

SECTION 1446(b) FEDERAL REMOVAL JURISDICTION AND THE THIRTY-DAY CLOCK: SHOULD A MOTION TO AMEND TRIGGER THE TIME BOMB?

Briant S. Platt*

I. INTRODUCTION

In the climactic final moments of many a James Bond film, 007 or one of his associates inadvertently triggers a time bomb, and Bond must race against time and circumstance to escape the crisis alive. With a little less panache, state court litigants face a similar time bomb, the expiration of which is fatal to federal removal jurisdiction. And while James will always live to fight another day, determining exactly when this legal time bomb is triggered defines which of the judicial actors will survive the removal countdown.

The federal removal triggers are codified in 28 U.S.C. § 1446(b).¹ While the first paragraph of § 1446(b) addresses causes of action that were originally removable at the time of filing, the second paragraph provides for removal where the action is one that “is or has become removable” at some point following commencement of the original action.² This second paragraph envisions several vehicles by which an action might become removable, and thereby portend to vest a federal district court with proper jurisdiction, namely “by amended pleading, motion, order, or other paper.”³ In addition to defining these possible removal “triggers,” the statute also mandates that such removal occur within a period of thirty days – our time bomb – once removal becomes an option.⁴

In analyzing removal situations involving the statutory triggers, federal district courts have struggled to define the exact moment when the thirty-day clock begins to tick after amendment of the original complaint makes an action removable. With such a commonplace activity as amendment, one would expect case law to be well settled on the subject; however, due to legislative

* J.D., William S. Boyd School of Law, University of Nevada, Las Vegas (2003). B.A., Brigham Young University (1997); M.B.A., University of Illinois (2000). I would like to thank Troy Healey for his contributions to early thoughts on this topic and my wife for her support and input. All errors that remain are mine.

¹ 28 U.S.C.A. § 1446(b) (West 2003) directly addresses what triggers removal and the timing requirements of such removal. The codification of other aspects of removal may be found at 28 U.S.C.A. §§ 1441-1447 (West 2003).

² 28 U.S.C.A. § 1446(b) (West 2003).

³ *Id.*

⁴ *Id.*

restraints on the removal process,⁵ appellate review of removal has been scant at best, especially as to § 1446(b)'s second paragraph.⁶ Given that there has been only a single federal appellate court decision to address the second paragraph's amendment triggers,⁷ federal district courts have been largely left to their own judgment, resulting in a makeshift body of federal district-level case law on the subject.

Currently, the federal district courts that have reviewed this timing issue take one of three approaches to its resolution.⁸ First, a large minority of district courts holds that mere delivery of the motion to amend triggers the thirty-day clock. Next, a majority of courts triggers the thirty-day clock at the moment the state court grants the requested permission to amend. And finally, a small minority of courts triggers the thirty-day clock only upon the defendant's receipt of communication from the state court which indicates the complaint has been amended and the amended complaint has been annexed to the state court's record. This note will first argue that the large minority's position on this issue is a flagrant violation of the sovereignty of the state courts, an illogical reading of the statute, and is at odds with traditional removal jurisprudence. Second, the majority's approach does not adequately conserve judicial resources and is a textually inaccurate read of the statute. Third, the position of the small minority is most consonant with the plain language of and original legislative intent behind § 1446(b), is most respectful of state sovereignty as represented by the state judiciary, and is the most efficient judicial process of the three alternatives.

II. HISTORY OF FEDERAL REMOVAL AND § 1446(b)

Federal removal jurisdiction has existed without interruption since the federal court's inception in 1789,⁹ while a sporadic and non-uniform body of fed-

⁵ 28 U.S.C.A. § 1447(d) (West 2003) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise . . .").

⁶ The Supreme Court has recently clarified a half-century of confusion as to the trigger of § 1446(b)'s first paragraph; see *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999).

⁷ See *Sullivan v. Conway*, 157 F.3d 1092 (7th Cir. 1998).

⁸ After researching the caselaw, it is the author's opinion that the relative sizes of the different positions on the issue are open to debate. However, the district courts themselves make reference to this size distribution, and for purposes of this paper, they will be assumed. See, e.g., *Finley v. Higbee Co.*, 1 F. Supp. 2d 701 (N.D. Ohio 1998):

Webster (thirty-day removal period commenced to run from the time defendants first received the motion to amend) represents the minority position. The majority of courts have held that the time for removal under [§ 1446(b)] begins to run not from the time a plaintiff files a motion to amend her complaint, but from the time the motion to amend the complaint is actually granted . . . Some courts have gone even further and stated that the time for removal does not begin to run from the date the state court grants the motion to amend, but instead runs from the date the amended complaint is filed and served.

