446(b), which imposes a thirty-day time limit on removal.<sup>6</sup> Prior to a

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<sup>1</sup>See 16 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 107.03, at 107-20 (3d ed. 2011) (stating that of the three ways to invoke federal jurisdiction—by filing in federal court, by removal, or by seeking federal-court review of a state judgment—removal “is the most peculiar and difficult of the three”); Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 57 (2008) (noting that “the removal provisions are a convoluted scheme that lacks a single, uniform historical pedigree of consistent jurisdictional treatment”).

Each year since 2007, more than 30,000 civil cases have been removed from state to federal court, comprising nearly fifteen percent of the federal courts' new civil cases annually. See ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 50, Table S-7 (2010). The total number of civil cases removed in 2010 was 31,341, as compared with 190,543 original filings. *Id.* For an interesting study of the factors that influence decisions to remove a case, see Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369 (1992). For analysis of whether removal improves defendants' chance of prevailing, see 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 (1998).

<sup>2</sup>This article will focus on decisions by the federal circuit courts of appeals. For citation and discussion of the many district court opinions on this issue, see 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3731, at 479–617 (2009 & Supp. 2011); Brian Sheppard, Annotation, *When Does Period for Filing Petition for Removal of Civil Action from State Court to Federal District Court Begin to Run Under 28 USCS § 1446(b)*, 139 A.L.R. FED. 331, 458–68 (1997 & Supp. 2010–11).

<sup>3</sup>See *infra* Part III.

<sup>4</sup>*Delalla v. Hanover Ins.*, 660 F.3d 180, 189 (3d Cir. 2011) (adopting the last-served defendant rule); *Destfino v. Reiswig*, 630 F.3d 952, 956 (9th Cir. 2011) (also adopting the last-served defendant rule).

<sup>5</sup>*Barbour v. Int'l Union*, 640 F.3d 599, 613 (4th Cir. 2011) (en banc) (reaffirming, by 7-5 vote, use of the intermediate rule).

<sup>6</sup>See 28 U.S.C. § 1446(b) (2006).

recent statutory amendment, Section 1446(b) spoke only in the singular, stating that “the defendant” shall file its notice of removal within thirty days of service.<sup>7</sup> In cases of multiple defendants, the courts have interpreted the removal statutes to require unanimous consent to removal by each defendant.<sup>8</sup> The problem arose, however, with the thirty-day time limit: how did the limitation apply when a case involved two or more defendants who received service of process on different dates?

Three distinct interpretations of former Section 1446(b) emerged.<sup>9</sup> The Fifth Circuit adopted the most restrictive view.<sup>10</sup> The Fifth Circuit’s interpretation—known as the first-served defendant rule—requires that a notice of removal be filed within thirty days of service on the first defendant to be served, and further requires all other defendants who have been served by that date to join in the notice of removal.<sup>11</sup> Under this rule, subsequently served defendants may have a very short time frame in which to decide on removal.<sup>12</sup> At the other end of the spectrum, several circuits—including the Sixth, the Eighth, the Eleventh, and, as of 2011, the Third and the Ninth—have adopted the most liberal interpretation of former Section 1446(b), referred to as the last-served defendant rule.<sup>13</sup> Under this interpretation, the time deadline for removal does not begin to run until the last defendant has been served, and removal is proper as long as all defendants join in or consent to removal within thirty days of service on the

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<sup>7</sup> See *id.* (“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 . . .”). For the full text of this statute, see *infra* text accompanying note 49.

As a matter of terminology, I will refer to the pre-amendment version of the statute as “former Section 1446(b)” and to the amended version of the statute as “new Section 1446(b)(2)” or “amended Section 1446(b)(2).”

<sup>8</sup> See *infra* notes 44–47 and accompanying text (discussing the rule of unanimity).

<sup>9</sup> Compare *Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir. 1986) (adopting the first-served defendant rule), with *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1203 (11th Cir. 2008) (adopting the last-served defendant rule), and *Barbour*, 640 F.3d at 613 (reaffirming use of the intermediate rule).

<sup>10</sup> See *Brown*, 792 F.2d at 481 (holding that if the first-served defendant fails to remove, for any reason, subsequent defendants are barred from seeking removal).

<sup>11</sup> See *infra* notes 78–104 and accompanying text.

<sup>12</sup> See *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1263 (5th Cir. 1988) (“It follows that since all served defendants must join in the petition, and since the petition must be submitted within thirty days of service on the first defendant, all served defendants must join in the petition no later than thirty days from the day on which the first defendant was served.”).

<sup>13</sup> See *infra* notes 106–137 and accompanying text.

last defendant.<sup>14</sup> In 2011, the Fourth Circuit reaffirmed its use of yet a third rule.<sup>15</sup> Under the Fourth Circuit's interpretation—known as the intermediate rule—removal is proper as long as the first-served defendant files a notice of removal within thirty days of service and each later-served defendant joins in the notice of removal within thirty days of its respective service.<sup>16</sup> This rule is somewhat more generous than the first-served defendant rule, because it gives each defendant a full thirty days in which to decide whether to join in the notice of removal; however, the intermediate rule still requires the first-served defendant to file for removal within thirty days of service on that defendant, and the case will not be removable if that defendant fails to do so.<sup>17</sup>

With this seemingly irreconcilable three-way split, defendants in any of the federal circuits that had not addressed the timing issue faced a great deal of uncertainty. Commentators predicted that the Supreme Court ultimately would be called upon to resolve this split.<sup>18</sup>

Several differing proposals to clarify the statutory language through legislative amendment also were made.<sup>19</sup> After a number of prior unsuccessful attempts, Congress, as part of the Federal Courts Jurisdiction and Venue Clarification Act of 2011, recently amended Section 1446(b) and legislatively adopted the last-served defendant rule.<sup>20</sup> This legislation applies only to cases commenced after its date of enactment, however, and thus does nothing to resolve the uncertainty and split as to proper

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<sup>14</sup> See *Destfino v. Reiswig*, 630 F.3d 952, 956 (9th Cir. 2011).

<sup>15</sup> *Barbour v. Int'l Union*, 640 F.3d 599, 613 (4th Cir. 2011).

<sup>16</sup> See *infra* notes 138–196 and accompanying text.

<sup>17</sup> See *Barbour*, 640 F.3d at 613.

<sup>18</sup> See, e.g., 16 MOORE, *supra* note 1, § 107.30[3][a][iv][C], at 107-190.24(1) to 107-190.25 (predicting that the Court “may well, and should,” adopt the last-served defendant rule).

<sup>19</sup> See *infra* Part IV (discussing the recent legislative amendment). The American Law Institute (ALI) proposed that the statute be amended to codify the first-served defendant rule. See AM. LAW INST., FEDERAL JUDICIAL CODE REVISION PROJECT § 1446(b)(1) (2004) [hereinafter FJC PROJECT], discussed *infra* at notes 261–273 and accompanying text. The ALI's proposal would allow some leeway, though, for judges to make exceptions to the rule. See *id.* § 1446(b)(3), discussed *infra* at notes 270–273 and accompanying text. The Judicial Conference of the United States, however, recommended legislative adoption of the last-served defendant rule, and all of the subsequent bills introduced in Congress conformed to this recommendation. See *infra* notes 274–305.

<sup>20</sup> Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 103(b)(3)(B), 125 Stat. 758 (enacted Dec. 7, 2011) (to be codified at 28 U.S.C. § 1446(b)(2)).

interpretation of the former statutory language.<sup>21</sup> Moreover, the new clarifying language creates new ambiguities in the statute for the courts to address in future cases.<sup>22</sup>

This Article has two overall goals. First, by reviewing former Section 1446(b) and the conflicting interpretations of its language, I hope to suggest which interpretation is most consistent with the statute's language and policy. Second, I hope to identify any problems with the recent legislative adoption of the last-served defendant rule.

I begin in Part II by briefly reviewing the policy supporting removal, the circumstances in which removal is available, and the procedural limitations on removal. In Part III, I discuss the various interpretations that the federal courts of appeals have given to the language of former Section 1446(b) in the multiple-defendant setting and the rationale supporting each interpretation. I also evaluate the strengths and weaknesses of the various courts' rationales and analyze which interpretation of former Section 1446(b) best fits with the language and policy of that statute. Then, in Part IV, I discuss the recent legislative revisions to the statute and identify possible weaknesses or ambiguities in the amended statute.

In Part V, I conclude that the Fourth Circuit's intermediate rule offers the best fit with former Section 1446(b)'s language and policy, while also affording sufficient protection to the removal rights of defendants. Amended Section 1446(b)(2), on the other hand, goes too far in protecting defendants, will create unnecessary delays, and—contrary to its stated intention to clarify the law—will leave many significant interpretative issues for the courts to resolve.

## II. THE STATUTORY SCHEME GOVERNING REMOVAL

### A. *The Theory and Availability of Removal*

Although the United States Constitution makes no reference to removal of cases from state to federal court, Congress has provided for removal since the federal courts were first created.<sup>23</sup> The general theory underlying

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<sup>21</sup> See *infra* note 260 and accompanying text. As I discuss there, because orders denying motions to remand typically are not reviewable by appeal until a case has ended, appeals governed by former Section 1446(b) are likely to continue to arise for a number of years.

<sup>22</sup> See *infra* Part IV.C (discussing the ambiguities that will be created by the proposed language).

<sup>23</sup> See ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 5.5, at 354 (5th ed. 2007) (discussing

removal is that when a case is of a type that properly falls within the federal courts' limited jurisdiction, the defendant should have the same opportunity to avail itself of the benefits of federal jurisdiction as the plaintiff.<sup>24</sup>

Typically, the statutory right to remove a case exists whenever the plaintiff or plaintiffs could have brought their suit in federal court—the suit is one that would have fallen within the original jurisdiction of the federal court<sup>25</sup>—but chose to file in state court instead.<sup>26</sup> This generally requires either that the plaintiffs have asserted claims that arise under federal law or

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Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79–80); *see also* CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 38, at 224–25 (7th ed. 2011) (discussing history of removal statutes). The current statutory provisions governing removal are found in Title 28 of the U.S. Code, where they have resided since the 1948 recodification of the Judicial Code. *See* 28 U.S.C. §§ 1441–1453 (2006 & Supp. III 2009). They are “closely derived” from prior 1887 legislation, however. *See* WRIGHT & KANE, *supra*, § 38, at 225.

For general discussion of the circumstances in which removal may occur and the procedure for removal, *see* CHEMERINSKY, *supra*, § 5.5; WRIGHT & KANE, *supra*, §§ 38–41. For more comprehensive discussion, *see* 16 MOORE, *supra* note 1, ch. 107; 14B–14C WRIGHT ET AL., *supra* note 2, §§ 3721–3800.

<sup>24</sup>*See* *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816) (stating that the federal judicial power was granted “not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum”); 16 MOORE, *supra* note 1, § 107.03, at 107-20 (“[R]emoval statutes are designed to provide defendants with a federal forum to litigate federal claims and state claims with diverse parties.”). Removal is available only to defendants. *See* CHEMERINSKY, *supra* note 23, § 5.5, at 356. Therefore, a plaintiff may not change its mind and remove a case to federal court after filing it in state court. *See id.* Also, a plaintiff may not remove on the basis of a counterclaim asserted by a defendant. *See id.*

When a case is removed to federal court, it remains in the same general geographic area in which it was filed; the case simply moves from the state courthouse to the federal courthouse. *See* 28 U.S.C. § 1441(a) (2006) (stating that removal is to the “district and division embracing the place where such action is pending”). Removal does not operate in reverse; there is no such thing as removal from federal to state court of a case originally filed in federal court. *See* CHEMERINSKY, *supra* note 23, § 5.5, at 356.

<sup>25</sup>*See* 28 U.S.C. § 1441(a) (“Except as otherwise expressly provided by Act of Congress, 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 . . .”).

<sup>26</sup>*See* CHEMERINSKY, *supra* note 23, § 5.5, at 355. The Supreme Court sometimes has spoken in terms of a defendant having a “right” to remove a case to federal court. *See, e.g.,* *Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 16 (1951); *Pullman Co. v. Jenkins*, 305 U.S. 534, 540–41 (1939). However, “[t]he right to remove a case from state to federal court is purely statutory, being dependent on the will of Congress.” WRIGHT & KANE, *supra* note 23, § 38, at 224.



that there is diversity of citizenship between the plaintiffs and the defendants.<sup>27</sup>

In spite of this general rule, there are some circumstances in which the defendants may not remove a case even though it otherwise would have fallen within federal jurisdiction.<sup>28</sup> Most significantly, if the basis for federal jurisdiction would be diversity of citizenship, the defendants may not remove the case if any one of the defendants is a citizen of the state in which the suit was filed.<sup>29</sup> The apparent justification for this restriction is that the traditional rationale for federal diversity jurisdiction—that out-of-state parties might face bias in state courts—is less applicable when one of the defendants is from the state in question.<sup>30</sup>

There also are some limited circumstances in which a defendant may remove a case to federal court even though the plaintiffs did not have the initial option of filing there.<sup>31</sup> Notable examples include removal of state-law claims brought against a federal officer or agency<sup>32</sup> and removal of state-court class-action lawsuits under the Class Action Fairness Act.<sup>33</sup>

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<sup>27</sup> See CHEMERINSKY, *supra* note 23, § 5.5, at 355 (stating that generally either the plaintiff's complaint must present a federal question or diversity of citizenship must exist for a case to be removable); WRIGHT & KANE, *supra* note 23, § 38, at 225 (indicating that because "removability is equated with original jurisdiction," the usual requirements for federal-question jurisdiction or diversity jurisdiction must typically be satisfied). Therefore, as to federal-question jurisdiction, a defendant may not remove based on a federal-law defense; the plaintiff must have presented a federal question in its complaint. See *id.*

<sup>28</sup> See WRIGHT & KANE, *supra* note 23, § 38, at 229–30 (discussing types of actions not subject to removal); Dodson, *supra* note 1, at 63–64 (discussing statutes that narrow removal authority).

<sup>29</sup> 28 U.S.C. § 1441(b) (stating that suits are removable based upon diversity of citizenship "only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought"). This statute was renumbered and slightly reworded under the recently enacted legislation. See Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 103(a)(3), 125 Stat. 758 (enacted Dec. 7, 2011) (to be codified at 28 U.S.C. § 1441(b)(2)).

<sup>30</sup> See CHEMERINSKY, *supra* note 23, § 5.5, at 356–57 ("The exception reflects the belief that . . . there is less reason to fear state court prejudice against the defendants if one or more of them is from the forum state."). For discussion of the traditional justifications for diversity jurisdiction, see Paul E. Lund, *National Banks and Diversity Jurisdiction*, 46 U. LOUISVILLE L. REV. 73, 108–09 (2007).

<sup>31</sup> In his article, Professor Dodson discusses removal statutes that are "undeniable grants of jurisdiction" because the same type of case could not have been brought in federal court originally. See Dodson, *supra* note 1, at 62–63; see also WRIGHT & KANE, *supra* note 23, § 38, at 228–29.

<sup>32</sup> See 28 U.S.C. § 1442. Congress recently enacted legislation amending this statute. See

Although removal has existed in some form or another since the earliest days of our country, the availability of removal remains a major point of controversy. The reasons for this are several-fold. First, removal subverts the usual rule that the plaintiff gets to choose the forum in which the plaintiff's claims will be heard.<sup>34</sup> Second, removal involves wresting a case from the state court's hands even though the state court had entirely proper jurisdiction over the case.<sup>35</sup> Third, removal creates the potential of disrupting the state court's proceedings after the court has devoted substantial time and attention to the case.<sup>36</sup>

These concerns have led the Supreme Court to state that the removal statutes should be strictly construed.<sup>37</sup> The burden is on the defendant or defendants who seek removal to show that federal jurisdiction is proper.<sup>38</sup> Moreover, if the defendants fail to follow the proper procedure for removal, this can serve as a basis for remanding the case to state court.<sup>39</sup>

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*infra* note 292.

<sup>33</sup> See 28 U.S.C. § 1332(d). For full discussion of removal under the Class Action Fairness Act (CAFA), see 14B WRIGHT ET AL., *supra* note 2, § 3724, at 887–937.

<sup>34</sup> See WRIGHT & KANE, *supra* note 23, § 38, at 224 (referring to removal as “quite an anomalous jurisdiction, giving a defendant, sued in a court of competent jurisdiction, the right to elect a forum of its own choosing”).

<sup>35</sup> See 16 MOORE, *supra* note 1, § 107.03, at 107-21 (“Although providing a federal forum is the goal of removal, the effect of removal is to deprive the state court of an action properly within its jurisdiction, which raises federalism concerns.”) (footnote omitted); Dodson, *supra* note 1, at 70 (stating that removal invokes federalism concerns because it “plucks a case from a state court of competent jurisdiction, without the state court’s consent, and deposits the case in the federal system, all at the whim of one of the parties”).

<sup>36</sup> See Dodson, *supra* note 1, at 70–71 (noting that removal has been viewed narrowly because it “can occur years into the case, after the state court has become invested in it and expended judicial resources overseeing it”).

<sup>37</sup> See, e.g., *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) (expressing policy of strict construction of removal statutes); see also 16 MOORE, *supra* note 1, § 107.05, at 107-26 to 107-27 (discussing the rule of strict construction of removal statutes and cases applying that presumption). See generally Paul E. Lund, *Federally Chartered Corporations and Federal Jurisdiction*, 36 F.S.U. L. REV. 317, 364–65 (2009) (discussing the strict construction rule and the presumption against federal jurisdiction).

<sup>38</sup> See 16 MOORE, *supra* note 1, § 107.11[3], at 107-44.2 to 107-45 (stating that removing defendants have the burden of showing that removal is proper); see also *id.* § 107.06, at 107-29 (discussing the “strong presumption” against removal).

<sup>39</sup> See *id.* § 107.41[1][a][ii], at 107-192 to 107-196 (discussing remand based on procedural defects).

### B. Removal Procedure and the Procedural Limitations on Removal

A defendant or defendants who wish to remove a case must file a notice of removal in the federal district court, stating the grounds for removal in the notice.<sup>40</sup> The notice of removal has automatic and immediate effect, and no authorization from the federal court is required to remove a case.<sup>41</sup> The state court has no say in whether removal may take place, and the state court may take no further action in the case once the notice of removal has been filed, unless and until the case is remanded to the state court.<sup>42</sup>

There are a number of procedural limitations on the statutory right of removal.<sup>43</sup> Most importantly, the courts for many years have interpreted the removal statutes as requiring that all defendants join in or consent to the removal petition.<sup>44</sup> This so-called rule of unanimity has a number of exceptions,<sup>45</sup> but the rule applies in the typical case in which removal is

<sup>40</sup> See 28 U.S.C. § 1446(a) (2006). The notice must also be filed “promptly” with the state court. See *id.* § 1446(d). The notice of removal filed with the federal court must include copies of all process, pleadings, and orders that the defendants have received. See *id.* § 1446(a). The federal court also receives copies of the record of the state-court proceedings, either from the state court itself or from the parties. See *id.* §§ 1447(b), 1449. The statute also provides that defendants who previously had not been served may be served after removal occurs. See *id.* § 1448.

<sup>41</sup> See WRIGHT & KANE, *supra* note 23, § 40, at 241 (noting that, under present removal procedure, removal does not require leave from either the state or the federal court).

<sup>42</sup> See 28 U.S.C. § 1446(d) (providing that filing of notice of removal with clerk of the state court “shall effect the removal and the State court shall proceed no further unless and until the case is remanded”); see also CHERMERINSKY, *supra* note 23, § 5.5, at 359 (indicating that state court is divested of jurisdiction over a case by filing of notice of removal); WRIGHT & KANE, *supra* note 23, § 40, at 241–42 (noting that any subsequent state-court action is void, even if the case was removed improperly). If necessary, the federal court can enjoin any further state-court proceedings. See CHERMERINSKY, *supra* note 23, § 5.5, at 359.

<sup>43</sup> See WRIGHT & KANE, *supra* note 23, § 40, at 241.

<sup>44</sup> See, e.g., *Fletcher v. Hamlet*, 116 U.S. 408, 410 (1886) (“There can be no removal by the defendants unless they all join . . .”); 16 MOORE, *supra* note 1, § 107.11[1][c], at 107-39 to 107-40 (discussing the rule of unanimity); 14C WRIGHT ET AL., *supra* note 2, § 3730, at 440–78 (same). The legislation recently adopted by Congress explicitly codifies the unanimity requirement. See *infra* notes 299–300 and accompanying text.

<sup>45</sup> See 16 MOORE, *supra* note 1, § 107.11[1][d], at 107-40.4 to 107-44 (discussing exceptions to rule of unanimity); 14C WRIGHT ET AL., *supra* note 2, § 3730, at 468–78 (same). In the typical case, the most important exceptions to the rule are that neither nominal defendants nor fraudulently joined defendants need join in the notice of removal. See *id.* at 472–78 (discussing the nominal party and fraudulent joinder exceptions).

premised on federal-question jurisdiction or diversity jurisdiction.<sup>46</sup> Therefore, if any one defendant in a multiple-defendant lawsuit does not agree that removal is appropriate, for whatever reason, this will prevent removal from occurring.<sup>47</sup>

The other significant procedural limitation on removal is the time limitation.<sup>48</sup> Prior to the recent amendment, the limitation was found in the first paragraph of Section 1446(b), which provided:

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.<sup>49</sup>

As Professor Howard Stravitz has pointed out, former Section 1446(b) was the only removal statute that by its express terms referred only to “the defendant” in the singular.<sup>50</sup> There is nothing in the legislative history that indicates any reason for this difference.<sup>51</sup> The statute was simple enough to apply when all defendants were served on the same date, but ambiguity arose in the common situation of service on different dates.<sup>52</sup> It is this ambiguity that has given rise to the current split among the circuit courts,<sup>53</sup> as discussed in Part III of this Article.

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<sup>46</sup> See 14C WRIGHT ET AL., *supra* note 2, § 3730, at 440.

<sup>47</sup> See 16 MOORE, *supra* note 1, § 107.11[1][c], at 107-39 to 107-40 (“[T]he failure of one defendant to join in the notice precludes removal.”).

<sup>48</sup> See 14C WRIGHT ET AL., *supra* note 2, § 3731, at 479.

<sup>49</sup> 28 U.S.C. § 1446(b) (2006) (emphasis added). The second paragraph of former Section 1446(b) addressed cases that were not removable at the time they were filed but later became removable. See *infra* note 56 and accompanying text.

<sup>50</sup> See Howard B. Stravitz, *Recocking the Removal Trigger*, 53 S.C. L. REV. 185, 200 & n.108 (2002) (citing removal statutes that, unlike former Section 1446(b), refer to “defendant or defendants” or to “defendants”).

<sup>51</sup> See *infra* notes 148–151 and accompanying text.

<sup>52</sup> See 28 U.S.C. § 1446(b).

<sup>53</sup> See Stravitz, *supra* note 50, at 200.

In its pre-amendment form, Section 1446(b) actually embodied two somewhat conflicting statutory policies. On the one hand, Congress intended that removal should take place as early in a case's life as possible, thus minimizing the potential for disruption of state-court proceedings.<sup>54</sup> This policy of timeliness or prompt action appears in a number of other provisions of the removal statutes as well.<sup>55</sup> For example, Congress also has imposed time limitations on the removal of cases that are not removable as originally filed but later become removable.<sup>56</sup> Similarly, the statutes impose strict time limits on the filing of a motion to remand a case to state court.<sup>57</sup>

On the other hand, the language of former Section 1446(b) reflected the policy that a defendant should have adequate time to receive and consider the complaint against it, retain counsel, and obtain the benefit of that counsel's advice on removal options.<sup>58</sup> This policy was reflected in two

<sup>54</sup> See 14C WRIGHT ET AL., *supra* note 2, § 3731, at 482–85 (noting that the goal of the thirty-day limit “is early resolution of the court system in which the case will be heard”).

<sup>55</sup> See 28 U.S.C. §§ 1446(b), 1447(c).

<sup>56</sup> Prior to the recent amendments, these limitations appeared in the second, unnumbered paragraph of Section 1446(b), which was added in 1949. See Act of May 24, 1949, ch. 139, § 83(a), 63 Stat. 89, 101. In summary, that paragraph provided that the defendant must file its notice of removal within thirty days of receiving notice that the case has become removable. 28 U.S.C. § 1446(b). The paragraph was amended in 1988 to provide that removal is not allowed in such a case if the only basis for removal would be diversity of citizenship and if more than one year has passed since the action was commenced. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016(b)(2)(B), 102 Stat. 4642, 4669 (1988). The legislative history indicates that this amendment was made “as a means of reducing the opportunity for removal after substantial progress has been made in state court . . . . Removal late in the proceedings may result in substantial delay and disruption.” H.R. REP. NO. 100-889, at 72 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6032–33. As part of the recent statutory amendments, these provisions have been relocated to new subsections 1446(b)(3) and (c)(1), and an equitable exception to the one-year limitation has been added in subsection (c)(1). See *infra* notes 295–298 and accompanying text.

<sup>57</sup> See 28 U.S.C. § 1447(c). If one or more of the defendants do not agree with the removal, or if the plaintiffs believe that removal was procedurally improper, the statute permits the filing of a motion to remand the case to state court; however, the statute provides that a motion to remand “on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal . . . .” See *id.* Motions to remand based upon the absence of federal subject-matter jurisdiction are not subject to this thirty-day restriction: “If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” See *id.*

<sup>58</sup> See 14C WRIGHT ET AL., *supra* note 2, § 3731.

post-1948 amendments to Section 1446(b).<sup>59</sup> First, the statute was amended in 1949 to address the situation presented in some states where a defendant might not receive a copy of the complaint at the same time it received service of process.<sup>60</sup> Second, although the statute originally gave a defendant only twenty days after service in which to file its notice of removal, this period was extended to thirty days in a 1965 amendment.<sup>61</sup>

### C. *The Supreme Court's Interpretation of Section 1446(b) in Murphy Brothers*

Few Supreme Court opinions have interpreted the procedural aspects of removal, and none have addressed the timing of removal in multiple-defendant lawsuits. The Court's 1999 decision in *Murphy Brothers v. Michetti Pipe Stringing, Inc.*, however, did address the more general issue of when the removal clock starts to run in a single-defendant lawsuit.<sup>62</sup> A number of courts have considered *Murphy Brothers* to be relevant to interpreting former Section 1446(b) in the multiple-defendant context as well.<sup>63</sup>

The issue in *Murphy Brothers* arose because the language of Section 1446(b) provides that removal must occur within thirty days of the defendant receiving a copy of the initial complaint "through service or otherwise."<sup>64</sup> The plaintiff had provided the defendant with a "courtesy

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<sup>59</sup> As originally enacted in 1948, Section 1446(b) comprised only a single paragraph, which provided: "The petition for removal of a civil action or proceeding may be filed within twenty days after commencement of the action or service of process, whichever is later." See Act of June 25, 1948, ch. 646, § 1446(b), 62 Stat. 869, 939.

<sup>60</sup> See *infra* notes 71–73 and accompanying text (discussing 1949 amendments); see also S. REP. NO. 81-303, at 6 (1949), reprinted in 1949 U.S.C.C.A.N. 1248, 1253–54 (discussing reasons for 1949 amendments, and noting that pre-amendment law "place[d] the defendant in the position of having to take steps to remove a suit to [f]ederal court before he [learned] what the suit [was] about").

<sup>61</sup> See Act of Sept. 29, 1965, Pub. L. No. 89-215, 79 Stat. 887. For discussion of the reason for the 1965 amendment, see S. REP. NO. 89-712, at 2 (1965), reprinted in 1965 U.S.C.C.A.N. 3245, 3246 (noting that the then-existing twenty-day period "'is so short as to make it impractical to remove many actions to the [f]ederal court even though valid grounds for removal exist'" (quoting letter from Warren Olney III, Director, Jud. Conf. of the U.S.)).

<sup>62</sup> 526 U.S. 344, 347 (1999).

<sup>63</sup> See *infra* notes 129–134 and accompanying text.

<sup>64</sup> See *Murphy Bros.*, 526 U.S. at 347; see also *supra* text accompanying note 49 (quoting text of 28 U.S.C. § 1446(b) (2006)). This language carries over to the amended statute. See *infra* note 295 and accompanying text (discussing amended Section 1446(b)(1)).

copy” of the complaint prior to formal service of the complaint and summons.<sup>65</sup> The court of appeals, as had some other lower courts, held that this informal receipt of the complaint started the thirty-day clock ticking because of the “or otherwise” language, and therefore removal was untimely even though the defendant sought to remove within thirty days of formal service.<sup>66</sup>

Beginning from the “bedrock principle” that “a defendant is not obliged to engage in litigation unless notified of the action,”<sup>67</sup> the 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,” and not by mere informal receipt of a copy of the complaint.<sup>68</sup> The Court emphasized the important role that service of process serves in the American legal system, and that a court ordinarily may not exercise power over a defendant unless the defendant either has been served or has waived formal service.<sup>69</sup> The Court also emphasized that one purpose of the 1948 revision was to provide a uniform time period for removal of actions.<sup>70</sup> It was with this goal of uniformity in mind, the Court said, that the statute was amended in 1949 to add the current “through service *or otherwise*” language;<sup>71</sup> this amendment was intended to address the then-existing situation in states such as New York where service of process could precede the filing of a complaint, thus making it possible for the time period for removal to expire before the defendant even received a copy of the complaint.<sup>72</sup> The amendment, said

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<sup>65</sup>The action was filed in Alabama state court on January 26, 1996. *Murphy Bros.*, 526 U.S. at 348. The plaintiff faxed a “courtesy copy” of the complaint to one of the defendant’s vice presidents on January 29. *See id.* Because of settlement negotiations between the parties, however, service did not occur until February 12. *Id.* The defendant filed its notice of removal on March 13, invoking federal diversity jurisdiction. *See id.*

<sup>66</sup>*See id.* at 349 & n.2 (discussing lower court rulings).

<sup>67</sup>*See id.* at 347.

<sup>68</sup>*See id.* at 347–48.

<sup>69</sup>*See id.* at 350 (also emphasizing that a defendant is not required to take any action prior to receiving service).

<sup>70</sup>*See id.* at 351 (discussing history and purpose of 1948 recodification). Before the 1948 recodification, a defendant had to remove within the time period allowed for responding to the complaint under state law. *Id.* Because those time periods varied from state to state, the time for removal also varied under the pre-1948 law. *See id.*

<sup>71</sup>*See* Act of May 24, 1949, ch. 139, § 83(a), 63 Stat. 89, 101 (emphasis added).

<sup>72</sup>*See Murphy Bros.*, 526 U.S. at 351–52 (discussing legislative history of the 1949 amendment). The 1949 amendment also added the language that appeared in the second half of

the Court, was directed at “accommodat[ing] atypical state commencement and complaint filing procedures” and was in no way “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.”<sup>73</sup>

### III. FORMER SECTION 1446(B) AND ITS APPLICATION IN MULTIPLE-DEFENDANT CASES

The vagueness of the former language of Section 1446(b), which expressly addressed only “the defendant” in the singular, led to considerable confusion as to how the statute should be applied in multiple-defendant cases.<sup>74</sup> Three distinct interpretations have arisen in the courts of appeals, each of which has its ardent supporters.<sup>75</sup>

In this section, I examine the cases that have given rise to these three distinct views and the rationale the courts have employed in adopting each view. I will argue that the Fourth Circuit’s intermediate rule is most consistent with the language and policy of former Section 1446(b) and of other removal statutes. The intermediate rule also does a better job of protecting the removal rights of defendants than does the first-served rule and also avoids the delay issues inherent in the last-served rule. Therefore, in cases governed by former Section 1446(b), courts should adopt or retain the intermediate rule.

#### A. *The Conflicting Interpretations of Section 1446(b)’s Former Language*

##### 1. The Fifth Circuit and the First-Served Defendant Rule

The Fifth Circuit, the first court of appeals to address the multiple-defendant issue, adopted the most stringent interpretation of former Section

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the first paragraph of former Section 1446(b) (the language allowing removal “within twenty [(later 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”). *See id.* at 352 n.4. This language, the Court said, was intended to address the then-existing situation in states such as Kentucky, where service of a summons was required but simultaneous service of the complaint was not required. *See id.*

<sup>73</sup> *See id.* at 352–53.

<sup>74</sup> *See* Stravitz, *supra* note 50, at 200.

<sup>75</sup> *See id.*



1446(b): the first-served defendant rule.<sup>76</sup> This rule requires all defendants who have been served at that point to file or join in a removal notice within thirty days of service on the first defendant.<sup>77</sup>

The Fifth Circuit first encountered this issue with its 1986 decision in *Brown v. Demco, Inc.*<sup>78</sup> The attempt to remove in *Brown* came several years after the case had been filed.<sup>79</sup> At the time the plaintiff, an injured oil-rig worker, commenced his action in Louisiana state court, none of the defendants—all or most of which were corporations—sought to remove the case.<sup>80</sup> More than four years later, the plaintiff amended his complaint to add two new defendants who sought to remove the case with the approval of the original defendants.<sup>81</sup> The district court denied a motion to remand the case to state court, finding that removal was timely.<sup>82</sup>

The court of appeals reversed, holding that removal was untimely.<sup>83</sup> Noting that the case “was removable the day process was served in 1980,”<sup>84</sup> the appellate court stated that the “general rule . . . is that ‘[i]f the first served defendant abstains from seeking removal or does not effect a timely removal, subsequently served defendants cannot remove . . . due to the rule of unanimity among defendants which is required for removal.’”<sup>85</sup> The court felt that this rule “follows logically” from three sources: the

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<sup>76</sup> See *Brown v. Demco, Inc.*, 792 F.2d 478, 481 (5th Cir. 1986).

<sup>77</sup> See *id.*

<sup>78</sup> See *id.*

<sup>79</sup> See *id.* at 480.

<sup>80</sup> *Id.* (discussing procedural history). They could have removed, though, based on diversity of citizenship. See *id.*

<sup>81</sup> The plaintiff identified these new defendants after an extensive period of discovery and alleged that they manufactured the specific product that led to the plaintiff’s injury. *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* The one-year restriction on removal of diversity cases, found in the second paragraph of former Section 1446(b), was not added until 1988 and thus could not have applied to this suit. See *supra* note 56 and accompanying text. Even if the one-year restriction had been in effect, however, it would not have prevented removal under these circumstances; courts have held that this restriction applies only to cases that were not removable as originally filed. See *infra* note 136.

<sup>84</sup> *Brown*, 792 F.2d at 481. The court also noted that although the time limitation is not jurisdictional and therefore can be waived, failure to seek removal within the time deadline “may render removal improvident within the meaning of 28 U.S.C. § 1447(c).” *Id.*

<sup>85</sup> *Id.* (quoting 1A JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 0.168[3.5-5], at 586–87 (2d ed. 1985)) (alteration in original).

unanimity rule, the thirty-day time limit itself, and the rule that a defendant can waive the right of removal by defending a case in state court.<sup>86</sup>

The Fifth Circuit anticipated a criticism that later would be raised by courts that have rejected the first-served rule: that the rule is unfair because it “deprives defendants served after the thirty-day period ‘of the opportunity to persuade the first defendant to join in the removal petition.’”<sup>87</sup> The court found this criticism to be misplaced:

A defendant who is added to a case in which a co-defendant has failed to seek removal is in no worse position than it would have been in if the co-defendant had opposed removal or were domiciled in the same state as the plaintiff. To permit the defendants in this case to obtain removal after they have tested state-court waters for four years would give them a second opportunity to forum-shop and further delay the progress of the suit. The unfairness of this to the plaintiff outweighs the unfairness, if any, to the last-joined defendant. The forum for a suit ought to be settled at some time early in the litigation.<sup>88</sup>

The court recognized there could be occasions when exceptional circumstances justified departure from the strict first-served rule, but here there was no evidence that the plaintiff had delayed adding defendants in a bad-faith effort to prevent removal.<sup>89</sup>

*Brown* involved a rather extreme set of circumstances, in which a later-added defendant sought to remove years after the action had been commenced.<sup>90</sup> It also dealt only with the question of when the notice of removal must be filed, not with whether later-served defendants must join the notice of removal within the initial thirty-day window.<sup>91</sup>

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<sup>86</sup> See *id.* at 482. The court also believed the first-served defendant rule to be “consistent with the trend to limit removal jurisdiction and with the axiom that the removal statutes are to be strictly construed against removal.” *Id.* (footnotes omitted).

<sup>87</sup> *Id.* at 482 & n.15 (quoting 14A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3732, at 531–32 (2d ed. 1985)).

<sup>88</sup> *Id.* at 482.

<sup>89</sup> See *id.*

<sup>90</sup> See *id.* at 481 (pointing out that the original defendants had “filed answers, amended answers, motions of various kinds, third party demands, cross claims, amended cross claims, and participated in discovery and depositions”).

<sup>91</sup> See *id.*

The Fifth Circuit soon turned to this second issue in *Getty Oil Corp. v. Insurance Co. of North America*.<sup>92</sup> The three defendants in that case, all of which were corporations, were served on September 3, 5, and 24, 1986, respectively.<sup>93</sup> The first two defendants filed their notice of removal on September 26, two days after the third defendant had been served with process, but the third defendant did not file its written consent to removal until October 24.<sup>94</sup>

In these circumstances, the appellate court said, removal was untimely under former Section 1446(b) because all three of the defendants had not filed or joined in the notice of removal within thirty days of service on the first-served defendant.<sup>95</sup> The court noted that *Brown* had held that the thirty-day clock for removal starts to run on the day on which the first defendant is served.<sup>96</sup> “It follows that since all . . . defendants must join in the petition, and since the petition must be submitted within thirty days of service on the first defendant, all *served* defendants must join in the petition no later than thirty days from the day on which the first defendant was served.”<sup>97</sup> The court continued to believe that its rule “promotes unanimity

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<sup>92</sup> 841 F.2d 1254 (5th Cir. 1988).

<sup>93</sup> *Id.* at 1256.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1262–63. The first two defendants had represented in their removal petition that the third defendant “do[es] not oppose and consent[s] to this Petition for Removal,” but the appellate court stated that this was insufficient. *See id.* at 1262 n.11 (alteration in original). “[W]hile it may be true that consent to removal is all that is required under [S]ection 1446, a defendant must do so itself.” *Id.* The court indicated that there was no requirement that each defendant sign the removal petition, “but there must be some timely filed written indication from each served defendant, or from some person or entity purporting to . . . act on its behalf in this respect and to have authority to do so, that it has actually consented to such action.” *Id.* In the absence of such a written document, “there would be nothing . . . to ‘bind’ the allegedly consenting defendant.” *Id.*

<sup>96</sup> *See id.* at 1263 (citing *Brown*, 792 F.2d at 481).

<sup>97</sup> *Id.* (emphasis added). The court noted that defendants who have not been served at the time the notice of removal is filed need not join in the notice. *See id.* at 1261 n.9 (citing *Pullman Co. v. Jenkins*, 305 U.S. 534, 540 (1939)). However, the citizenship of unserved defendants must still be considered when the court is determining whether complete diversity of citizenship exists. *See N.Y. Life Ins. Co. v. Deshotel*, 142 F.3d 873, 883 (5th Cir. 1998) (citing *Pullman Co.*, 305 U.S. at 540–41).