Id. at 704.

⁹ See, e.g., Jerry Meade, *Death of the Receipt Rule: Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 39 BRANDEIS L.J. 493, 495-96 (2000) ("Congress originally provided for removal jurisdiction when it passed the Judiciary Act of 1789, which was subsequently recognized by the Supreme Court as an appropriate exercise of congressional power.").

eral removal case law developed between 1789 and 1911.¹⁰ The federal removal requirements were liberalized briefly during Reconstruction, in order to accommodate the resurrected federal question jurisdiction, before being reined back in under an 1887 statute.¹¹

Congress' first attempt at broader codification of the removal process came in the form of the Judicial Code of 1911.¹² The Code's strictures continued the earlier practice of triggering a defendant's removal period according to state trial court filing dates.¹³ In addition, a defendant desiring to remove to federal court filed the removal petition with the state court, which then determined if removal was appropriate, though the ultimate decision regarding permission to remove was vested in the federal district court.¹⁴

As part of a comprehensive revision of federal procedure, the 1948 Congress streamlined federal removal within 28 U.S.C. §§ 1441-1447. Section 1446(b) allowed a defendant to remove an action originally removable within "twenty days after commencement of the action or service of process, *whichever is later*."¹⁵ Prior to 1948's codification, 160 years' worth of removal procedure had developed into an unruly body of law that was considered "piecemeal" and disjointed, an indictment that included the 1911 congressional effort,¹⁶ Congress intended that § 1446 "[make] uniform the time for filing petitions to remove" and "give adequate time [to remove] and operate uniformly throughout the federal jurisdiction."¹⁷ It should be briefly noted here that § 1446(b)'s second paragraph was not enacted until the following year, when the statute was amended.

¹⁰ See S.L.P., *State-Federal Court Conflicts Over the Removability of Causes: The Prospect Under the New Judicial Code*, 98 U. PA. L. REV. 80 (1949). See also Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 IOWA L. REV. 717 (1986).

¹¹ Federal question jurisdiction was created in the Federalist-era Judiciary Act of 1801, but was rescinded the year following its passage by the Congress of Jefferson's Republican Revolution. See generally Collins, *supra* note 10. The 1875 reintroduction of federal question jurisdiction was facilitated, in large part, by relaxed removal requirements. However, due to a rising calendar backlog and cooler heads in Washington, Congress restricted removal's availability in its 1887 revision of removal law. See Thomas R. Hrdlick, *Appellate Review of Remand Orders in Removed Cases: Are They Losing a Certain Appeal?*, 82 MARQ. L. REV. 535 (1999).

¹² Judicial Code § 29 (1911) (known as the "general removal procedure statute").

¹³ Under the 1911 statute, removal was allowed "at any time before the defendant is required by the laws of the State or the rule of the State court in which suit is brought to answer or plead to the declaration or complaint of the plaintiff." Judicial Code § 29 (1911).

¹⁴ See S.L.P., *supra* note 10, at 81-82:

If the state court decided that the removal statute had not been complied with, it was not required to allow removal or to stay proceedings . . . But no action of the state court could deprive the petitioner of his right to an independent decision of the question by the federal court. Notwithstanding the state court's refusal to stay proceedings, the defendant could file the record in federal court, and force the plaintiff to appear there, at least for the purpose of moving to remand the case to the state court, to avoid dismissal for want of prosecution.

¹⁵ 28 U.S.C.A. § 1446(b) (West 2003) (emphasis added).

¹⁶ See Robert L. Wills & Ralph E. Boyer, *Proposed Changes in Federal Removal Jurisdiction and Procedure*, 9 OHIO ST. L.J. 256 (1948) ("Much of the confusion concerning removal results from the fact that the removal statutes have been amended in piece-meal fashion, and have not been integrated into one coherent scheme.").

¹⁷ Revision Notes, 1948 Act, in 28 U.S.C.A. § 1446(b) (West 2003).