The Fifth Circuit also has stated that the removing defendants need not obtain the consent of other defendants who have been improperly joined as parties, *see Rico v. Flores*, 481 F.3d 234, 239 (5th Cir. 2007) (stating that *Getty Oil*, 841 F.2d at 1262, only requires the consent of “properly joined” defendants), or the consent of mere “nominal” or “formal” defendants, *see Farias v. Bexar Cnty. Bd. of Trs.*, 925 F.2d 866, 871 (5th Cir. 1991) (stating this as an exception to

among the defendants without placing undue hardships on subsequently served defendants.”<sup>98</sup> The appellate court declined to order the case to be remanded to the state court, however; instead, it directed the district court to consider whether any exceptional circumstances existed that might excuse the late removal or whether the plaintiff had waived its objections to the untimely removal by the actions it took in federal court after the case had been removed.<sup>99</sup>

The Fifth Circuit has not had occasion to directly revisit this issue again in the twenty-plus years since *Getty Oil* was decided, but the court has continued to cite both *Brown* and *Getty Oil* as good authority.<sup>100</sup> Under that precedent, a notice of removal must be filed within thirty days of service on the first defendant, and all defendants who have been served as of that date must join in or consent to the removal within that initial thirty-day period<sup>101</sup> (with the exception of fraudulently joined defendants or nominal defendants).<sup>102</sup> Although the court may excuse noncompliance with this time deadline, only a small number of cases have found the requisite

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the general rule of *Getty Oil*, 841 F.2d 1254). *See also* 28 U.S.C. § 1441(a) (2006) (for purposes of removal, citizenship of defendants sued under fictitious names is disregarded).

<sup>98</sup> *See Getty Oil*, 841 F.2d at 1263. As it had in *Brown*, the court again stated that its rule was “consistent with the trend to limit removal jurisdiction and with the axiom that the removal statutes are to be strictly construed against removal.” *Id.* at 1263 n.13 (citing *Brown*, 792 F.2d at 482). The court also supported its rule by pointing out that Section 1448 permits a subsequently served defendant to move to remand the case if it does not concur in the removal. *Id.* at 1263 (“[T]he latter defendant may still either accept the removal or exercise its right to choose the state forum by making a motion to remand.”).

<sup>99</sup> *See id.* at 1263–64 (noting that Section 1446(b)’s time limitation is not jurisdictional and therefore is subject to waiver by the plaintiff). The court also expressed significant doubt as to whether diversity of citizenship even existed among the parties in the first place. *See id.* at 1257–61. Because the district court had not addressed this threshold jurisdictional issue, however, the appellate court remanded the case to the district court for further consideration of that issue, including whether any parties had been fraudulently joined in an effort to prevent removal. *See id.* at 1259, 1264.

<sup>100</sup> *See, e.g.,* *Gillis v. Louisiana*, 294 F.3d 755, 759 (5th Cir. 2002) (citing general rule of *Getty Oil*, 841 F.2d at 1262 n.9); *Deshotel*, 142 F.3d at 887 n.4 (quoting *Brown*, 792 F.2d at 481 & n.11 and citing *Getty Oil*, 841 F.2d at 1262–63); *see also* *Cornella v. State Farm Fire & Cas. Co.*, No. 10-1169, 2010 WL 2605725, at \*3 (E.D. La. June 22, 2010) (stating that the Supreme Court’s decision in *Murphy Brothers* “did not address, much less overrule, the Fifth Circuit’s precedent recognizing the ‘first service’ rule,” and rejecting the argument that the court should follow more recent holdings by the Eleventh Circuit and other circuits).

<sup>101</sup> *See Getty Oil*, 841 F.2d at 1262–63; *Brown*, 792 F.2d at 481–82.

<sup>102</sup> *See Farias*, 925 F.2d at 871; *Rico*, 481 F.3d at 239; *see supra* note 97.

exceptional circumstances to be present.<sup>103</sup> Among the many dozens of district court cases within the Fifth Circuit that have applied the *Brown/Getty Oil* precedent, the vast majority have strictly applied the rule.<sup>104</sup>

## 2. The Last-Served Defendant Rule

Several other circuits, concerned that the first-served defendant rule might lead to “inequitable” results, have adopted an alternative, considerably more liberal rule.<sup>105</sup> Under this rule, typically referred to as the last-served defendant rule, removal is timely as long as the removal notice is filed and joined in by all defendants within thirty days of service on the last-served defendant.<sup>106</sup>

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<sup>103</sup> See, e.g., *Gillis*, 294 F.3d at 759 (finding that exceptional circumstances justified technical noncompliance with the statute); cf. *Tedford v. Warner-Lambert Co.*, 327 F.3d 423, 426 & n.8 (5th Cir. 2003) (quoting *Brown*, 792 F.2d at 481, and applying an equitable exception to the one-year limitation on removal found in the second paragraph of former Section 1446(b)). In *White v. White*, the court noted that although neither *Brown* nor *Getty Oil* defined “exceptional circumstances,” they did “imply that bad faith or forum manipulation would fit the bill.” 32 F. Supp. 2d 890, 893 (W.D. La. 1998). The court in *White* found evidence that the plaintiff there had manipulated service and intentionally first provided a copy of the complaint to an unsophisticated defendant, thereby setting a “removal trap.” See *id.* The court’s “removal trap” quote was borrowed from Derek S. Hollingsworth, Comment, *Section 1446: Remediating the Fifth Circuit’s Removal Trap*, 49 BAYLOR L. REV. 157 (1997). See *id.*

<sup>104</sup> See, e.g., *Jones v. Watts*, No. 5:10-cv-189-DCB-JMR, 2011 WL 2160915, at \*5 (S.D. Miss. June 1, 2011) (noting that “while it is no longer entirely accurate that ‘[t]he Fifth Circuit has never published an opinion in which it either found exceptional circumstances or further defined the term,’ if reduced from an airtight certainty to a generalization, this assessment provides a reasonably sound reflection on the likelihood of the Fifth Circuit finding an exceptional circumstance” outside clearly confined circumstances (quoting *White*, 32 F. Supp. 2d at 893)); *Prescott v. Mem’l Med. Ctr.*, No. 9:00CV-00025, 2000 WL 532035, at \*5 (E.D. Tex. Mar. 25, 2000) (“District courts throughout the country have rarely found exceptional circumstances significant enough to prevent remand.”).

<sup>105</sup> See *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1205–07 (11th Cir. 2008) (“The first-served rule has been criticized by other courts as being inequitable to later-served defendants . . .”).

<sup>106</sup> See *id.* The Eleventh Circuit apparently was the first court of appeals to actually use the phrase “last-served defendant rule” to describe the rule it was applying, although the court believed that it might be more accurate to call the rule an “each defendant” rule. See *id.* at 1205 n.4 (arguing that this is more accurate nomenclature because “the statute should be read to permit each defendant, whether first or last served or somewhere in between, thirty days within which to file a notice of removal upon receipt of service”).

The Sixth Circuit became the first court of appeals to adopt this interpretation of former Section 1446(b) with its 1999 decision in *Brierly v. Alusuisse Flexible Packaging, Inc.*<sup>107</sup> Two years later, the Eighth Circuit adopted the last-served rule in *Marano Enterprises v. Z-Teca Restaurants, L.P.*<sup>108</sup> In 2008, the Eleventh Circuit adopted the rule in *Bailey v. Janssen Pharmaceutica, Inc.*<sup>109</sup> Most recently, in 2011, the Third Circuit and the

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<sup>107</sup> 184 F.3d 527, 533 (6th Cir. 1999) (“[W]e hold that a later-served defendant has 30 days from the date of service to remove a case to federal district court, with the consent of the remaining defendants.”). *Brierly* involved a wrongful-death action against a deceased employee’s employer and an officer of that company. *Id.* at 529–30. The action was filed in Kentucky state court on May 12, 1994, and the defendant employer filed a notice of removal on June 8. *Id.* at 530. The individual defendant had not been served at that time and thus did not join in the notice of removal. *Id.* At first, the plaintiff was unable to serve the individual defendant because that defendant had left the state. *Id.* After the plaintiff learned of the defendant’s new address in Wisconsin, the plaintiff still was not able to effect service because the federal district court had ordered a stay of all proceedings until the court resolved the plaintiff’s motion to remand the case. *See id.* at 530–31.

The district court later ordered the case remanded to state court because the defendant employer had failed to make an adequate showing that complete diversity of citizenship existed between the plaintiff and the two defendants. *Id.* at 530 (also describing a second, again unsuccessful, attempt by the defendant employer to remove the action). After the remand, but more than a year and a half after the action had commenced, the individual defendant was served on November 10, 1995, and on November 30, within thirty days of service, sought to remove the case to federal court with the defendant employer’s consent. *Id.* at 531. Finding that the defendants now had adequately shown that complete diversity had existed since the lawsuit was commenced, the district court denied the plaintiff’s motion to remand. *See id.*

<sup>108</sup> 254 F.3d 753, 757 (8th Cir. 2001) (“We hold that the later-served defendants in this case had thirty days from the date of service on them to file a notice of removal with the unanimous consent of their co-defendants, even though the first-served co-defendants did not file a notice of removal within thirty days of service on them.”). The case, a franchise dispute, was filed in Missouri state court against three corporate defendants and two individuals. *Id.* at 754. Two of the defendants were served on February 1, 2000, and two more were served on February 3. *Id.* On March 3, all five defendants—including an individual who had not yet been served—filed a joint notice of removal. *Id.* This was less than thirty days after the February 3 service but thirty-one days after the February 1 service. *See id.*

<sup>109</sup> 536 F.3d at 1204 (holding that “earlier-served defendants who may have waived their right to independently seek removal by failing to timely file a notice of removal . . . may nevertheless consent to a timely motion by a later-served defendant”). The lawsuit in *Bailey*, a wrongful-death suit, was based on the sale of a prescription pain patch. *See id.* at 1203–04. Suit was filed in Florida state court on February 28, 2006, against four defendants: Walgreen Company, which owned the store that sold the patch; Janssen Pharmaceutica, Inc., which distributed the patch; Alza Corporation, which manufactured the patch; and Johnson & Johnson, Inc., which owned both Alza and Janssen. *See id.* Walgreen was served on May 12, Alza on May 15, and Janssen on May 19. *Id.* at 1204. Alza and Janssen filed motions to dismiss in state court on June 12. *Id.* The fourth

Ninth Circuit became the fourth and fifth circuits to join the last-served bandwagon, with their rulings in *Delalla v. Hanover Insurance*<sup>110</sup> and in *Destfino v. Reiswig*.<sup>111</sup> These cases have involved a wide spectrum of factual situations, ranging all the way from the situation presented in *Marano Enterprises*, in which removal occurred just one day too late to satisfy the first-served defendant rule,<sup>112</sup> to the situation *Brierly* presented, in which removal occurred more than a year and a half after the first defendant was served.<sup>113</sup>

Although the five circuits that have adopted the last-served rule have employed a variety of rationales and policy arguments to support this construction, the opinions share a number of common themes. First, all have relied, to varying degrees, on the statutory language of former Section 1446(b).<sup>114</sup> Most have used the statutory language mainly as a basis for

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defendant, Johnson & Johnson, was served on June 22. *Id.* Johnson & Johnson filed a notice of removal within thirty days of service on it but more than two months after service on the initially served defendants. *See id.* Curiously, the court never explicitly states whether the other defendants joined in the notice of removal or filed written consent to it. *See id.* The court did note, however, that all the defendants were represented by the same attorney in the state-court proceedings. *Id.*

<sup>110</sup> 660 F.3d 180, 189 (3d Cir. 2011) (“We join the Sixth, Eighth, Ninth, and Eleventh Circuits in adopting the later-served rule.”). The plaintiffs in *Delalla* were two companies that sued the attorney and the law firm that had represented the plaintiffs in a trademark dispute, as well as the liability insurance company that had retained the attorney on the plaintiffs’ behalf; the plaintiffs alleged that the attorney had negotiated a settlement of the trademark dispute that inadequately protected the plaintiffs’ interests. *See id.* at 182–83. The suit was filed in New Jersey state court on March 30, 2009, the defendant insurance company was served on April 14, and the defendant attorney and law firm were served on April 23. *See id.* On May 15—thirty-one days after the insurance company had been served—the defendant attorney and law firm filed a notice of removal, which the defendant insurance company joined. *See id.* at 183.

<sup>111</sup> 630 F.3d 952, 956 (9th Cir. 2011) (“[W]e hold that each defendant is entitled to thirty days to exercise his removal rights after being served.”). *Destfino* involved a suit filed in California state court against twenty-nine individuals, ten businesses, and a church. *Id.* at 954. One of the defendant businesses, Courtesy Oldsmobile-Cadillac, filed a notice of removal twenty-five days after it was served. *Id.* at 955. The court’s opinion does not indicate when the other defendants were served, although it does note that some defendants never were served. *See id.* at 957.

<sup>112</sup> *See Marano Enters.*, 254 F.3d at 754.

<sup>113</sup> *See Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 530–31 (6th Cir. 1999).

<sup>114</sup> The Sixth Circuit, for example, noted that analysis of this issue must begin with the statutory language, but the court quickly turned away from that language, asserting that the statute “contemplates only one defendant and thus does not answer the question of how to calculate the timing for removal in the event that multiple defendants are served at different times.” *Id.* at 532. Although I agree that the language of former Section 1446(b) by its express terms “does not

arguing that the first-served rule conflicts with this language.<sup>115</sup> These courts have pointed out that the Fifth Circuit's construction of the statute effectively requires a court to read the statute as if it stated that the notice of removal must be filed within thirty days of service on "the *first-served* defendant."<sup>116</sup> A couple of the cases, though, have attempted to place affirmative reliance on the language of the statute in support of the last-served interpretation. The Eleventh Circuit, for instance, has argued that "the statute, as written, could reasonably be read to permit each defendant a right to remove within thirty days of service on the individual defendant."<sup>117</sup>

Second, a number of the courts that have adopted the last-served rule have argued that the rule is fully consistent with the rule of unanimity.<sup>118</sup> This is the case, the courts claim, because the last-served rule requires that all of the defendants consent to removal at the time of removal by the later-

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answer" the question, that language is more helpful and deserves more attention than the Sixth Circuit and some other courts have given to it. See *infra* notes 195–218 and accompanying text.

<sup>115</sup> See *Delalla*, 660 F.3d at 187 (stating that the first-served rule "contravenes the actual language of § 1446(b) by substituting 'the defendant' with 'the initial defendant'"); *Destfino*, 630 F.3d at 955 (stating that the statute speaks in terms of "the defendant" and does not say "first defendant" or "initial defendant"); *Bailey*, 536 F.3d at 1207 (stating that the first-served rule would essentially require reading the words "first served" into the statute); *Brierly*, 184 F.3d at 533 (noting that reading the statute so that the removal time period commences with service on the first defendant would have the effect of inserting the word "first" before "defendant" in the language of the statute, and stating that Congress could have easily done this if that was what it had intended).

<sup>116</sup> See, e.g., *Brierly*, 184 F.3d at 533 ("[H]olding 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.").

<sup>117</sup> See *Bailey*, 536 F.3d at 1207 (citing *Brierly*, 184 F.3d at 533); see also *Destfino*, 630 F.3d at 955 (stating that the statute's "most straightforward meaning is that each defendant has thirty days to remove after being brought into the case").

In its recent ruling, the Third Circuit claimed that when Section 1446(a) and former Section 1446(b) were read together, the last-served defendant rule was "the only reasonable reading" of former Section 1446(b). See *Delalla*, 660 F.3d at 187. I more fully address this claim *infra* at note 217.

<sup>118</sup> The Eleventh Circuit, for example, has argued that the last-served rule is "not inconsistent" with the rule of unanimity: "Earlier-served defendants may choose to join in a later-served defendant's motion or not, therefore preserving the rule that a notice of removal must have the unanimous consent of the defendants." *Bailey*, 536 F.3d at 1207. "The unanimity rule alone does not command that a first-served defendant's failure to seek removal necessarily waives an unserved defendant's right to seek removal; it only requires that the later-served defendant receive the consent of all then-served defendants at the time he files his notice of removal." *Id.*



served defendant, regardless of whether they previously objected to removal.<sup>119</sup> In the Ninth Circuit's view, courts that have argued that the first-served rule is more consistent with the rule of unanimity essentially:

[C]onstrue a defendant's failure to remove within thirty days as an affirmative decision not to remove. But the fact that a defendant hasn't taken the initiative to seek removal doesn't necessarily mean he will object when another defendant does. Failure to file a petition may be based on a lack of resources, trusting a lawyer's advice or inertia. There is no reason to lock an earlier-served defendant out of the federal forum, if he later chooses to consent.<sup>120</sup>

Courts that have adopted the last-served rule also have invoked a number of policy arguments in favor of the last-served rule, with the common theme of fairness to defendants.<sup>121</sup> One such argument is that the first-served rule does not give later-served defendants adequate time to consider whether removal is an available and appropriate option.<sup>122</sup> This apparently was what the Sixth Circuit was referring to, for example, when it expressed concern that the first-served rule can lead to inequitable results.<sup>123</sup> Another argument is that other rules can result in "unfairness" or "hardship" to later-served defendants, who can be deprived of "their" right to remove a case through the inadvertence of earlier-served defendants.<sup>124</sup> A similar but somewhat different policy argument is the argument that the Fifth Circuit anticipated in *Brown*: that later-served defendants should have the opportunity to persuade earlier-served defendants that removal is proper.<sup>125</sup>

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<sup>119</sup> See *id.*

<sup>120</sup> *Destfino*, 630 F.3d at 956 (internal citation omitted).

<sup>121</sup> See, e.g., *id.* (concluding that the last-served rule is the "wiser and more equitable approach").

<sup>122</sup> See *McKinney v. Bd. of Trs.*, 955 F.2d 924, 928 (4th Cir. 1992).

<sup>123</sup> See *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999); see also *Destfino*, 630 F.3d at 955–56 ("A contrary rule could deprive some defendants of their right to a federal forum because they were served too late to exercise that right, and encourage plaintiffs to engage in unfair manipulation by delaying service on defendants most likely to remove.").

<sup>124</sup> See *Destfino*, 630 F.3d at 956 (stating that "each defendant is entitled to thirty days to exercise *his* removal rights after being served" (emphasis added)); *Marano Enters. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 755 (8th Cir. 2001) (noting the "hardships" caused by the *Getty Oil* rule when an earlier-served defendant fails to file a notice of removal).

<sup>125</sup> See *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1206–07 (11th Cir. 2008);

Some courts have defended the last-served defendant rule against the argument that it may result in delay in the ultimate resolution of whether the case will be heard in a state or federal forum.<sup>126</sup> In these courts' view, a plaintiff can limit the potential of this delay occurring by insuring that all defendants are served at the same time, as soon as the case is filed.<sup>127</sup> The Ninth Circuit, for example, made this point and further observed that when plaintiffs fail to make prompt service, "the marginal efficiency benefits of selecting a forum early don't outweigh the manifest unfairness of depriving later-served defendants of a federal forum."<sup>128</sup>

Finally, a number of the courts that have adopted the last-served defendant rule have relied upon the Supreme Court's decision in *Murphy Brothers v. Michetti Pipe Stringing, Inc.*<sup>129</sup> This reliance has taken a number of forms. First, some courts have claimed that *Murphy Brothers* had relaxed the traditional rule that removal statutes are to be strictly construed.<sup>130</sup> A couple of courts have gone further, though, and claimed that *Murphy Brothers* "clarified" the multiple-defendant issue and "perhaps . . . portended" a "definitive answer."<sup>131</sup> As the Eighth Circuit

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*Marano Enters.*, 254 F.3d at 755 ("Later-served defendants would not be afforded the opportunity to attempt to persuade their co-defendants to join a notice of removal if more than thirty days had passed since the first defendant was served.").

<sup>126</sup> See, e.g., *Destfino*, 630 F.3d at 956.

<sup>127</sup> See *id.*

<sup>128</sup> See *id.*

<sup>129</sup> 526 U.S. 344 (1999).

<sup>130</sup> See *Destfino*, 630 F.3d at 956; *Bailey*, 536 F.3d at 1207 (citing *Murphy Bros.*, 526 U.S. at 357 (Rehnquist, C.J., dissenting), and *Marano Enters.*, 254 F.3d at 756).

<sup>131</sup> See *Marano Enters.*, 254 F.3d at 756. The Eleventh Circuit also has stated that *Murphy Brothers* "supports endorsing" the last-served rule. See *Bailey*, 536 F.3d at 1207–08 (agreeing with the Eighth Circuit that "the Supreme Court, based on its reasoning in *Murphy Brothers*, would endorse the last-served defendant rule because that rule recognizes that individual defendants are not required to take action—whether seeking removal or otherwise responding to another defendant's notice of removal—until they are properly served" (citing *Marano Enters.*, 254 F.3d at 756)). "In other words, *Murphy Brothers* supports the last-served defendant rule because a defendant has no obligation to participate in any removal procedure prior to his receipt of formal service of judicial process." *Id.*

The Eleventh Circuit also asserted that the first-served rule would contravene *Murphy Brothers* because it "would obligate a defendant to seek removal prior to his receipt of formal process bringing him under the court's jurisdiction." See *id.* at 1208. This is not entirely true, however. Even under the strict first-served rule as applied by the Fifth Circuit, a defendant who has not been served at the time the notice of removal is filed is not obligated to join in that notice. See *supra* note 97 and accompanying text. The only time an unserved defendant would be

explained, *Murphy Brothers* had stressed the central role of service of process and reasoned that a defendant is not required to take any action until process has been served.<sup>132</sup> “We conclude that, if faced with the issue before us today, the Court would allow each defendant thirty days after receiving service within which to file a notice of removal, regardless of when—or if—previously served defendants had filed such notices.”<sup>133</sup> Similarly, the Eleventh Circuit has argued that:

It appears to us to be contrary to the Supreme Court’s holding in *Murphy Brothers*, as well as the interests of equity, to permit a first-served defendant to, in effect, bind later-served defendants to a state court forum when those defendants could have sought removal had they been more promptly served by the plaintiff.<sup>134</sup>

The courts that have applied the last-served defendant rule have done so irrespective of the reason why the earlier-served defendants failed to act, and even have applied it when the earlier-served defendant unsuccessfully sought to remove the case.<sup>135</sup> The rule also has been applied no matter how

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“obligated” to seek removal before service would be if his earlier-served co-defendants failed to timely file such a notice themselves. Such an attempt by the unserved defendant, though, would prove unsuccessful if his co-defendants declined to join in the removal notice, because of the rule of unanimity.

<sup>132</sup> See *Marano Enters.*, 254 F.3d at 756. The court also noted that the Supreme Court construed the statute as requiring formal service of process before the removal clock started to run “notwithstanding an earlier admonition by the Court . . . for strict construction of the removal statute.” See *id.* (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108–09 (1941)).

<sup>133</sup> *Id.*

<sup>134</sup> See *Bailey*, 536 F.3d at 1208. The court also stated that the motion to dismiss that certain defendants filed in state court did not waive those defendants’ right to remove or bar them from joining Johnson & Johnson’s later notice of removal. See *id.* at 1209 n.10 (citing *Cogdell v. Wyeth*, 366 F.3d 1245, 1249 (11th Cir. 2004)).

<sup>135</sup> The Eighth Circuit has applied its *Marano Enterprises* rule to uphold removal of a lawsuit by a defendant who was added to the suit nine months after the initial defendant had unsuccessfully sought removal. See *Brown v. Tokio Marine & Fire Ins. Co.*, 284 F.3d 871, 872–73 (8th Cir. 2002) (“The law is settled in this Circuit that the thirty-day period to file a notice of removal runs from the time that a defendant is served with the complaint, even when the defendant is a later-served defendant and does not receive service until the time limit during which the first-served defendant could have removed the case has expired.” (citing *Marano Enters.*, 254 F.3d at 756–57)).

The Sixth Circuit in *Brierly* similarly held that removal was proper even though the earlier-served defendant had (twice) unsuccessfully sought to remove the case. See *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999). As to the prior unsuccessful attempts

late in the game a newly served defendant sought to remove the case and without regard to the defensive actions other defendants had taken in state court.<sup>136</sup> Finally, the courts have applied the rule without regard to who was served first—whether that defendant was the “more sophisticated” or “least sophisticated” defendant—and irrespective of whether the defendants were represented by the same legal counsel.<sup>137</sup>

### 3. The Fourth Circuit and the Intermediate Rule

Since the Fourth Circuit’s 1992 decision in *McKinney v. Board of Trustees*,<sup>138</sup> the Fourth Circuit has presented an alternative to the polar opposites of the first-served rule and the last-served rule.<sup>139</sup> Typically referred to as the intermediate rule, the Fourth Circuit’s approach bears some resemblance to the first-served defendant rule, in that it requires that a notice of removal be filed within thirty days of service on the first-served

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at removal, the court acknowledged that no previous case had dealt with a situation in which the first-served defendant had failed in an attempt to remove the case. *See id.* at 533 n.3. The court concluded, though, that this previous failure should not prevent that defendant from consenting to removal by a later-served defendant. *See id.* “Given the rule of unanimity, holding otherwise would vitiate the removal application of the later-served defendants and thereby nullify our holding that later-served defendants are entitled to 30 days to remove the case to district court.” *Id.*

<sup>136</sup>The Eleventh Circuit, for example, stated in its *Bailey* decision that the motion to dismiss that certain defendants filed in state court did not waive those defendants’ right to remove or bar them from joining Johnson & Johnson’s later notice of removal. *See Bailey*, 536 F.3d at 1209 n.10 (citing *Cogdell*, 366 F.3d at 1249).

The Sixth Circuit in *Brierly* upheld removal even though removal occurred more than a year and a half after the case had been filed. *See Brierly*, 184 F.3d at 534–35. The court concluded that the one-year limitation on removal, found in the second paragraph of former Section 1446(b) (*see supra* note 56), did not bar removal of this case, holding that the one-year limitation applies only to cases that were not removable at the time they were commenced but that later become removable. *See id.*

<sup>137</sup>In *Bailey*, for example, all of the defendants were sophisticated corporate defendants that presumably were experienced with both state- and federal-court litigation. *See Bailey*, 536 F.3d at 1204. Moreover, all of the defendants were represented by the same attorneys in the state-court proceedings. *See id.* In *Delalla*, all three defendants were served within a short time period, the first defendant to be served was an insurance company that presumably was experienced with both state- and federal-court litigation, and the remaining defendants were an attorney and his law firm. *See Delalla v. Hanover Ins.*, 660 F.3d 180, 183 (3d Cir. 2011).

<sup>138</sup>955 F.2d 924 (4th Cir. 1992).

<sup>139</sup>*See Barbour v. Int’l Union*, 640 F.3d 599, 610 (4th Cir. 2011) (en banc) (affirming the Fourth Circuit’s continued adherence to “the *McKinney* Intermediate Rule”).

defendant.<sup>140</sup> If the first-served defendant does not file a notice, the case cannot be removed.<sup>141</sup> However, the intermediate rule does provide some relief to later-served defendants.<sup>142</sup> If a timely notice of removal has been filed by the first-served defendant, the subsequently served defendants need not rush to join in that notice within the initial thirty-day period; rather, each defendant has thirty days from the date on which it receives service of process to file its own notice of removal or join in a previously filed notice.<sup>143</sup> At the time the Fourth Circuit adopted this rule in *McKinney*, it did so as a response to the limitations imposed by the first-served defendant rule, which then was the prevailing rule.<sup>144</sup> In 2011, though, the court maintained its adherence to the intermediate rule with the court's en banc opinion in *Barbour v. International Union*.<sup>145</sup>

*McKinney* presented a situation in which removal would have been untimely under the first-served defendant rule of *Getty Oil*.<sup>146</sup> Most of the defendants joined in the initial notice of removal, which was filed exactly thirty days after service on the first group of defendants.<sup>147</sup> One other defendant, who had been served after the removal notice was filed, did not join in the notice at that time, but she later did join in the notice within

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<sup>140</sup> See *id.* at 612. Professor Stravitz refers to the Fourth Circuit's rule as the "individual-defendant rule." See Stravitz, *supra* note 50, at 200. He argues in favor of the last-served defendant rule, but he finds the intermediate rule to be "inherently more fair" than the first-served defendant rule. See *id.* at 202.

<sup>141</sup> See *Barbour*, 640 F.3d at 612.

<sup>142</sup> See *id.*

<sup>143</sup> See *id.*

<sup>144</sup> See *McKinney v. Bd. of Trs.*, 955 F.2d 924, 928 (4th Cir. 1992).

<sup>145</sup> 640 F.3d at 613.

<sup>146</sup> See *McKinney*, 955 F.2d at 925.

<sup>147</sup> See *id.* (discussing procedural history). The plaintiffs in *McKinney* were former employees of a community college who sued the members of the college's board of trustees, alleging wrongful termination. *Id.* The complaint was filed in North Carolina state court on April 25, 1988. *Id.* Three of the twelve defendants were served on April 25, and eight others were served on May 19. *Id.* The original three plus seven of the eight others filed their removal petition on May 25, exactly thirty days after service on the first three defendants. *Id.* The defendant who had been served but who did not join, a Mr. Smith, was out of town at the time, and his attorney was unable to contact him. *Id.* The twelfth defendant was served after the removal petition was filed; she and Mr. Smith then joined in the previously filed removal petition within thirty days of service on Mr. Smith. See *id.* The district court rejected the plaintiffs' motion to remand the case, holding that "individual defendants have thirty days from the time they are served with process or with a complaint to join in an otherwise valid removal petition." *McKinney v. Bd. of Trs.*, 713 F. Supp. 185, 190 (W.D.N.C. 1989).

thirty days of service on her.<sup>148</sup>

Unlike the Fifth Circuit, which gave little attention to the actual language of former Section 1446(b) in *Brown* and *Getty Oil*, the Fourth Circuit stated that “[w]e begin our analysis with the statutory language.”<sup>149</sup> The court noted that the statute referred only to “the defendant” in the singular, and the court asserted that it would be “inappropriate” to read the statute as stating “the defendant *first served*.”<sup>150</sup> The court, though, believed that “the statutory language by itself does not answer our question” because it “only contemplates one defendant.”<sup>151</sup>

The Fourth Circuit panel also stated that it did “not find the *Getty Oil* conclusion to be logical.”<sup>152</sup> Although, in the court’s view, the statute “clearly” required the first-served defendant to file for removal within thirty days, it “does not imply in any way that later served defendants have less than thirty days in which to act.”<sup>153</sup> The court also believed that the *Getty Oil* rule, and its “one fixed deadline,” could lead to the inequitable result of later-served defendants having little or no time to decide whether to join in removal, which Congress would not have intended.<sup>154</sup>

The court also found unpersuasive the plaintiffs’ primary policy argument: that a plaintiff should be able to know within a fixed period of time whether the case will be heard in state or federal court.<sup>155</sup> The court stressed that this argument “only looks at forum selection from a plaintiff’s point of view, assuming that there is something inherently bad about removal and ‘defeating’ the plaintiff’s choice of forum.”<sup>156</sup> “To the contrary, by providing for removal in the first place, Congress seems to believe that the defendant’s right to remove a case that could be heard in federal court is at least as important as the plaintiff’s right to the forum of his choice.”<sup>157</sup>

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<sup>148</sup> See *McKinney*, 955 F.2d at 925.

<sup>149</sup> See *id.* at 926.

<sup>150</sup> See *id.*

<sup>151</sup> See *id.* The court also noted that nothing in the statute’s legislative history addressed the multiple-defendant issue. See *id.*

<sup>152</sup> See *id.*

<sup>153</sup> See *id.*

<sup>154</sup> See *id.* at 926–27.

<sup>155</sup> See *id.* at 927. The court observed that a plaintiff can exercise some control over this issue by “mak[ing] sure that all defendants are served at about the same time.” See *id.*

<sup>156</sup> See *id.*

<sup>157</sup> See *id.* “Rather than favoring plaintiffs or defendants, we agree with the district court that

The Fourth Circuit noted one other policy consideration that it believed was not present at the time of the Fifth Circuit's ruling in *Getty Oil*.<sup>158</sup> Congress amended Section 1446(a) in 1988 to make notices of removal subject to the requirements of Rule 11 of the Federal Rules of Civil Procedure.<sup>159</sup> "As amended, [S]ection 1446(a) is further reason to allow all defendants a full thirty days to investigate the appropriateness of removal."<sup>160</sup> Congress would not have forced later-served defendants into the "Hobson's choice" of having to either "forego removal or join hurriedly in a petition for removal and face possible Rule 11 sanctions."<sup>161</sup>

At the time that the Fourth Circuit adopted this new interpretation of former Section 1446(b) in *McKinney*, the primary competing interpretation was the Fifth Circuit's first-served defendant rule, as articulated in *Getty Oil*.<sup>162</sup> It therefore is unsurprising that the court in *McKinney* focused on the *Getty Oil* rule and the rationale for that rule.<sup>163</sup> As we have seen, though, later cases in other circuits, also finding the rationale of *Getty Oil* to be unpersuasive, adopted their own interpretation of the statutory language—the so-called last-served defendant rule.<sup>164</sup> Recently, the Fourth Circuit chose to stick by its "intermediate" interpretation of former Section 1446(b) with the court's en banc decision in *Barbour v. International Union*.<sup>165</sup> The court's decision in *Barbour* was far from unanimous, but the

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the removal procedure is intended to be 'fair to both plaintiffs and defendants alike.'" *Id.* (quoting *McKinney v. Bd. of Trs.*, 713 F. Supp. 185, 189 (W.D.N.C. 1989)). The court also believed that the first-served rule increases the possibility for "tactical maneuvering" by a plaintiff in an effort to defeat the defendants' opportunity for removal. *See id.* at 927–28. "'This cannot be what Congress had in mind. Congress created the removal process to protect defendants. It did not extend such protection with one hand, and with the other give plaintiffs a bag of tricks to overcome it.'" *See id.* at 928 (quoting *McKinney*, 713 F. Supp. at 189).

<sup>158</sup> *See id.*

<sup>159</sup> *See id.* (citing Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1016(b)(1), 102 Stat. 4642, 4669 (1988)).

<sup>160</sup> *See id.*

<sup>161</sup> *See id.*

<sup>162</sup> *See id.* at 926.

<sup>163</sup> *See id.*

<sup>164</sup> *See, e.g.,* *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1209 (11th Cir. 2008); *Marano Enters. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 757 (8th Cir. 2001); *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999).

<sup>165</sup> 640 F.3d 599, 613 (4th Cir. 2011) (en banc). *Barbour* involved a suit against the International Union of the United Auto Workers (the UAW) and two local union chapters, filed on February 11, 2008. *See id.* at 602–03. The UAW was served on March 20, and one local was served on March 29. *See id.* at 604. All three defendants, including the local that had not yet been

majority forcefully rejected the rationale underlying the last-served defendant rule.<sup>166</sup>

The *Barbour* majority reaffirmed its view that “the *McKinney* Intermediate Rule is the most logical and faithful interpretation of the operation of [former Section] 1446(b).”<sup>167</sup> The court found its primary support in the language of the statute, which it regarded as plain.<sup>168</sup> The statute imposes an obligation on a defendant to file for removal within thirty days of service; “[i]f you do not seek removal within the thirty-day window, you have forfeited your right to remove.”<sup>169</sup> In the court’s view, it would “defy logic” to read the statute differently simply because there are multiple defendants who are served on different days; the statutory language “unequivocally requires action by a defendant (seeking removal within thirty days of being served), not inaction.”<sup>170</sup> If the first defendant failed to take the required action, the language of former Section 1446(b) did not bar the other defendants from removing the case; “rather, it is the rule of unanimity that does.”<sup>171</sup>

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served, filed a notice of removal on April 28, which was more than thirty days after service on the UAW. *Id.* All of the defendants were represented by the same attorneys. *Id.* at 616.

<sup>166</sup> *See id.* at 612–16. Seven judges joined the majority opinion, while five judges joined the concurring opinion, which would have adopted the last-served defendant rule. *See id.* at 601; *see also id.* at 618 (Agee, J., concurring in the judgment).

<sup>167</sup> *See id.* at 610 (majority opinion). The court noted the limited nature of federal jurisdiction and the Supreme Court’s admonition that removal statutes are to be strictly construed “inasmuch as the removal of cases from state to federal court raises significant federalism concerns.” *Id.* at 605. The court also noted that the thirty-day restriction on removal “is designed to prevent ‘undue delay in removal and the concomitant waste of state judicial resources.’” *See id.* (quoting *Lovern v. Gen. Motors Corp.*, 121 F.3d 160, 163 (4th Cir. 1997)).

<sup>168</sup> *See id.* at 610–11; *see also id.* at 610 (“When interpreting any statute, we must first and foremost strive to implement congressional intent by examining the plain language of the statute.” (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002))).

<sup>169</sup> *See id.* at 611. The court said that the first-served defendant, the UAW, therefore forfeited its right of removal under the statute by not seeking removal within thirty days of service. *See id.*

<sup>170</sup> *See id.* “Equally illogical is the proposition that a first-served defendant in a multiple-defendant case should believe he or she does not have to act simply because there will be later-served defendants in the case who may or may not file a notice of removal.” *Id.*

<sup>171</sup> *See id.* “In other words, once the first-served defendant elects to proceed in state court, the issue concerning removal is decided under the rule of unanimity.” *Id.* The court stressed that “[w]hile the operation of [former] § 1446(b) may appear unfair to some, such operation is an inevitable feature of a court of limited jurisdiction.” *Id.* The court repeated its belief that the *McKinney* rule gives later-served defendants “ample time” to decide whether to join in a notice of removal. *See id.*



This reading of the statute, in the court's view, also avoids the "fatal flaw" of the last-served defendant rule, in that the last-served rule reads the filing obligation as applying only to a single defendant: the last-served one.<sup>172</sup> "Innumerable defendants can intentionally ignore § 1446(b) if the last-served defendant can convince the earlier-served defendants that their intentional decision was in error."<sup>173</sup> The intermediate rule also avoids having to read the words "first-served" or "last-served" into the statute.<sup>174</sup> The court repeated its belief that the *McKinney* rule is consistent with "admonitions" from the Supreme Court that removal statutes should be narrowly construed "and that doubts concerning removal should be resolved in favor of state court jurisdiction."<sup>175</sup>

The court also rebutted each of the primary rationales given in support of the last-served defendant rule.<sup>176</sup> Regarding the perceived "inequities" to the first-served rule and the *McKinney* rule—that they deprive later-served defendants of the opportunity to persuade earlier-served defendants that removal is appropriate—the court found it "difficult to believe that Congress intended to protect this power of persuasion when it enacted § 1446(b)."<sup>177</sup> Moreover, the court believed that the last-served rule actually creates its own inequity by treating single-defendant and multiple-defendant cases differently.<sup>178</sup> In a single-defendant case, if the defendant fails to remove within thirty days, the defendant is forever barred from

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<sup>172</sup> See *id.* at 611–12.

<sup>173</sup> *Id.* at 612 (footnote omitted).

<sup>174</sup> See *id.* The court acknowledged that former Section 1446(b) spoke only in terms of filing a notice of removal and did "not specifically address joinder." See *id.* at 612 n.4. The court believed, however, that the clear intent of Congress in enacting Section 1446(b) was to require *some* sort of action by each defendant, either by filing a notice of removal or joining a previously filed notice. See *id.* The majority apparently was making this point in response to the concurring judges' argument (*see infra* note 192) that former Section 1446(b) did not address or foreclose an earlier-served defendant's "separate right to joinder" of a removal petition filed by a later-served defendant.

<sup>175</sup> See *id.* at 613. *McKinney*'s interpretation of the statutory language "is narrow because it requires compliance from the outset. Moreover, to the extent there is doubt as to which rule is most appropriate, it stands to reason that the doubt should be resolved in favor of the interpretation that requires initial—rather than later—compliance with [former] § 1446(b)." See *id.*

<sup>176</sup> See *id.* at 613–16. The court first noted that although "the trend in recent case law" might favor the last-served rule, an interpretation "that is inconsistent with the statute's plain language and results in a broad construction of the statute simply cannot be endorsed." See *id.* at 613.