In the year following the 1948 enactment, litigants in several states reported timing disparities in the removal statute's operation, resulting in what became known as "the New York" and "Kentucky" problems.¹⁸ In some states, local rules permitted a plaintiff to commence an action by serving a defendant with a summons but not the complaint;¹⁹ some of these states also allowed the plaintiff to file the complaint in the state court at some point after service of summons on a defendant.²⁰ These local approaches resulted in the possibility that the statutory removal period (triggered by service of summons) could expire before a complaint had ever been filed in state court, thereby frustrating a defendant's opportunity to possess the complaint and determine whether removal is available before the removal clock had run.²¹ To ensure that the defendant's access to the complaint was preserved, Congress amended the original statute in 1949, triggering the twenty-day clock to run on either "receipt" of the original pleading, or service of summons if the complaint had been previously filed in court, whichever period is *shorter*.²²

Most relevant for the purposes of this note, Congress added a second paragraph to § 1446(b) in its 1949 amendment, providing for removal where the cause as stated in the initial pleading was not removable but had subsequently become so.²³ Congress limited the removal period in this second paragraph to twenty days from the moment that the cause became removable, pairing the clock with that of § 1446(b)'s first paragraph.²⁴ Congress set the removal period to trigger upon "receipt by defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is [or] has become removable."²⁵

In adding § 1446(b)'s second paragraph, Congress declared that it "intended to make clear that the right of removal may be exercised at a later stage of the case if the initial pleading does not state a removable case but its removability is subsequently disclosed."²⁶ Congress then stated that this amendment was declaratory of the existing rule, and cited to *Powers v. Chesapeake & O. Railway Co.*,²⁷ an 1898 Supreme Court case. In *Powers*, the state

¹⁸ H.R. REP. NO. 352, at 14 (1949).

¹⁹ *Id.*

²⁰ *Id.*

²¹ This problem arose, in part, because of the 1948 codification's innovations with the removal period. Prior to 1948, the removal clock was triggered in accordance with state rules on service of process. *See supra* note 13.

²² *See* S. REP. NO. 303, at 6 (1949):

In some States suits are begun by the service of summons or other process without the necessity of filing any pleading until later. As the section now stands, this places the defendant in the position of having to take steps to remove a suit to the Federal Court before he knows what the suit is about. As said section is herein proposed to be rewritten, a defendant is not required to file his petition for removal until 20 days after he has received (or it has been made available to him) a copy of the initial pleading filed by the plaintiff setting forth the claim upon which the suit is based and the relief prayed for. It is believed that this will meet the varying conditions of practice in all States.

²³ 28 U.S.C. § 1446(b) (1949).

²⁴ *Id.*

²⁵ *Id.*

²⁶ Revision Notes, 1949 Act, in 28 U.S.C.A. § 1446(b) (West 2003).

²⁷ 169 U.S. 92 (1898).

trial court allowed the plaintiff to amend his complaint and dismiss a non-diverse defendant, thereby creating diversity between the remaining defendant and plaintiff for the first time since the action was begun. On appeal, the Supreme Court held that in such an instance, removal was an appropriate option for the defendant, since grounds for removal had arisen subsequent to the suit's initiation. By amending § 1446(b), Congress affirmed the Court-sanctioned judicial practice of allowing removal where the complaint was not originally removable, but added the innovation of a statutory clock restricting the period in which a defendant might exercise that removal.²⁸

In 1965, Congress amended § 1446 once more, increasing the removal period from twenty to thirty days.²⁹ Congress' avowed purpose behind this amendment was to ensure that defendants have an adequate period of time within which to investigate the plaintiff's complaint and determine if valid grounds for removal exist.³⁰ Again, as with the 1949 amendment, Congress paired the removal periods of § 1446(b)'s first and second paragraphs.

Finally, in a continued effort to improve judicial efficiency, Congress amended § 1446(b)'s second paragraph in 1988, prohibiting a defendant from removing on the basis of diversity jurisdiction where more than one year had transpired since the commencement of the action. Congress imposed the one-year limitation on removal because it wished to avoid the "substantial delay and disruption" that occurs when an action is removed late in litigation.³¹

²⁸ While § 1446(b)'s second paragraph is a significant boon for the defendant, the time limitation imposed by Congress on removal clearly attempts to balance this benefit with the concerns of both the plaintiff and the courts, state and federal. *See, e.g.*, *Wilson v. Intercollegiate (Big Ten) Conference Athletic Ass'n*, 668 F.2d 962, 965 (7th Cir. 1982):

The purpose of the 30-day limitation is twofold: to deprive the defendant of the undeserved tactical advantage that he would have if he could wait and see how he was faring in state court before deciding whether to remove the case to another court system; and to prevent the delay and waste of resources involved in starting a case over in a second court after significant proceedings, extending over months or even years, may have taken place in the first court.