<sup>177</sup> See *id.*

<sup>178</sup> See *id.*

removal; however, in a multiple-defendant case, the first-served defendant who fails to remove “gets another bite at the apple.”<sup>179</sup>

The court also rejected the suggestion by some courts that the words “the defendant” in former Section 1446(b) should be read as “each defendant,” such that each defendant has thirty days to file a notice of removal.<sup>180</sup> The court characterized this as a “statutory slight-of-hand” that allowed these courts to get around the “obvious import” of their interpretation, which necessitates inserting the words “last-served” between “the” and “defendant.”<sup>181</sup>

The court also dismissed as “beside the point” the *Bailey* court’s assertion that the last-served rule is consistent with the rule of unanimity “because it allows earlier-served defendants to join a later-served defendant’s notice of removal”; in the court’s view, all three rules “are consistent with the rule of unanimity, because each of them requires all of the defendants at some point in time to unanimously agree to removal.”<sup>182</sup> Instead, “[t]he more salient question concerns when the forum selection decision must be made.”<sup>183</sup> The court expressed concern that the last-served rule creates the possibility that the forum-selection issue “may not be resolved for quite some time,”<sup>184</sup> and that the rule could be used as “a tool

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<sup>179</sup> See *id.* “There simply is no language in [former] § 1446(b) that can be construed to suggest that Congress intended to treat single defendants and multiple-defendants [sic] differently in determining the timeliness of removal.” *Id.* The court also rejected the *Bailey* court’s argument that the *McKinney* rule “is inequitable to later-served defendants because, ‘through no fault of their own, [the later-served defendants] might . . . lose their statutory right to seek removal.’” See *id.* at 613–14 (quoting *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1206 (11th Cir. 2008) (alteration in original)). “This inequity is illusory, because it assumes that later-served defendants can insist that a case be removed to federal court. However, if the first-served defendant (or any other defendant) opposes removal, the case cannot be removed ‘through no fault’ of the later-served defendants.” *Id.* at 614.

<sup>180</sup> See *id.* (citing *Bailey*, 536 F.3d at 1207, and *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999)).

<sup>181</sup> See *id.* (explaining that “this removal of the definite article ‘the’ does nothing to help the *Bailey* and *Brierly* courts’ cause, because the statute read as such requires each defendant to file a timely notice of removal”). The majority also argued that the last-served interpretation would effectively change the word “shall” in the statute to “may.” See *id.*

<sup>182</sup> *Id.* (citing *Bailey*, 536 F.3d at 1207).

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* The court indicated that this would be a particular concern when additional defendants are added as a result of information learned during discovery, or if some defendants are not served until later in the case due to difficulties with effecting service on them. See *id.*

to forum-shop.”<sup>185</sup> The principle that removal statutes must be narrowly construed “necessarily means that we penalize plaintiffs, as well as defendants, that sit on or waive their removal rights.”<sup>186</sup> Embracing the last-served rule essentially required the court to read an “interest of justice” exception into the statute, when “no such standard exist[ed] in the statute.”<sup>187</sup>

Finally, the court rejected the notion that *Murphy Brothers* pointed in favor of the last-served defendant rule.<sup>188</sup> *Murphy Brothers*, the court observed, involved only a single defendant and dealt only with the issue of what event triggered the thirty-day window for that defendant.<sup>189</sup> The principle underlying the Court’s ruling—that a defendant has no obligation to act until brought within a court’s authority through formal service of process—“is neither threatened nor implicated in this case.”<sup>190</sup>

In concluding, the court noted the lack of empirical evidence that plaintiffs’ attorneys are manipulating service to prevent removal.<sup>191</sup> The court pointed out that, in fact, the defendants in this case all were represented by the same attorneys, and the “most sophisticated” defendant was the first defendant to be served.<sup>192</sup>

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 615. “Instead of construing the statute to encourage defendants to act in timely compliance with § 1446(b), the courts embracing the Last-Served Defendant Rule have done just the opposite.” *Id.*

<sup>188</sup> *See id.* at 615–16 (discussing *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999)).

<sup>189</sup> *See id.* at 615.

<sup>190</sup> *Id.* Moreover, the court said, the *Bailey* and *Marano Enterprises* courts relied on a “faulty premise—that the first-served defendant will always consent to the removal”—when they asserted that the first-served and *McKinney* rules are inconsistent with *Murphy Brothers* because they obligate later-served defendants to act before they receive service. *See id.* (citing *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1208 (11th Cir. 2008), and *Marano Enters. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 756 (8th Cir. 2001)). “Without the filing of a notice of removal within the initial thirty-day window, participation by later-served defendants at that juncture of the litigation is inconsequential, as a result of the rule of unanimity, a rule that understandably was not implicated in *Murphy Brothers*.” *Id.* at 615–16.

<sup>191</sup> *See id.* at 616.

<sup>192</sup> *See id.* The concurring judges’ rationale for favoring the last-served defendant rule largely followed that of the other circuits that have adopted that rule, although they would have preferred to call it the “each-served defendant rule.” *See id.* at 618 n.1 (Agee, J., concurring in the judgment). The concurrence’s most novel argument was that former Section 1446(b) only expressly addressed the filing of a notice of removal, not joinder of such a notice by other

*B. The Fourth Circuit's Intermediate Rule Offers the Best Fit With Former Section 1446(b)*

Although the proponents of all three rules are able to muster arguments in favor of their respective interpretations of former Section 1446(b),<sup>193</sup> ultimately the arguments supporting the intermediate rule prove to be the most persuasive. The intermediate rule is the best fit with the former language of Section 1446(b), and it also does the best job of accommodating the conflicting policies embodied within that statute and the other removal statutes.

1. The Intermediate Rule Is the Most Faithful Reading of Former Section 1446(b)'s Text

Any attempt to interpret a statute should begin, of course, with the statutory text.<sup>194</sup> Although the Fourth Circuit may have overstated matters when it claimed that the meaning of former Section 1446(b)'s language is "plain,"<sup>195</sup> the Fourth Circuit's interpretation—which allows each defendant

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defendants. *See id.* at 624. When a defendant fails to file a notice of removal within thirty days of service, its "statutory right" to file such a notice "ceases to exist," but this does not defeat that defendant's "separate right to joinder." *See id.* For the majority's response to this argument, see *supra* note 174.

<sup>193</sup> The current editions of the two leading federal courts treatises speak in favor of the last-served defendant rule. Professor Moore's treatise at one point favored the first-served rule. *See Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 532 n.2 (6th Cir.1999) (discussing position taken in earlier edition of Moore's treatise). The most recent edition still recognizes that the first-served rule is "supported by two considerations": the rule of strict construction of removal statutes and the purpose of Section 1446(b)'s time limits, "to ensure that the question of where the case will be litigated be put to rest as soon as possible." *See* 16 MOORE, *supra* note 1, § 107.30[3][a][i][A]. However, Moore's now predicts that the Supreme Court would adopt the last-served rule, as signaled by *Murphy Brothers'* implicit rejection of the policies underlying the unanimity rule. *See id.* (discussing the effect of *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999)).

The Wright and Miller treatise does not squarely support one particular approach. However, it too concludes that *Murphy Brothers* "casts doubt" on what the authors characterize as the central assumption of the first-served rule, "that service on one defendant could trigger the time for unanimous action to perfect removal." *See* 14C WRIGHT ET AL., *supra* note 2, § 3731, at 597.

<sup>194</sup> *Delalla v. Hanover Ins.*, 660 F.3d 180, 185 (3d Cir. 2011).

<sup>195</sup> *Barbour v. Int'l Union*, 640 F.3d 599, 610–11 (4th Cir. 2011) (en banc). To paraphrase the Supreme Court's statement in a somewhat different context, if the meaning of the statute were so plain, the courts would not be so hopelessly conflicted over its true meaning. *See Murphy Bros.*, 526 U.S. at 355.

its own thirty-day period to file or join in a notice of removal<sup>196</sup>—is most consistent with the statute’s language and purpose.

The one thing that *is* clear about former Section 1446(b) is that the statute, by its express terms, uses only the singular.<sup>197</sup> The statute requires that a notice of removal be filed within thirty days of “the defendant” receiving the complaint.<sup>198</sup> But that does not mean that the statute sheds no light on how a multiple-defendant case should be handled.

To begin with, and perhaps most importantly, the statutory language speaks in mandatory terms—as the Fourth Circuit stated, the statute “unequivocally requires action.”<sup>199</sup> The statute requires that the defendant “shall” file a notice of removal within the prescribed period.<sup>200</sup> To read the statute so as to require only one defendant to comply, while allowing other defendants to blithely ignore the thirty-day time limit, arguably undermines the mandatory nature of the statute’s command.

The statute, in its most straightforward reading, also seems to require that each defendant take the required action.<sup>201</sup> The statute does not differentiate among defendants; it is addressed to every defendant.<sup>202</sup> It provides that “the defendant” “shall” file a notice of removal. It does not say that the “first-served defendant” shall take that action, or that “any” defendant may take that action.<sup>203</sup>

The statute gives the defendant a full thirty days from service to file the notice of removal.<sup>204</sup> The most natural reading of this language is that each defendant should have the full thirty days to consider its forum options and decide whether to join in removal of the case.<sup>205</sup>

The Fourth Circuit’s *McKinney* intermediate rule<sup>206</sup> is entirely consistent with the language of the statute. First, it is fully in keeping with the mandatory nature of the statutory language; each defendant is required

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<sup>196</sup> See *Marano Enters. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 756 (8th Cir. 2001).

<sup>197</sup> See 28 U.S.C. § 1446(b) (2006).

<sup>198</sup> See *id.* For the full text of former Section 1446(b), see *supra* text accompanying note 49.

<sup>199</sup> See *Barbour*, 640 F.3d at 611.

<sup>200</sup> 28 U.S.C. § 1146(b).

<sup>201</sup> See *id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> Recall that the statute originally provided only a twenty-day window, but that this was extended to thirty days in the 1965 amendment. See *supra* note 61 and accompanying text.

<sup>205</sup> See *McKinney v. Bd. of Trs.*, 955 F.2d 924, 928 (4th Cir. 1992).

<sup>206</sup> See *id.*

to take action within thirty days of service on that defendant.<sup>207</sup> It also is fully in keeping with the statute's provision that the defendant is to have thirty days in which to file its notice.<sup>208</sup> Each defendant is given the full thirty days to make its decision on removal.<sup>209</sup>

Both the first-served and last-served rules, however, run headlong into the text of former Section 1446(b) in differing ways. The first-served defendant rule is, arguably, consistent with the mandatory nature of the statutory language; all defendants (or at least all who have been served at that point) are required to join in the notice of removal within the mandated thirty-day period.<sup>210</sup> However, it deprives some defendants of the benefit of having a full thirty days after service to consider forum options and to decide whether removal should be pursued.<sup>211</sup> It seems relatively clear that Congress intended that a defendant should have an adequate period in which to consider its options, as demonstrated by both the original provision and the later twenty-day-to-thirty-day amendment.<sup>212</sup> The first-served rule, though, can require a defendant to make a removal decision on the same day it is served, or within a short period afterwards, perhaps without the benefit of counsel.<sup>213</sup> Also, as a number of courts have pointed out, the first-served rule does damage to the actual statutory language because it requires a court to read the statute as if it contained language requiring that a notice of removal be filed within thirty days of service on the first-served defendant.<sup>214</sup>

The last-served defendant rule also conflicts with former Section 1446(b)'s language in a number of ways. First, it is inconsistent with the mandatory nature of that language.<sup>215</sup> Only one defendant, the last-served defendant, actually is required to take any action within the specified thirty

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<sup>207</sup> *See id.*

<sup>208</sup> *See id.*; *see also* 28 U.S.C. § 1446(b).

<sup>209</sup> *McKinney*, 955 F.2d at 928.

<sup>210</sup> *See supra* note 101 and accompanying text.

<sup>211</sup> *See supra* note 122–23 and accompanying text.

<sup>212</sup> *See supra* note 61 and accompanying text.

<sup>213</sup> *See Stravitz, supra* note 50, at 201 (positing a scenario under which a later-served defendant's time to remove could be "cut to hours or minutes" under the first-served rule).

<sup>214</sup> *See, e.g., Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999); *McKinney*, 955 F.2d at 926.

<sup>215</sup> *See* 28 U.S.C. § 1446(b) (2006) (stating the defendant "shall" file a notice of removal within thirty days of service on that defendant).

days.<sup>216</sup> By not requiring that every defendant heed the statute's command—by filing a notice of removal within thirty days of service on that defendant—the last-served rule effectively reads the word “shall” out of the statute.<sup>217</sup> Second, the last-served rule, like the first-served rule, requires the court to read the statutory language as if it contained language that it does not actually contain, that is, as if the statute authorized the filing of the notice of removal by “any” defendant or by the “last-served” defendant.<sup>218</sup> Instead, as noted above, the statute most naturally reads as requiring action by each defendant. Also, the last-served rule makes mincemeat of the statute's clear intention that the removal petition be filed in a timely manner before the state court has invested substantial time and effort in handling the suit. As discussed more fully *infra*, the last-served rule can result in removal occurring months or even years after the case has been pending in the state court.

In addition to providing the most consistent reading of the textual language of former Section 1446(b), the intermediate rule also is fully consistent with the maxim that jurisdictional statutes in general, and removal statutes in particular, are to be strictly construed.<sup>219</sup> Like the first-

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<sup>216</sup> See *Barbour v. Int'l Union*, 640 F.3d 599, 611–12 (4th Cir. 2011) (en banc) (stating that the “fatal flaw” of the last-served defendant rule is that it only applies to the last-served defendant).

<sup>217</sup> See *id.* at 616. In its recent opinion in *Delalla v. Hanover Insurance*, the Third Circuit made the novel claim that the last-served defendant rule is mandated by the “plain text” of Section 1446(b), when that section is read in conjunction with Section 1446(a). See 660 F.3d 180, 186 (3d Cir. 2011). The court pointed out that Section 1446(a) “provides that ‘[a] defendant or defendants’ may initiate the removal process by filing a notice of removal,” thus “explicitly anticipat[ing] the possibility that multiple defendants will file notices of removal.” See *id.* at 185–86. (first alteration in original). “Given that § 1446(a) explicitly affirms the possibility of multiple notices of removal, the only reasonable reading of § 1446(b) is that the subsection applies individually to *each* notice of removal that might potentially be filed by *each* removing ‘defendant.’” *Id.* at 186 (emphasis in original).

The Third Circuit, though, has ignored the mandatory nature of former Section 1446(b)'s language. The statute mandates that “the defendant” (which, by the Third Circuit's own reasoning, is best read to refer to each defendant) “shall” file a notice of removal within thirty days of service on that defendant.

<sup>218</sup> See *Barbour*, 640 F.3d at 612.

<sup>219</sup> See, e.g., *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941) (expressing policy of strict construction of removal statutes); see also Lund, *supra* note 37, at 364–65 (discussing the strict-construction rule and the presumption against federal jurisdiction).

It could be argued that the maxim does not apply with full force in this setting. Most of the cases that have invoked that maxim have involved issues as to whether federal jurisdiction was

served rule, the intermediate rule requires that removal take place within thirty days of service on the first defendant. The intermediate rule provides some relief as to how quickly later-served defendants must join in that notice of removal, but it results in no delay in removal.

Some courts and commentators have speculated that the Supreme Court's decision in *Murphy Brothers* "portended" that the Supreme Court would read former Section 1446(b) as embodying the last-served defendant rule.<sup>220</sup> While this may prove to be an accurate forecast,<sup>221</sup> this conclusion does not inevitably flow from the Court's rationale in that case. The intermediate rule—which allows each defendant thirty days from the date of service on that defendant either to file a notice of removal or join in a previously filed notice—is fully consistent with the Court's rationale that a defendant is not required to act unless and until the defendant receives formal service, or waives that service.<sup>222</sup>

Finally, the intermediate rule is fully consistent with the rule of

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even proper to begin with. As I have argued elsewhere, the presumption against federal jurisdiction should apply with full force in that setting. *See id.* at 365. In the factual setting of the removal timing issue, however, there is no debate whether the case properly falls within federal jurisdiction (or, if there is, it is a separate issue); the only question is whether the procedural requirements for removal have been followed. It might be argued in response to this, though, that the strict-construction maxim still should apply in this procedural setting because of the general intrusiveness of removal on state-court prerogatives, and the particular intrusion that occurs when a state court has invested substantial time and resources in the case. *See, e.g.,* Stravitz, *supra* note 50, at 188 (stating that courts strictly enforce the removal timing provisions of Section 1446(b) "because removal of a case properly pending in state court raises federalism concerns").

Regardless of whether the strict-construction rule applies with full force in this setting, I find questionable the assertion by some courts that the Supreme Court in *Murphy Brothers* "relaxed" the presumption against removal. *See, e.g.,* Destfino v. Reiswig, 630 F.3d 952, 956 (9th Cir. 2011); Bailey v. Janssen Pharmaceutica, Inc., 536 F.3d 1202, 1207 (11th Cir. 2008). If anything, the Court's failure to address this presumption is a *sub silentio* recognition by the Court that the presumption is most applicable in cases that deal with an issue of whether a case properly is within federal jurisdiction or not, and is not as applicable in cases that present procedural issues relating to removal.

<sup>220</sup> *See* Marano Enters. v. Z-Teca Rests., L.P., 254 F.3d 753, 756 (8th Cir. 2001); *see also* Destfino, 630 F.3d at 956; Bailey, 536 F.3d at 1207–08; Stravitz, *supra* note 50, at 195 (stating that *Murphy Brothers* "strongly suggested a proper resolution" of the timing issue).

<sup>221</sup> Or perhaps not. *Murphy Brothers* was decided by a 6-3 vote, and the composition of the Court has changed considerably since then.

<sup>222</sup> Arguably the first-served defendant rule is less consistent with that rationale, however. Although the rule, as applied by the Fifth Circuit, does not require defendants who have not been served to join in the notice of removal (*see supra* note 97 and accompanying text), it can necessitate that a defendant take very prompt action after receiving service.



unanimity. Arguably all three of the conflicting interpretations of former Section 1446(b) are at least somewhat consistent with the rule of unanimity because they all ultimately require that all defendants consent—or at least not object—to removal.<sup>223</sup> (The last-served rule, though, has some problems, which I will discuss *infra*.) But the intermediate rule is particularly consistent with the requirement of unanimity because it affirmatively requires each defendant to take action and either file a notice of removal or join in a previously filed notice.<sup>224</sup>

## 2. The Intermediate Rule Advances the Policies of the Removal Statutes and of Former Section 1446(b)

The intermediate rule also offers the best fit with the policies embodied in former Section 1446(b) and in the overall removal scheme. The rule requires that timely action be taken to remove a case, and helps to ensure that any dispute as to whether a case is removable will be resolved as promptly as possible.<sup>225</sup> The intermediate rule also is most consistent with the removal statutes' policy that removal in a multiple-defendant case is not an individual right that may be exercised by any defendant, but rather is a joint right that requires unified action by all of the defendants. The rule also protects the defendants' removal rights while minimizing the possibility that defendants may make strategic use of the timing of removal.

One uniform theme of the removal statutes is promptness, both in the initial decision whether to seek removal and in the resolution of any motions to remand; Congress wanted decisions about the appropriate forum to be made as soon as possible.<sup>226</sup> As originally enacted, Section 1446(b) required the removal notice to be filed within twenty days of service.<sup>227</sup> This later was expanded to thirty days to allow a defendant somewhat more time to retain counsel and obtain the benefit of that counsel's advice, but Congress still required prompt action.<sup>228</sup> Plaintiffs who wish to file a

<sup>223</sup> See *Barbour v. Int'l Union*, 640 F.3d 599, 614 (4th Cir. 2011) (en banc).

<sup>224</sup> See *id.* at 607.

<sup>225</sup> *Id.* at 613.

<sup>226</sup> See H.R. REP. NO. 112-10, at 14 (2011) (expressing current Congressional interest in "ensuring that defendants act with reasonable promptness in invoking Federal jurisdiction").

<sup>227</sup> Compare 28 U.S.C. § 1446(b) (1964) (setting forth twenty-day time period for removal after receipt of service), with Act of Sep. 17, 1965, Pub. L. No. 89-215, 1965 U.S.C.C.A.N. (79 Stat.) 887 (substituting "thirty days" for "twenty days" wherever appearing in Section 1446(b)).

<sup>228</sup> See *supra* note 61 and accompanying text. The theme of promptness also carries through to the portion of former Section 1446(b) that governs removal of cases that were not removable as

motion to remand the case to state court also are required to act promptly.<sup>229</sup> The unifying theme of these provisions seems to be that if a case is to be removed from state court, this should occur at the earliest stage of the case possible, before the state court has become invested in the case. Similarly, if a case is to be sent back to state court, that decision should be made known at an early date.

The intermediate rule is fully consistent with this theme; it requires that the notice of removal be filed at the earliest possible date, within thirty days of service on the first defendant.<sup>230</sup> The last-served rule, however, is not. I will discuss this point more fully with some specific factual scenarios in Part IV in conjunction with the discussion of the recent statutory revisions,<sup>231</sup> but the problem is that there are a number of possible scenarios in which the last-served rule allows removal to occur at a much later stage of the case, possibly even years into the case. Proponents of the last-served rule argue that this possible delay is largely within the control of the plaintiffs, who can ensure that all defendants are served at the same time or within a short time of each other.<sup>232</sup> But this certainly overstates the case. There are any number of situations in which a plaintiff may act diligently but in which service on one or more defendants still is delayed for some legitimate reason—a defendant is evading service, for instance.<sup>233</sup>

Another theme of the removal statutes in multiple-defendant suits is that the right of removal in such suits is a collective right, which requires collective action by all defendants; it is not an individual right that any one of the defendants may invoke. The rule of unanimity is, of course, a prime

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originally filed. *See* 28 U.S.C. § 1446(b) (2006). Again, a thirty-day deadline applies, and no removal is possible if the case has been pending more than one year.

<sup>229</sup> *See* 28 U.S.C. § 1447(c) (providing that a motion to remand a case “on the basis of any defect other than lack of subject matter jurisdiction” must be made within thirty days of filing of notice of removal).

<sup>230</sup> *See* *Barbour v. Int’l Union*, 640 F.3d 599, 607 (4th Cir. 2011) (en banc). The first-served defendant rule is equally consistent with this timeliness theme, but it runs up against another policy of the removal statutes: that of allowing a defendant adequate time to retain counsel and consider its forum options before being forced to act. *See supra* notes 58–61 and accompanying text.

<sup>231</sup> *See infra* notes 308–24 and accompanying text.

<sup>232</sup> *See, e.g., Destfino v. Reiswig*, 630 F.3d 952, 956 (9th Cir. 2011). Arguably, though, this is another weakness with the last-served rule; the timing of the resolution of removal issues lies too much within the control of the plaintiff, depending on how promptly the plaintiff acts.

<sup>233</sup> *See, e.g., Proulx v. Wells*, 235 S.W.3d 213, 214–15 (Tex. 2007) (demonstrating a plaintiff’s substantial efforts to locate an evasive defendant for purposes of service).

example of this; all of the defendants must join in, or consent to, the notice of removal, and the objection of any one of the defendants will prevent removal from occurring.<sup>234</sup> But removal as a collective right also finds its embodiment in a number of other provisions. For example, 28 U.S.C. § 1441(b) provides that a suit may not be removed on the basis of diversity of citizenship if any of the defendants is a citizen of the state in which the action is filed.<sup>235</sup> The other defendants may very much want to remove the case, and may have good reason for feeling that way as out-of-state citizens themselves, but they are unable to do so. Similarly, the rule requiring complete diversity of citizenship will prevent removal from occurring if any one of the defendants shares the same state citizenship as a plaintiff.<sup>236</sup> Again, the diverse defendants may have great desire and motivation for removing the action, but they will be unable to do so. In the multiple-defendant setting, removal is a collective right; it is all or nothing.

The last-served rule conflicts with this notion of removal as a collective right. Indeed, the proponents of that rule speak as if removal is an individual right of each defendant; they stress the importance of preserving the removal rights of later-served defendants.<sup>237</sup> But there is no such individual right in multiple-defendant cases.<sup>238</sup> If an earlier-served defendant chooses not to remove, removal will not be possible; the other defendants cannot override that decision.<sup>239</sup>

Some proponents of the last-served rule have pointed out that an earlier-

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<sup>234</sup>There are of course exceptions to the rule of unanimity (*see supra* note 45), but those exceptions simply prove the general rule: that removal requires uniform agreement and concerted action by all defendants.

<sup>235</sup>*See* 28 U.S.C. § 1441(b) (2006). This provision is being relocated to Section 1441(b)(2). *See supra* note 29 and accompanying text.

<sup>236</sup>*See* 28 U.S.C. § 1332. The Supreme Court long ago interpreted Section 1332 and its predecessors to require complete diversity. *See* *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806). For the complete-diversity requirement to be satisfied, no plaintiff may be a citizen of the same state as any defendant. *See* CHEMERINSKY, *supra* note 23, § 5.3.3, at 302–03.

<sup>237</sup>*See, e.g., Destfino*, 630 F.3d at 955–56 (stating that contrary rules would “deprive some defendants of *their* right to a federal forum” and that “*each defendant* is entitled to thirty days to exercise *his* removal rights”) (emphasis added); *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1206 (11th Cir. 2008) (stating that the first-served rule can lead to situations in which later-served defendants, “through no fault of their own, . . . lose *their* statutory right to seek removal”) (emphasis added); *Stravitz*, *supra* note 50, at 202–03 (arguing that rules other than the last-served rule “abridge[] the [last-served] defendant’s procedural right to a federal forum”).

<sup>238</sup>*See* *Marano Enters. v. Z-Teca Rests., L.P.*, 254 F.3d 753, 755–57 (8th Cir. 2001).

<sup>239</sup>*Id.*

served defendant's failure to remove may not reflect a conscious decision to remain in state court; the defendant may not have realized that removal was an option or may have inadvertently missed the deadline.<sup>240</sup> This is undoubtedly true. But the opposite is also true; it may, in fact, have been a conscious decision in spite of later claims to the contrary. Moreover, if the case were a single-defendant case, the defendant's excuse for missing the deadline would not matter, and the defendant could not later change his mind; the defendant would be held to have waived removal, whether the defendant acted deliberately or not.<sup>241</sup> The last-served rule, though, allows a defendant who has consciously decided not to remove to later change its mind and join in a later-served defendant's notice of removal.<sup>242</sup> It thus treats single-defendant cases and multiple-defendant cases as if they were two distinct, unrelated species, in spite of no differentiation in the statute itself.

Proponents of the last-served rule also argue that the rule helps to preserve the later-served defendant's opportunity to persuade earlier-served defendants that removal is possible and advisable.<sup>243</sup> But there was nothing in the removal statutes, as they existed prior to the recent amendments, to indicate that Congress contemplated that such an opportunity should exist. There certainly is no such power of persuasion in a single-defendant lawsuit; no matter how poorly counseled the defendant may be, it will have given up the ability to remove if it fails to take the requisite steps within the specified time period.<sup>244</sup> Proponents of the last-served rule also understate the opportunities for consultation between defendants that exist under the intermediate rule.<sup>245</sup>

The intermediate rule provides sufficient time for each defendant to make an informed decision about removal.<sup>246</sup> One of the major drawbacks

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<sup>240</sup> See, e.g., *Destfino*, 630 F.3d at 956.

<sup>241</sup> See *id.*

<sup>242</sup> *Id.*

<sup>243</sup> See, e.g., Stravitz, *supra* note 50, at 202–03 (arguing that the later-served defendant should have the opportunity to consult with and persuade earlier-served defendants).

<sup>244</sup> See 28 U.S.C. § 1446(b) (2006).

<sup>245</sup> See, e.g., Stravitz, *supra* note 50, at 203 (arguing that “[c]onsultation 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”).

<sup>246</sup> See *Barbour v. Int’l Union*, 640 F.3d 599, 613 (4th Cir. 2011) (en banc) (explaining that later-served defendants “need only join a notice of removal that has been filed in compliance with the time requirements of § 1446(b) and within thirty days of the date they were served”).

of the first-served rule, in comparison, is that it does not allow adequate time for an informed decision about removal.<sup>247</sup> Prior to filing for removal, a defendant must first determine whether it was the first defendant to be served.<sup>248</sup> If not, service on the previously served defendant will have started the removal clock.<sup>249</sup> Then, the defendant must determine whether other defendants have been served in the time since it was served and, if so, when they were served. This may be hard to do, particularly if proof of service has not yet been filed with the court. If other defendants have been served, they must be contacted and asked to join in the notice of removal. At this stage, though, they might not yet have legal counsel of their own, or their legal counsel may have just become involved and may not have had time to study the complaint. The intermediate rule, however, allows each defendant a full thirty days in which to retain an attorney, if it does not already have one, and to obtain the benefit of the attorney's advice as to any removal options—the same amount of time the defendant would have if it were the only defendant to the suit.<sup>250</sup>

Critics of both the first-served rule and the intermediate rule have argued that those rules create the opportunity for plaintiffs to manipulate the timing of service in the hope of minimizing the likelihood that successful removal will occur.<sup>251</sup> Critics typically posit a situation in which a plaintiff first intentionally serves a “less sophisticated” defendant and then delays service on the more sophisticated defendant, hoping that the first defendant will fail to make timely removal.<sup>252</sup>

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<sup>247</sup> See *Brown v. Demco, Inc.*, 792 F.2d 478, 481–82 (5th Cir. 1986) (explaining the rule of unanimity and its effect on a later-served defendant's ability to remove and acknowledging that this rule “has been criticized as unfair”).

<sup>248</sup> See *id.* at 481.

<sup>249</sup> See *id.*

<sup>250</sup> See *Barbour*, 640 F.3d at 608–09 (describing as a policy concern the need “to allow all defendants a full thirty days to investigate the appropriateness of the removal”).

<sup>251</sup> See, e.g., *Destfino v. Reiswig*, 630 F.3d 952, 955–56 (9th Cir. 2011).

<sup>252</sup> Typically, though, the cases in which the last-served rule has been adopted and applied have involved nothing like the parade of horrors that critics of the alternative rules fear. For example, in *Brierly*, the first-served defendant was a presumably sophisticated corporate entity that did, in fact, file a timely (but unsuccessful) notice of removal. See *supra* note 107. In *Marano*, four out of five defendants were served within a three-day period. See *supra* note 108. The one defendant who has not been served at the time the notice of removal was filed would not be required to join in that notice under either the first-served defendant rule or the intermediate rule. In *Bailey*, service on the four defendants was spread out over a forty-one day period, but each defendant was a sophisticated corporate entity, and they all were represented by the same

There are a number of responses to this criticism, however. First, as the Fourth Circuit has noted, these critics can point to no evidence that plaintiffs are intentionally making such strategic use of the rules in jurisdictions where either of these rules apply.<sup>253</sup> Second, critics overstate the possibility that any such attempt to make strategic use of service to defeat removal is likely to prove effective. The examples they posit typically involve situations in which the first-served defendant has no legal counsel at all, or legal counsel who may be ignorant of removal options or the possible benefits of litigating in federal court.<sup>254</sup> But there are few situations in which a plaintiff could accurately forecast whether such a scenario is likely to play out.<sup>255</sup> A plaintiff who wishes to avoid removal is much more likely to find success by joining a non-diverse defendant, or a defendant that is a citizen of the forum state, than it is through attempts to manipulate the timing of service.

Proponents of the last-served rule also fail to recognize (or understate the possibility) that the last-served rule may lead to defendants making strategic use of removal timing.<sup>256</sup> It is not hard to imagine a situation—particularly one in which the defendants share counsel, or in which the various defense counsel already are in close communication—in which

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attorney. *See supra* note 109; *see also Barbour*, 640 F.3d at 616 (noting that all defendants in *Barbour* were represented by the same attorney, and that the “most sophisticated” defendant was the first to receive service).

<sup>253</sup> *See Barbour*, 640 F.3d at 616.

<sup>254</sup> For example, in the illustration given by the American Law Institute, the plaintiff “has reason to know” that the first-served defendant “is the unsophisticated operator of a small business.” *See* FJC PROJECT, *supra* note 19, at 458–59 (Illustration 1446-b-3), discussed *infra* at notes 271–273 and accompanying text. That defendant appears pro se and fails to remove. The plaintiff then serves the defendant manufacturer, which “the plaintiff has reason to believe is sophisticated in its defense of products-liability litigation.” *See id.*

Notably, though, the ALI did not give this example to argue in favor of the last-served defendant rule; instead, this example was given in support of including a codified *equitable* exception to the *first-served* rule. *See id.*

<sup>255</sup> If there were evidence of intentional misconduct by the plaintiff that had the effect of preventing removal, this is exactly why the Fifth Circuit recognizes an equitable exception to the first-served defendant rule. *See supra* notes 103–104 and accompanying text (discussing Fifth Circuit’s equitable exception); *see also infra* note 264 and accompanying text (discussing ALI’s proposal to include a codified equitable exception in the statute). The Fourth Circuit has not explicitly recognized such an equitable exception in either of the cases applying the intermediate rule, but there is no reason to think the court would decline to do so if the facts warranted.

<sup>256</sup> *See Stravitz, supra* note 50, at 209–10 (describing scenarios where defendants in a last-served system consult each other on removal).

earlier-served defendants might intentionally postpone filing a notice of removal, knowing that they will still be able to join in such a notice once the last defendant is served. These defendants, for example, might hope to test the waters in the state court by filing a motion to dismiss there, hoping for a quick ruling from the state court. Under the last-served rule, there is little risk to such procedural use of removal timing.<sup>257</sup>

At the end of the day, no rule is perfect. Overall, though, the intermediate rule does the best job of balancing the removal statutes' policy of protecting the removal rights of defendants against the policy of ensuring that forum choice options are exercised in a timely manner. For this reason, a court addressing the removal timing issue in a case governed by the former version of Section 1446(b) should adopt the intermediate rule.

#### IV. THE RECENT LEGISLATIVE AMENDMENT OF SECTION 1446(B)

The last fifteen years witnessed a number of proposals to amend Section 1446(b) and bring about a uniform answer to the multiple-defendant issue.<sup>258</sup> First, the American Law Institute, as part of its Federal Judicial Code Revision Project, endorsed codification of the first-served defendant rule, with a codified equitable exception. The Judicial Conference of the United States, however, departed from the ALI on this issue and recommended adoption of the last-served rule.<sup>259</sup> The Judicial Conference's recommendation to codify the last-served defendant rule served as the basis for one of the provisions in legislation recently enacted

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<sup>257</sup> In *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1208 (11th Cir. 2008), the court held that a motion to dismiss that some of the defendants filed in state court prior to removal did not waive those defendants' right to remove or bar them from joining in a later-served defendant's removal notice. The court reached this conclusion in spite of the fact that all of the defendants were represented by the same attorney in the state-court proceedings. *See id.* at 1204. A limited number of cases have found waiver to have occurred when a defendant filed a motion to dismiss and took other defensive actions in state court. *See, e.g., Fate v. Buckeye State Mut. Ins. Co.*, 174 F. Supp. 2d 876, 881–82 (N.D. Ind. 2001) (finding that waiver occurred when defendant filed a motion to dismiss and took other actions in state court for nearly a one-year period); *Scholz v. RDV Sports, Inc.*, 821 F. Supp. 1469, 1470–72 (M.D. Fla. 1993). However, these cases, unlike *Bailey* and the situation discussed in the text, involved only a single defendant. *See Bailey*, 536 F.3d at 1202; *see also Fate*, 174 F. Supp. 2d at 876; *Scholz*, 821 F. Supp. at 1469. For further discussion of waiver and the circumstances in which it can occur, see *infra* note 326 and accompanying text.

<sup>258</sup> In addition to the proposals discussed in the text, see Stravitz, *supra* note 50, at 207 (setting forth his own proposed statutory codification of the last-served defendant rule).

<sup>259</sup> Judicial Conference Report, Sept. 23, 2003, at 22.

by Congress, the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (JVCA).<sup>260</sup> As I will illustrate, however, Congress has not adequately anticipated the problems—especially problems associated with delay in removal—that codification of the last-served rule will bring about. The new legislation also creates new and substantial ambiguities that courts will have to address in the future.

#### A. *The ALI's Federal Judicial Code Revision Project*

The first proposal to amend Section 1446(b) appeared as part of the American Law Institute's Federal Judicial Code Revision Project, published in 2004.<sup>261</sup> The Project sought "to identify particular statutes governing federal civil litigation that were needlessly complicating the work of the federal courts."<sup>262</sup> On the multiple-defendant timing issue, the ALI

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<sup>260</sup>The removal provisions took effect thirty days after the JVCA's effective date and apply to cases commenced on or after the effective date (January 6, 2012). *See* Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 1045, 125 Stat. 758 (enacted Dec. 7, 2011). Cases commenced prior to this effective date therefore will continue to be governed by the ambiguous language of former Section 1446(b). Because a district court's order denying a motion to remand typically is not reviewable on appeal until there is a final judgment in the case, *see* WRIGHT & KANE, *supra* note 23, § 41, at 254 & n.29, it is likely that the appellate debate regarding the proper interpretation of former Section 1446(b) will continue for a number of years to come.

<sup>261</sup>The project began in 1994, with work proceeding in stages. *See* FJC PROJECT, *supra* note 19, at 1–2 (Introductory Statement). Tentative Draft No. 2, dealing with supplemental jurisdiction, was approved in 1998; Tentative Draft No. 3, dealing with removal, was approved in 1999; and Tentative Draft No. 4, dealing with venue, was approved in 2001. *See id.* at 2. Professor John Oakley served as Reporter for the project and prepared a lengthy Prospectus. *See* John B. Oakley, *Prospectus for the American Law Institute's Federal Judicial Code Revision Project*, 31 U.C. DAVIS L. REV. 855 (1998). The Prospectus noted the division of authority on the removal timing issue and recommended this as a topic for the Project to address, but the Prospectus did not recommend a particular resolution of that issue. *See id.* at 1001–02.

<sup>262</sup>FJC PROJECT, *supra* note 19, at 2. With regard to Section 1446(b), the ALI proposed retaining the two then-existing paragraphs of that section but splitting them into two discrete subsections, (b)(1) and (b)(2). *See id.* at 330. The ALI also proposed clarifying the language of those subsections to specify that subsection (b)(1) would apply only to actions that were "ascertainably" removable when commenced and that subsection (b)(2) would apply either to actions that were not removable when commenced or to actions which could not be "ascertained to be removable" when the action was filed. *See id.*

Proposed subsection (b)(1) would have largely retained the language of the first paragraph of former Section 1446(b); certain changes to the language of that paragraph, though, would be made to more clearly capture in the statutory language the Court's holding in *Murphy Brothers*. *See id.* (stating that the statute "makes express on the face of the statute the understanding of the current



proposed amending the statute to expressly codify the first-served defendant rule.<sup>263</sup> Because the ALI was concerned that the first-served rule could lead to unfair results, however, the Institute proposed the creation of a new subsection of the statute, which would give the district court judge equitable power to extend the time for removal “in the interest of justice.”<sup>264</sup>

There is little in the Project itself or in its Commentary to explain why the ALI proposed codifying the first-served rule.<sup>265</sup> Cases adopting all three interpretations of former Section 1446(b) had been decided by 1999 when this portion of the Project was approved,<sup>266</sup> and the Commentary noted that some courts had rejected the first-served defendant rule on the basis that it deprives later-served defendants ““of the opportunity to persuade the first defendant to join in the notice of removal.””<sup>267</sup> The Commentary noted, though, that a “leading case” (the Fifth Circuit’s decision in *Brown v. Demco, Inc.*)<sup>268</sup> had “underscored the importance of the general rule despite its potential for unfairness.”<sup>269</sup> Therefore, while the

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law announced in *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999), with respect to the troublesome ‘service or otherwise’ language”); see also *supra* notes 62–73 and accompanying text (discussing *Murphy Bros.*, 526 U.S. 344).

<sup>263</sup> See FJC PROJECT, *supra* note 19, at 330. This change would be accomplished primarily by changing the statute’s requirement that the notice of removal be filed within thirty days of service on “the defendant” to require filing within thirty days of service on “a” defendant. See *id.* at 449 (Commentary to § 1446(b)(1)) (“by referring only to ‘a’ defendant . . . , new § 1446(b) follows those cases construing present § 1446(b) to hold that the time for removal begins to run when any one of several defendants receives the required notice that the action against them is removable”).