However, this also works to the defendant's advantage in the sense that it objectifies the removal clock's triggers, thereby creating certainty; *see, e.g.*, *Haun v. Retail Credit Co.*, 420 F. Supp. 859, 863 (W.D. Pa. 1976) ("The purpose of § 1446(b) is to provide a uniform and definite time for a defendant to remove an action").

²⁹ 28 U.S.C. § 1446(b) (1965).

³⁰ *See S. REP. NO. 712*, at 2 (1965): "the existing 20-day period for filing a petition for the removal of a civil action from a State court to a Federal court is too short to permit the removal of many actions as to which valid grounds of removal exist." In a letter from the Department of Justice, included in the Senate's report, Deputy A.G. Katzenbach noted that the removal period's short fuse posed a formidable obstacle to the government's defense of actions against its representatives:

Complaints in State courts against officers and employees of the Federal Government often allege facts which are insufficient to show that the acts complained of were under color of office and thereby removable . . . The present 20-day period does not allow sufficient time for investigation by the defendant and, accordingly, there are an unnecessarily large number of remands from the Federal courts back to the State courts . . . the additional 10 days would be most helpful.

Id. at 3. Such endemic removal problems would seem to apply equally to § 1446(b)'s first and second paragraphs.

³¹ H.R. REP. NO. 100-889, at 72 (1988):

Subsection (b)(2) amends 28 U.S.C. § 1446(b) to establish a one-year limit on removal based on diversity jurisdiction as a means of reducing the opportunity for removal after substantial pro-

It is important to note that, in each of these stages of federal removal's development, Congress has sought to give the defendant adequate notice of the possibility of removal to federal court and to promote judicial efficiency in the removal process itself.³² These two concerns address some of the most fundamental criticisms and aspirations that have characterized the federal judiciary as an institution. From their conception, the federal courts have been championed as impartial forums, "free" from the biases, real or perceived, extant in the state court systems.³³ Indeed, some of the federal court's harshest critics have historically been states' rights advocates, alleging federal intrusion into the states' authority and operation.³⁴ In addition, critics of the federal courts have asserted that the forum is an exorbitant and unnecessary luxury for litigants who already possess unfettered access to state courts.³⁵ Against this backdrop

gress has been made in state court . . . Removal late in the proceedings may result in substantial delay and disruption.

For criticism of the amendment, see George D. Billinson, *Recent Amendments to the Removal Statute – Judicial Disimprovements and Inaccess*, 40 SYRACUSE L. REV. 1145, 1157 (1989) ("Simply stated, amended section 1446(b) is a bad law. It will destroy the defendant's right to a federal forum in many cases. It will foster shrewd trial tactics by plaintiffs while at the same time punishing innocent defendants. Furthermore, the amendment is inconsistent with established federal precedent and other removal provisions.").

³² See S. REP. NO. 712, at 2 (1965).

[A] subcommittee of the Judicial Conference . . . concluded that the existing 20-day period for filing a petition for the removal of a civil action from a State court to a Federal court is too short to permit the removal of many actions as to which valid grounds of removal exist."

See also H.R. REP. NO. 100-889, *supra* note 31.

³³ See, e.g., *Burgess v. Seligman*, 107 U.S. 20, 34 (1883) ("The very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which, it might be supposed, would be unaffected by local prejudices and sectional views.").

³⁴ For example, Professor Bourguignon describes the objections of Brutus, the anonymous Anti-Federalist voice during the Constitution's ratification, to the federal judiciary: "Brutus believed the new federal judiciary would be the chief instrument of the states' destruction. 'Nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial.'" Henry J. Bourguignon, *The Federal Key to the Judiciary Act of 1789*, 46 S.C. L. REV. 647, 666 (1995). Brutus's misgivings were alive and well in the first Congress. On the second day of debate in the House on the Judiciary bill, Representative Livermore moved to strike the creation of a Supreme Court entirely. He then stated:

I fear this principle of establishing judges of a supreme court will lead to an entire new system of jurisprudence, and fill every state in the union with two kinds of courts for the trial of many causes, a thing so heterogeneous, must give great disgust: Sir, it will be establishing a government within a government, and one must prevail upon the ruin of the other.