<sup>264</sup> See *id.* at 330–31, 454–55. The proposed Section 1446(b)(3) would read: “In the interest of justice a district court may extend the time limits of this subsection if several defendants file a notice of removal that is untimely with respect to some but not all of the defendants required to join in the notice of removal.” The “interest of justice” language was borrowed from the statutes governing transfer of venue. See *id.* at 455 (discussing 28 U.S.C. §§ 1404, 1406 (2006)).

<sup>265</sup> See *id.* Nor was there any discussion of this section at the May 18, 1999, meeting of the American Law Institute at which the removal provisions were discussed and approved, other than a brief mention by Reporter John Oakley that the language of Section 1446(b) was being divided into two subsections. See 75 A.L.I. PROC. 185 (1999).

<sup>266</sup> The Commentary noted that there was “a great deal of confusion in and conflict among the lower courts as to whether the time for removal begins to run when any one defendant receives a copy of the relevant pleading.” See FJC PROJECT, *supra* note 19, at 449; see also *id.* at 530–34 (Reporter’s Note E: The “Rule of Unanimity” and Its Exceptions).

<sup>267</sup> See *id.* at 454 (quoting 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3732, at 339 (3d ed. 1998)).

<sup>268</sup> 792 F.2d 478, 482 (5th Cir. 1986).

<sup>269</sup> See FJC PROJECT, *supra* note 19, at 454–55 (citing *Brown v. Demco, Inc.*, 792 F.2d 478 (5th Cir. 1986)). The Commentary also noted that *Brown* had indicated that the first-served rule

ALI's proposal preserved the "general rule," a new subsection was added to "confer[] the equitable discretion needed to avoid unfair application of that general rule."<sup>270</sup>

The Commentary to the proposed new equitable exception gave an example of a factual situation in which the equitable exception to the first-served defendant rule might apply, involving a scenario in which a plaintiff intentionally first effected service of process on an unsophisticated defendant and then waited more than thirty days to serve the more sophisticated corporate defendant.<sup>271</sup> The Commentary noted that evidence that a plaintiff has manipulated the sequence or timing of service of process "is relevant but not indispensable" to a determination whether the equitable exception should be applied.<sup>272</sup> "Justice may be served by extending the time for removal even absent sharp practice by the plaintiff. On the other hand, evidence of sharp practice would not necessarily require the district court to find that an extension of time would serve the interest of justice."<sup>273</sup>

### *B. The Federal Courts Jurisdiction and Venue Clarification Act of 2011*

By 2001—around the same time that the final drafts of the ALI Project were being approved—the Committee on Federal-State Jurisdiction of the Judicial Conference of the United States began its own project "to ascertain amendments for judicial improvements."<sup>274</sup> The Committee ultimately

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might not be applied in cases involving bad faith conduct for the plaintiffs or "where there is some other 'equitable reason why'" removal should be allowed. *See id.* (quoting *Brown*, 792 F.2d at 481–82). For discussion of *Brown*'s holding and rationale, see *supra* notes 76–91 and accompanying text.

<sup>270</sup> *See* FJC PROJECT, *supra* note 19, at 455.

<sup>271</sup> *See id.* at 458–59 (Illustration 1446-b-3). The illustration involved a hypothetical products-liability suit regarding a bicycle helmet. Suit is brought against the manufacturer of the helmet but also against a vendor who sold the plaintiff the helmet at a kiosk at an amateur bicycle race. In the illustration, the plaintiff first serves the vendor, who the plaintiff "has reason to know is the unsophisticated operator of a small business." *See id.* at 458. The vendor appears pro se and fails to remove. The plaintiff then waits more than thirty days and serves the manufacturer, which "the plaintiff has reason to believe is sophisticated in its defense of products-liability litigation." *See id.*

<sup>272</sup> *See id.* at 459.

<sup>273</sup> *See id.* "[T]he scope of the discretion of the district court is broad but not unbounded." *Id.*

<sup>274</sup> *See* Judicial Conference Report, Mar. 14, 2001, at 22. On that same date, the Committee also endorsed amending 28 U.S.C. § 1332(a) to clarify the "resident alien proviso," *see id.* at 21–22, and the Committee also later endorsed the ALI's proposal to clarify "the availability of

recommended seven specific amendments to Title 28 “to improve the clarity of the law and increase judicial efficiency.”<sup>275</sup> The full Judicial Conference approved the Committee’s proposals in September 2003.<sup>276</sup> Among these proposals was one that, contrary to the ALI Project’s recommendation, would codify the last-served defendant rule in multiple-defendant cases.<sup>277</sup>

In November 2005, the Subcommittee on Courts, the Internet, and Intellectual Property of the House Judiciary Committee held a hearing on proposed legislation that embodied the Judicial Conference’s various proposals.<sup>278</sup> Subcommittee Chairman Lamar Smith of Texas noted that the proposals covered by the draft legislation would have “a wide impact on ordinary private litigation in the [f]ederal courts.”<sup>279</sup> Chairman Smith noted that because removal affects not only the federal courts but the state courts as well and involves “intrusion on State prerogatives,” removal is “one of

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diversity jurisdiction for corporations with foreign contacts,” *see* Judicial Conference Report, Sept./Oct. 2001, at 56.

<sup>275</sup> *See* Judicial Conference Report, Sept. 23, 2003, at 22–23. One of the proposals related to citizenship of insurers in direct-action litigation. The remaining six proposals related to removal and remand procedures. *See id.* In addition to the last-served defendant proposal, discussed in the text, these proposals included ones that: (1) related to how to address removal issues in diversity cases when the amount in controversy was unclear; (2) authorized federal district courts to waive the one-year limit on removal in some circumstances; (3) clarified the provisions of 28 U.S.C. § 1441(c) regarding the removal and remand of cases containing both federal-law claims and unrelated state-law claims; (4) separated the removal provisions for criminal and civil cases into two statutes; and (5) removed the specific reference to Rule 11 in 28 U.S.C. § 1446(a). *See id.* The Judicial Conference later approved an additional proposal relating to the amount-in-controversy issue, *see* Judicial Conference Report, Sept. 20, 2005, at 23–24, and also a proposal addressing derivative removal jurisdiction, *see* Judicial Conference Report, Sept. 18, 2007, at 15–16. The proposal relating to the specific reference to Rule 11 that was approved in September 2003 was later rescinded in 2009. *See* Judicial Conference Report, Mar. 17, 2009, at 18.

<sup>276</sup> *See* Judicial Conference Report, Sept. 23, 2003, at 22–23.

<sup>277</sup> *See id.* at 22 (noting that the proposal would “give each defendant 30 days in which to have the opportunity to remove or consent to removal, and . . . permit earlier-served defendants, who did not remove within their own 30-day time period, to consent to a timely notice of removal by a later-served defendant”). Many of the Judicial Conference’s other proposals were based on or closely paralleled proposals by the ALI; there is nothing in the publicly available record to indicate the reason for the departure on this particular issue.

<sup>278</sup> *See Federal Courts Jurisdiction Clarification Act: Hearing Before the Subcomm. on Courts, the Internet, and Intell. Prop. of the H. Comm. on the Judiciary*, 109th Cong. (Nov. 15, 2005) [hereinafter *Hearings*].

<sup>279</sup> *See id.* at 1 (statement of Rep. Lamar Smith, Chairman, Subcomm. on Courts, the Internet, and Intell. Prop. of the H. Comm. on the Judiciary).

the most contentious aspects of civil litigation.”<sup>280</sup> In defining the circumstances in which a defendant may seek “the protection of a neutral Federal forum,” Chairman Smith noted, “[o]ur job is not to favor plaintiffs or defendants, but to make sure that the jurisdictional arrangements are both fair and efficient for all litigants.”<sup>281</sup>

Judge Janet Hall of the United States District Court for the District of Connecticut, testifying on behalf of the Judicial Conference’s Committee on Federal-State Jurisdiction, noted that the overall purpose of the various proposals was to address various interpretational issues that had divided the courts in a way that would “help the parties avoid expense and delay.”<sup>282</sup> In her written statement, she detailed the divide among the courts in the interpretation of Section 1446(b) in multiple-defendant cases.<sup>283</sup> The proposed codification of the last-served defendant rule was, she stated, necessary to provide “[f]airness to later-served defendants,” whether those defendants were parties to the original suit or were brought in by an amended complaint.<sup>284</sup> She also stated that the change would not “allow an indefinite period for removal” because “plaintiffs could still choose to serve all defendants at the outset of the case.”<sup>285</sup>

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<sup>280</sup> See *id.* at 1–2.

<sup>281</sup> See *id.* at 2.

<sup>282</sup> See *id.* at 4 (statement of Hon. Janet C. Hall, Member, Comm. on Fed.-State Jurisdiction of the Jud. Conf. of the U.S.).

<sup>283</sup> See *id.* at 11.

<sup>284</sup> See *id.* Although Judge Hall claimed that the proposed amendment “essentially embraces the Fourth Circuit’s view,” see *id.*, that observation is incorrect. See *supra* notes 138–92 and accompanying text (discussing Fourth Circuit’s view).

<sup>285</sup> See *Hearings, supra* note 278, at 11. When asked by Representative Adam Schiff whether the amendment would allow a defendant who received late service because he had been evading service to remove a case on the eve of trial, Judge Hall first pointed out the one-year limit on removal already contained in the statute. See *id.* at 67. However, this provision would not prevent the scenario that Representative Schiff described from occurring; courts have interpreted the one-year limitation as applying only to cases that could not have been removed as originally filed (see *supra* note 136), and nothing in the legislation changes this aspect of the statute. Judge Hall also stressed that the proposal “not just . . . gives fairness to the last-served defendant, but the plaintiff can control this in many respects. They [sic] can choose to serve everyone right away, and then there will be just a very short period for removal.” See *Hearings, supra* note 278, at 67. But this observation largely missed the point of Representative Schiff’s question, which envisioned a situation in which the plaintiff *has* made every effort to promptly serve all defendants.

Professor Arthur Hellman also spoke in favor of the amendment. Although Professor Hellman primarily spoke in favor of abolishing the one-year restriction on removal, see *id.* at 15–17, his written statement briefly addressed the last-served defendant proposal and characterized it

A bill containing the proposals the Subcommittee had considered was introduced in 2006, but that bill was not reported out of committee.<sup>286</sup> The bill did not reappear until November 2009, when it returned as House Bill 4113, the proposed Federal Courts Jurisdiction and Venue Clarification Act.<sup>287</sup> This bill passed the House in September 2010 and was referred to the Senate Judiciary Committee,<sup>288</sup> but the Senate committee did not act on the bill prior to the close of the 111th Congress.<sup>289</sup>

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as “a fair and reasonable solution” to the removal timing issue, *see id.* at 24.

<sup>286</sup>Federal Courts Jurisdiction Clarification Act of 2006, H.R. 5440, 109th Cong. (as introduced in House, May 22, 2006). The bill was sponsored by Representative Lamar Smith of Texas. The bill included all of the recommendations the Judicial Conference had approved in September 2003, *see supra* note 275, and also the recommendations previously approved in 2001, *see supra* note 274. It also included a proposal that provided for automatic adjustments to the amount-in-controversy requirement every five years, indexed to any percentage change in the Consumer Price Index. *See* Federal Courts Jurisdiction Clarification Act of 2006, H.R. 5440, 109th Cong. § 5 (as introduced in House, May 22, 2006) (“Indexing the Amount in Controversy”). The provision codifying the last-served defendant rule appeared in Section 4(b) of the bill.

The bill was referred to the House Judiciary Committee and a mark-up session was held before one of its subcommittees, which approved the bill and reported it to the full Committee. *See* 109 CONG. REC. DAILY DIG. D550 (May 24, 2006) (approval by Subcomm. on Courts, the Internet, and Intell. Prop.). However, no action was taken up by the full Committee or by either house. *See* 111 CONG. REC. H7163 (daily ed. Sept. 28, 2010) (discussing history of 2006 bill).

<sup>287</sup>Federal Courts Jurisdiction and Venue Clarification Act of 2009, H.R. 4113, 111th Cong. (as introduced in House, Nov. 19, 2009). The bill again was sponsored by Representative Lamar Smith; Representative Howard Coble of North Carolina co-sponsored the bill. The bill retained most of the provisions from the 2006 bill, in somewhat reworded form, but also added a number of proposed revisions to the federal venue statutes.

As originally introduced, House Bill 4113 included language that would have allowed a plaintiff who opposed removal to file a declaration that it was seeking an amount of recovery less than the statutory requirement. *See* H.R. 4113, 111th Cong. § 104 (as introduced in House, Nov. 19, 2009). This language was deleted from the version of the bill that was approved by the full House, as was the provision (*see supra* note 286) relating to indexing the amount in controversy requirement to changes in the Consumer Price Index. *See* Federal Courts Jurisdiction and Venue Clarification Act of 2010, H.R. 4113, 111th Cong. (as approved by House, Sept. 28, 2010).

<sup>288</sup>111 CONG. REC. H7161-64 (daily ed. Sept. 28, 2010) (debate on and passage of bill by House), S7783 (daily ed. Sept. 29, 2010) (receipt of bill in Senate and reference to Senate Judiciary Committee). There were no hearings or mark-up sessions on the bill by the House Judiciary Committee or any of its subcommittees, “[g]iven the press of legislative business.” *See* 111 CONG. REC. H7163 (daily ed. Sept. 28, 2010) (statement by Rep. Smith). “Instead, we processed, reviewed, and amended the bill informally, working closely with the judiciary and various stakeholders.” *Id.* Representative Smith also thanked the Administrative Office of the United States Courts, which “functioned as a clearinghouse to vet the bill” with input from the Judicial Conference’s Federal-State Jurisdiction Committee, academics, and “interested

The bill was reintroduced in January 2011, the first month of the current 112th Congress, as House Bill 394.<sup>290</sup> For the most part, the new bill tracked the language of the version of House Bill 4113 that the full House approved in 2010, with some relatively minor changes intended to address Senate concerns.<sup>291</sup> The bill was quickly pushed through the House and was unanimously approved by the House on February 28, 2011.<sup>292</sup> The proposed legislation went back and forth between the two chambers a couple of times due to technical amendments, but the final version of the JVCA passed the Senate on November 30, 2011, and was signed by President Obama on December 7, 2011.<sup>293</sup>

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stakeholders.” *Id.*

<sup>289</sup> 112 CONG. REC. H1369 (daily ed. Feb. 28, 2011) (stating that the Senate was unable to pass the legislation before the end of the 111th Congress).

<sup>290</sup> Federal Courts Jurisdiction and Venue Clarification Act of 2011, H.R. 394, 112th Cong. (as introduced in House, Jan. 24, 2011). The bill again was introduced by Representative Lamar Smith, with co-sponsors Representative Howard Coble of North Carolina, Representative John Conyers, Jr. of Michigan, and Representative Henry C. Johnson, Jr. of Georgia. *See id.*

<sup>291</sup> *See* H.R. REP. NO. 112-10, at 2–3 (2011) (discussing the changes “insisted on” by the Senate Judiciary Committee). The only substantive change is one that deleted the proposed amendment to the statutory language addressing “derivative removal jurisdiction.” *See id.*

<sup>292</sup> *See id.* (discussing the “informal vetting process” for the bill); 112 CONG. REC. H1367–70, H1374–75 (daily ed. Feb. 28, 2011) (debate on bill in House and approval on roll call vote). The debate in the House chamber was relatively brief. Sponsors Lamar Smith and Henry Johnson spoke in favor of the bill, as did Representative Jackson Lee of Texas; all three stated that the bill was intended to clarify jurisdictional issues so that judges could spend less time on these issues. *See id.* at H1369.

On the same day it approved House Bill 394, the House also approved a separate bill to amend the statutes relating to removal by federal officers or agencies. *See* Removal Clarification Act of 2011, H.R. 368, 112th Cong. (2011). That bill later was approved by the Senate and became law on November 9, 2011. *See* Removal Clarification Act of 2011, Pub. L. No. 112-51 (2011) (amending 28 U.S.C. §§ 1442, 1446(g), 1447(d)).

<sup>293</sup> *See* 112 CONG. REC. S6925–27 (daily ed. Oct. 31, 2011) (bill passed by Senate, with technical amendments, relating to the numbering of a proposed new statutory section dealing with removal of criminal cases); 112 CONG. REC. H7841 (daily ed. Nov. 18, 2011) (approval by House, with further technical amendment); 112 CONG. REC. S8074 (daily ed. Nov. 30, 2011) (Senate concurs in House amendment). Professor Hellman has prepared an informative summary of the legislative process and wrangling that led to the adoption of the JVCA. *See* Arthur Hellman, *The Federal Courts Jurisdiction and Venue Clarification Act: Some Missing Pieces*, JURIST (Jan. 4, 2012), <http://jurist.org/forum/2012/01/arthur-hellman-jvca-ii.php>. He also has prepared an excellent short summary of the JVCA’s various provisions. *See* Arthur Hellman, *Litigation Alert: The Federal Courts JVCA is Now Law*, JURIST (Dec. 30, 2011), <http://jurist.org/forum/2011/12/arthur-hellman-jvca.php>. For more extensive discussion of the JVCA’s provisions, see H.R. REP. NO. 112-10.

Recall that Section 1446(b) previously consisted of two unnumbered paragraphs.<sup>294</sup> The JVCA retains the existing language of the first paragraph as new subsection (b)(1), which will continue to govern the timing of removal of cases involving only one defendant.<sup>295</sup> The language previously found in the second paragraph of Section 1446(b), with some changes,<sup>296</sup> has been renumbered as subsection (b)(3); this new subsection will govern the timing of removal of cases that are not removable as originally filed but that later become removable.<sup>297</sup> Between those two subsections, an entirely new subsection (b)(2) has been added to address multiple-defendant cases.<sup>298</sup> The provisions of that new subsection read as follows:

(2)(A) When a civil action is removed solely under  
[S]ection 1441(a), all defendants who have been properly

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<sup>294</sup> See *supra* notes 49, 56, and accompanying text. The first paragraph of former Section 1446(b) contained the general requirement that “the defendant” file for removal within thirty days of service, while the second paragraph addressed cases that were not removable as originally filed but that later became removable.

<sup>295</sup> See Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 103(b)(3)(A), 125 Stat. 758 (enacted Dec. 7, 2011) (to be codified at 28 U.S.C. § 1446(b)(1)).

<sup>296</sup> The main change to newly numbered subsection (b)(3) is to remove the language relating to the one-year restriction on removal. This language has been relocated to brand new subsection (c)(1), which provides:

A case may not be removed under subsection (b)(3) on the basis of jurisdiction conferred by [S]ection 1332 more than 1 year after commencement of the action, unless the district court finds that the plaintiff has acted in bad faith in order to prevent a defendant from removing the action.

See *id.* § 103(b)(3)(C) (to be codified at 28 U.S.C. § 1446(c)(1)). This new subsection thus expressly codifies two existing interpretations of the former statutory language: that the one-year restriction applies only to cases that are removed on the basis of diversity of citizenship, and that it applies only to cases that are removed under subsection (b)(3) (in other words, cases that were not removable as they were originally filed but that later became removable). It also explicitly codifies the court’s authority to make an equitable exception to the one-year limitation, but only upon a finding of bad faith by the plaintiff. The proposed codification of a bad faith exception was thoroughly critiqued in E. Farish Percy, *The Tedford Equitable Exception Permitting Removal of Diversity Cases After One Year: A Welcome Development or the Opening of Pandora’s Box?*, 63 BAYLOR L. REV. 146 (2011).

<sup>297</sup> See Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, § 103(b)(3)(B) (enacted Dec. 7, 2011) (to be codified at 28 U.S.C. § 1446(b)(3)).

<sup>298</sup> See *id.* § 103(b)(3)(B) (to be codified at 28 U.S.C. § 1446(b)(2)(A)-(C)).

joined and served must join in or consent to the removal of the action.

(B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.

(C) If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.<sup>299</sup>

Thus, the statute first codifies the rule of unanimity for multiple-defendant lawsuits.<sup>300</sup> It then adopts the last-served defendant rule in its fullest form.<sup>301</sup> If any defendant—including the last-served defendant—chooses to file a notice of removal, the previously served defendants can join in that notice, even if they previously made a conscious decision not to seek removal.<sup>302</sup>

The report accompanying the bill states that the overall purpose of the JVCA is to “bring[] more clarity to the operation of Federal jurisdictional statutes” and to address judges’ concerns that “the current rules force them to waste time determining jurisdictional issues at the expense of adjudicating underlying litigation.”<sup>303</sup> On the removal timing issue, the report claims that the last-served defendant rule is necessitated by considerations of “[f]airness to later-served defendants”<sup>304</sup> and that it would “not allow an indefinite period for removal.”<sup>305</sup>

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<sup>299</sup> *See id.*

<sup>300</sup> The language regarding removal “solely under [S]ection 1441(a)” is intended to prevent conflict with other, specific removal statutes, such as 28 U.S.C. § 1441(c) (2006), under which the rule of unanimity does not apply. *See* H.R. REP. NO. 112-10, at 13 (2011).

<sup>301</sup> *See supra* Part III.A.2 (discussing the last-served defendant rule).

<sup>302</sup> *Id.*

<sup>303</sup> H.R. REP. NO. 112-10, at 1–2.

<sup>304</sup> *See id.* at 14 (stating that the rule allows removal both by defendants who are named in the original complaint and those who may be added later, and it applies “even if the earlier-served defendants chose not to remove initially”).

<sup>305</sup> *See id.* (“[P]laintiffs could still choose to serve all defendants at the outset of the case, thereby requiring all defendants to act within the initial 30-day period.”). The House Report claims that the rule “provides for equal treatment of all defendants in their ability to obtain Federal



*C. The Codification of the Last-Served Defendant Rule Will Bring About Needless Delays and Will Create New Ambiguities in the Statute*

As things have stood under former Section 1446(b), defendants in any of the federal circuits in which the timing issue has not yet been addressed have faced a great deal of uncertainty as to which rule will govern their case.<sup>306</sup> Legislative clarification of this issue would, therefore, seem like a good thing.

Codification of the last-served defendant rule, however, is not the best policy choice as a solution to the timing issue, and it will conflict with other policies embodied in the removal statutes. Adoption of the last-served defendant rule also likely will lead to a number of problems, including removal of cases well into the procedural life of the case, that Congress has not adequately foreseen.<sup>307</sup> Finally, the newly adopted language will present some significant issues of interpretation. In other words, the clarification statute will likely prove partially successful but at the expense of creating new issues for the courts to resolve.

I will not repeat here the policy points I made in Part III while discussing former Section 1446(b). Instead, I will focus on how the new Section 1446(b)(2) may lead to significant delays in removal. Proponents of the last-served rule have argued that this should not prove to be a problem; the plaintiff can ensure prompt determination of whether removal will occur by serving all of the defendants at the same time.<sup>308</sup> And in many cases this likely will prove to be the case; all of the defendants will be served on the same day, or within short succession, and the last-served rule will have no significant impact on when the removal notice must be filed.<sup>309</sup> The problem, though, stems from the fact that a significant number of cases may not fit this pattern. Sometimes a plaintiff, despite great diligence on its part, may not be able to serve a defendant until months or even years after

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jurisdiction over the case against them without undermining the Federal interest in ensuring that defendants act with reasonable promptness in invoking Federal jurisdiction.” *See id.*

<sup>306</sup> In such a circuit, a defendant who is the first to receive service of process would be well advised to file a notice of removal within thirty days of service, make every effort to determine who else has been served, and have anyone who has been served join in the notice.

<sup>307</sup> *See, e.g., Brierly v. Alusuisse Flexible Packaging Inc.*, 184 F.3d 527, 534–35 (6th Cir. 1999) (allowing the last-served defendant to remove a year and a half after commencement of the case).

<sup>308</sup> *See supra* notes 127–128 and accompanying text.

<sup>309</sup> *See supra* note 127 and accompanying text.

the case has commenced.<sup>310</sup> There are a number of possible reasons this realistically might occur.

First, the plaintiff may encounter difficulties and delays serving a defendant because the defendant is avoiding service.<sup>311</sup> Or a defendant may have moved, and there is unavoidable delay in determining the defendant's new location.<sup>312</sup> In the early stages of congressional hearings on the proposed legislation, Representative Adam Schiff raised a question relating to what would occur in a case in which a defendant, who delayed service by avoiding process servers, sought to remove the case.<sup>313</sup> Judge Janet Hall, a member of the Judicial Conference's Committee on Federal-State Jurisdiction, replied by reminding the representative of the statute's one-year limit on removal.<sup>314</sup> But, unfortunately, Judge Hall was wrong in suggesting that this provision would serve as a limit under Representative Schiff's hypothetical. Most cases have held that the one-year limit applies only in the situation of cases that were not removable as they originally were filed but that later became removable<sup>315</sup>—which is not the situation that Representative Schiff posited. The recent amendments make it even clearer in the text of the statute itself that the one-year limit applies only to newly removable cases.<sup>316</sup> There is, in fact, nothing in the text of the amended statute that would allow the court to deny removal to the evading

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<sup>310</sup> See, e.g., *Davis v. Frederick J. Hanna & Assocs., P.C.*, 506 F. Supp. 2d 1322, 1323–24 (N.D. Ga. 2007).

<sup>311</sup> See *id.* (allowing alternative service of process where plaintiff had attempted to serve defendant corporation on three separate occasions and had reason to believe defendant was evading service).

<sup>312</sup> See, e.g., *United States v. Tobins*, 483 F. Supp. 2d 68, 78–79 (D. Mass. 2007) (holding that plaintiff had made various attempts to identify defendant's updated address).

<sup>313</sup> See *Hearings*, *supra* note 278, at 67. The exchange between Representative Schiff and Judge Hall is discussed *supra* at note 285.

<sup>314</sup> See *id.* For discussion of the one-year limit found in 28 U.S.C. § 1446(b), see *supra* note 59.

<sup>315</sup> See, e.g., *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 534–35 (6th Cir. 1999). In *Brierly*, the corporate defendant (seemingly a sophisticated defendant) was served first but made an unsuccessful attempt to remove the case. See *id.* at 530. Due to delays beyond the plaintiff's control, an individual defendant was served over a year and a half later. See *id.* The Sixth Circuit, applying the last-served defendant rule, reversed the district court and held that removal should have been allowed on these facts. See *id.* at 534–35; see also note 107 and accompanying text (discussing procedural history of *Brierly*). Cases such as *Brierly* make clear that the delay problem I have posited in the text is very real and already has occurred in jurisdictions that apply the last-served rule.

<sup>316</sup> See *supra* note 296 (discussing new subsections 1446(b)(3) and (c)(1)).

defendant if the defendant is able to gain consent to removal from his prior served co-defendants.

Another situation in which delayed removal may be allowed to take place under the last-served defendant rule arises when a new defendant is added after significant state-court proceedings have occurred.<sup>317</sup> Recall, for example, that in *Brown v. Demco, Inc.*<sup>318</sup> the original defendants (including a number of seemingly “sophisticated” defendants) willingly and vigorously defended the action in state court for more than four years.<sup>319</sup> When the protracted discovery process in that case resulted in the addition of two new defendants, those defendants sought to remove the case.<sup>320</sup> The Fifth Circuit foreclosed removal in that case through application of the first-served defendant rule,<sup>321</sup> and removal also would not have occurred under the intermediate rule.<sup>322</sup> Under the new codification of the last-served defendant rule, however, there is nothing in the statutory language that would give the federal court the ability to remand the case.<sup>323</sup> The one-year bar to removal would not apply because this case was removable as originally filed; the original defendants simply chose not to remove.<sup>324</sup>

A plaintiff faced with a factual situation such as *Brown* might attempt to argue that removal should not be allowed because the original defendants

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<sup>317</sup>During the legislative hearings on the draft legislation that led up the new law it was explicitly contemplated that the new rule would apply in this situation. See, e.g., *Hearings, supra* note 278, at 11 (statement of Hon. Janet C. Hall, Member, Comm. on Fed.-State Jurisdiction of the Jud. Conf. of the U.S.) (stating that the rule would apply whether the later-served defendant was a party to the original suit or was brought in by later amendment).

<sup>318</sup>792 F.2d 478 (5th Cir. 1986), discussed *supra* at notes 78–90 and accompanying text.

<sup>319</sup>*Id.* at 480.

<sup>320</sup>*Id.*

<sup>321</sup>*Id.* at 481–82.

<sup>322</sup>See *supra* Part III.A.3 (discussing the intermediate rule).

<sup>323</sup>A statute of limitations issue might well arise in a case like this, and could eventually result in the dismissal of the newly added defendant. But consider how and when that issue would arise, and what the effect of that ruling would be. The defendant likely would have to raise this defense in its answer to the complaint, and follow up that answer with a motion for summary judgment. These documents might be filed before the case was removed to federal court, but the court would not rule on the statute-of-limitations issue until a later date. In the meantime, the new defendant will have successfully removed the case. Even if the federal court later granted the motion for summary judgment and dismissed the new defendant, this would not give the court a statutory basis for remanding the case. The case would now be stuck in federal court, even though the only party who really desired that forum has left the building.

<sup>324</sup>See *Brown*, 792 F.2d at 481.

waived their right to remove the case.<sup>325</sup> Cases in some circuits have held that actions by a defendant to defend a case in state court may amount to a waiver of the right to remove, although courts typically have applied a high threshold for waiver.<sup>326</sup> An extreme set of facts such as those presented in *Brown* might be sufficient to meet that high threshold.<sup>327</sup>

But this raises the first ambiguity with amended Section 1446(b)(2)—and thus one of the issues that courts may be forced to spend time attempting to resolve. Can a concept of waiver coexist with the last-served defendant rule? To some extent, the notion that the actions of some defendants may amount to a waiver of the rule seems inconsistent with the whole idea behind the last-served rule.<sup>328</sup> The last-served rule is premised on the rationale that later-served defendants should have the opportunity to persuade their co-defendants that removal is the proper course.<sup>329</sup> No distinction is made as to whether the earlier-served defendants' failure to remove was inadvertent or deliberate. The new text, which specifies that the "earlier-served defendant may consent to the removal even though that

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<sup>325</sup> See *Rosenthal v. Coates*, 148 U.S. 142, 147–48 (1883) (holding that an original defendant may waive removal rights).

<sup>326</sup> In recognizing that a defendant may waive its ability to remove a case through actions taken in state court, the Supreme Court stressed that the removal statutes "do not contemplate that a party may experiment on his case in the state court, and, upon an adverse decision, then transfer it to the federal court." *Id.* at 147–48. The courts, however, have applied a strict standard and typically have declined to find that waiver has occurred. See, e.g., *Brown*, 792 F.2d at 481–82. Professor Moore's treatise, in summarizing the waiver case law, states that before a defendant's actions in state court can be held to constitute a waiver of the right to removal, "it must be unequivocally apparent that the case is removable, and the intent to waive the right to remove to federal court and to submit to state court jurisdiction must be clear and unequivocal, and the defendant's actions must be inconsistent with the right to remove." 16 MOORE, *supra* note 1, § 107.18[3][a], at 107-174 (footnote omitted); see also 14B WRIGHT ET AL., *supra* note 2, § 3721, at 105 (stating that cases require "substantial offensive or defensive action in the state court action" by the defendant that indicates a willingness to try the case in state court).

<sup>327</sup> See 792 F.2d at 480. The court in *Brown*, in fact, partly relied on a waiver rationale. See *supra* note 86 and accompanying text. *Brown*, though, appears to be one of only a limited number of cases to have found that waiver occurred based on actions by some but not all of the defendants.

<sup>328</sup> See *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1204 (11th Cir. 2008) (holding that "earlier-served defendants who may have waived their right to independently seek removal by failing to timely file a notice of removal . . . [and by filing a motion to dismiss in state court] may nevertheless consent to a timely motion by a later-served defendant").

<sup>329</sup> See *supra* note 125 (discussing the rationale for the last-served defendant rule).

earlier-served defendant did not initiate or consent to removal,”<sup>330</sup> also makes no distinction as to the reason for the earlier failure to act. The courts ultimately may reach a consensus that the waiver doctrine does not fit at all with the last-served rule, or that it has limited application under that rule, but the courts likely will be called upon to address that issue in the foreseeable future.

Another ambiguity relates to what action, if any, earlier-served defendants are required to take, and when that action must be taken, if a later-served defendant files a notice of removal. New subsection (b)(2)(A) explicitly codifies the rule of unanimity, providing that each defendant “must join in or consent to the removal of the action.”<sup>331</sup> New subsection (b)(2)(B) provides that each defendant has thirty days after receiving the complaint to file a notice of removal.<sup>332</sup> Subsection (b)(2)(C) then provides “[i]f defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.”<sup>333</sup> So, reading those subsections together, the later-served defendant has thirty days after service to file its notice of removal, and the earlier-served defendants must consent to removal. But how must that consent be demonstrated? Must the earlier-served defendants actually join in the notice of removal, or file their own written document consenting to the removal? And must this be done within the same thirty-day period allowed to the later-served defendant? If it is not done within this period, would this be a basis for the plaintiffs to argue that removal was improvident?<sup>334</sup>

Similarly, if some sort of affirmative written consent is required, how can that consent be demonstrated? Can the later-served defendant represent in its petition that the earlier-served defendants affirmatively consent to removal, or that they have no objection to removal? This issue has caused

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<sup>330</sup> See *supra* text accompanying note 299 (quoting new subsection 1446(b)(2)(C)).

<sup>331</sup> See *supra* text accompanying note 299 (quoting new subsection 1446(b)(2)(A)).

<sup>332</sup> See *supra* text accompanying note 299 (quoting new subsection 1446(b)(2)(B)).

<sup>333</sup> See *supra* text accompanying note 299 (quoting new subsection 1446(b)(2)(C)).

<sup>334</sup> See *Destfino v. Reiswig*, 630 F.3d 952, 956–57 (9th Cir. 2011) (stating that, although all previously served defendants are required to join in the notice of removal, failure to do so is not jurisdictional, and “the district court may allow the removing defendants to cure the defect by obtaining joinder of all defendants prior to the entry of judgment”). It would not prove surprising if courts were to adopt a similar view under amended Section 1446(b)(2).

some controversy under the former version of the statute.<sup>335</sup> The American Law Institute suggested that the statute should include language that would permit a removing defendant to represent that other defendants joined in the removal petition,<sup>336</sup> but this language was not part of the legislation recently enacted by Congress. The issue therefore is likely to recur under the amended statute.

One additional issue that may arise is whether the recent amendment has altered the result of *Murphy Brothers v. Michetti Pipe Stringing, Inc.* in multiple-defendant cases.<sup>337</sup> Recall that *Murphy Brothers* interpreted the language of the first paragraph of former Section 1446(b)—which provided that the notice of removal must be filed “within thirty days of receipt by the defendant, through service or otherwise, of a copy of” the complaint—to mean that formal service of process (or waiver of service) must occur before the removal period starts to run; prior receipt of a “courtesy copy” of the complaint does not start the clock ticking.<sup>338</sup> This language is retained verbatim in new subsection (b)(1), which will govern single-defendant lawsuits.<sup>339</sup> However, new subsection (b)(2)(B), which governs removal in multiple-defendant cases, uses noticeably different language, providing that “[e]ach defendant shall have 30 days *after receipt by or service on* that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.”<sup>340</sup> Therefore, the new subsection refers back to subsection (b)(1), but it uses different language—“after receipt by or

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<sup>335</sup> See 16 MOORE, *supra* note 1, § 107.30[2][a][ii][B] (discussing cases and explaining that a majority of courts have stated that although it is not required that all defendants sign the notice of removal, it is not sufficient for one party to represent that another party, represented by a different attorney, consents to removal; rather, defendants who do not sign the removal notice must file a written notice indicating that they agree with removal). *But see* Harper v. AutoAlliance Int’l, Inc., 392 F.3d 195, 201–02 (6th Cir. 2004) (holding that the attorney for one party may represent that another party consents to removal).

<sup>336</sup> See FJC PROJECT, *supra* note 19, § 1446(a)(4), at 436 (“The attorney of record for one defendant may sign on behalf of other defendants who must join in the removal provided that such attorney has previously received the authorization of each defendant, in person or through counsel, on whose behalf the attorney signs the notice of removal.”). There is no indication as to why this proposal was not included among those endorsed by the Judicial Conference.

<sup>337</sup> 526 U.S. 344 (1999).

<sup>338</sup> See *supra* notes 62–73 and accompanying text (discussing holding and rationale of *Murphy Bros.*, 526 U.S. at 347–53).

<sup>339</sup> See *supra* note 295 and accompanying text (discussing new subsection 1446(b)(1)).

<sup>340</sup> *Supra* text accompanying note 299 (quoting new subsection 1446(b)(2)(B)) (emphasis added).

service on”—to describe the triggering event.<sup>341</sup> Suppose that the last-served defendant, prior to formal service, received a “courtesy copy” of the complaint from the plaintiff, or received a copy from an earlier-served defendant. Could it be argued that the defendant’s time period for removal was triggered when it received a copy of the complaint in this informal manner? A court may well say no, and may conclude that the explicit reference to subsection (b)(1) in subsection (b)(2)(B) shows that Congress intended that the two subsections be interpreted uniformly. The failure to use consistent language in both subsections, however, has created an apparent ambiguity that plaintiffs may attempt to exploit.

## V. CONCLUSION

The removal timing issue in multiple-defendant lawsuits has been one of the most divisive issues in federal jurisdictional law. Any court that confronts that issue in a case governed by former Section 1446(b) should embrace the Fourth Circuit’s intermediate rule. The intermediate rule is true to the purpose and text of former Section 1446(b) because it affirmatively requires each defendant to take timely action.<sup>342</sup> The intermediate rule also allows adequate time for each defendant to individually consider whether removal is appropriate, and in most circumstances it also allows adequate opportunity for consultation among the defendants.<sup>343</sup> If a situation arises in which there is reason to believe that a plaintiff has manipulated service in an attempt to prevent removal, the court retains the ability to excuse noncompliance with the statute’s time limits. The rule also minimizes the potential for disruption of state-court proceedings after the state judicial system has invested substantial time and effort in the case.

Although it is important that the removal statutes adequately protect the rights of defendants, the recent decision to codify the last-served defendant rule goes too far in that regard. Based on an overstated fear that plaintiffs might attempt to manipulate the timing of service, Congress has adopted a solution that inevitably will create unnecessary delays in the forum determination in a significant number of cases. The legislation also will not eliminate litigation over removal timing issues, as the new law leaves a number of current issues unaddressed and creates new ambiguities that

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<sup>341</sup> See *id.*

<sup>342</sup> See *supra* Part III.B.1.

<sup>343</sup> See *supra* Part III.B (discussing the benefits of the intermediate rule).

courts will be forced to resolve. Congress would have been better advised to consider legislative adoption of the intermediate rule. In the alternative, Congress could have adopted the American Law Institute's proposed combination of the first-served defendant rule with a codified equitable exception, which would partially address the concerns that prompted the legislation while avoiding the removal delay issues.

Now that Congress has chosen the last-served rule, it should consider taking steps to minimize the opportunity for extreme delay in removal that the last-served rule creates. It could do so by extending the one-year limit on removal to all cases in which removal is sought based on diversity jurisdiction, not just to cases that were not removable as filed.<sup>344</sup> There would still be cases in which removal might occur after significant proceedings have occurred in state court, but this amendment would limit the possibility that a state court would proceed to the eve of trial only to have a case wrenched from its hands.

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<sup>344</sup>This could be accomplished by the very simple step of removing the words "under subsection (B)(3)" from new subsection (c)(1); the language would then apply to all cases in which removal is premised upon federal diversity jurisdiction. *See supra* note 296 (quoting new subsection 1446(c)(1)).