11 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791: DEBATE IN THE HOUSE OF REPRESENTATIVES – FIRST SESSION 1330 (Kenneth R. Bowling et al. eds., 1992). Livermore went on to argue that the Constitution did not necessitate a Supreme Court at all, and argued against an expensive federal judiciary. *Id.* at 1330-32. He concluded his remarks by stating, ". . . I contemplate with horror the effects of the [proposed judiciary]; I think I see a foundation laid for discord, civil wars, and all its concomitants." *Id.* at 1332.

³⁵ For example, Senator Maclay, an Anti-Federalist member of the committee assigned to draft the Judiciary Act in the first Congress, was strongly opposed to the creation of inferior federal courts on the basis of their cost and interference with local government. Speaking of the Judiciary Act of 1789, he wrote:

I opposed this bill from the beginning. It certainly is a Vile law System, calculated for Expense, and with a design to draw by degrees all law business into the federal Courts. The Constitution

of financial and procedural concerns, Congress has molded its federal removal statutes, attempting both to preserve the federal forum for qualifying defendants and to streamline the judicial process to avoid duplicative, time-consuming procedure.

Also in response to such concerns, Congress codified the common law tradition of limiting review of the removal procedure.³⁶ Section 1447(d), sister legislation to § 1446, proscribes appellate review of the federal district court's decision to *remand* for improper removal, while leaving appellate courts free to review removal *where upheld* by a district court.³⁷ In addition to promoting more frequent remand of removal petitions, the practical effect of § 1447(d)'s scruples has been to greatly truncate appellate law on the issue, given that one side of the argument has been silenced by Congress. With the appellate court voice all but muted on the issue, this note proceeds to the largely district-level case law concerning § 1446(b)'s second paragraph.

III. COMPARING THE THREE DISTRICT COURT POSITIONS

As outlined in the introduction, there are three camps among federal district courts (and a single federal circuit court) as to when § 1446(b)'s thirty-day clock should be triggered. A large minority of jurisdictions triggers the thirty-day clock at the time the plaintiff files a motion to amend the complaint, where the amended complaint would give rise to federal jurisdiction.³⁸ A majority of jurisdictions (including the Seventh Circuit Court of Appeals) requires that the plaintiff's motion to amend actually be allowed by the state trial court in order to start the clock.³⁹ And a small minority takes the majority's position a step further in starting the clock to run only upon receipt by the defendant of

is meant to swallow up all the State Constitutions by degrees and this to Swallow by degrees all the State Judiciaries. . . . Oh Sweet Candor when wilt thou quit the Cottage and the lispings infants lip, and shed thy Glory round the Statesman's head.

Diary of William Maclay (Friday, 17 July, 1789), in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS, 1789-1791: THE DIARY OF WILLIAM MACLAY AND OTHER NOTES ON SENATE DEBATES 116 (Kenneth R. Bowling et al. eds., 1998).

³⁶ Non-review of remand orders has been an aspect of federal removal jurisdiction since 1887, excepting the period of 1948-1949. See S.L.P., *supra* note 10, at 88:

An alarming feature of the revised procedure, as originally enacted in 1948, was the total omission of the rule that a remand order by a federal district court is non-reviewable. . . . Apparently, the omission was due to inadvertence, since the amendments of 1949 explicitly restore the rule.

For treatment of subsequent Supreme Court-created exceptions to the non-review rule, see Michael E. Solimine, *Removal, Remands, and Reforming Federal Appellate Review*, 58 Mo. L. Rev. 287 (1993).

³⁷ 28 U.S.C.A. § 1447(d) (West 2003). For a history and discussion of § 1447(d)'s proscription of remand review, see generally Charles Everingham IV, *Removal, Waiver, and the Myth of Unreviewable Remand in the Fifth Circuit*, 45 BAYLOR L. REV. 723 (1993); see also Hrdlick, *supra* note 11.

³⁸ See, e.g., *Harriman v. Liberian Maritime Corp.*, 204 F. Supp. 205 (D. Mass. 1962); see also *Webster v. Sunnyside Corp.*, 836 F. Supp. 629 (S.D. Iowa 1993).

³⁹ See, e.g., *Sullivan v. Conway*, 157 F.3d 1092 (7th Cir. 1998); see also *Graphic Scanning v. Yampol*, 677 F. Supp. 256 (D. Del. 1988).

'notice' that indicates the plaintiff's proposed amended complaint has become an official part of the record.⁴⁰

Each of these three positions takes issue with the details of § 1446(b) and their application. Section 1446(b)'s second paragraph reads:

If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order, or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.⁴¹

This section will address each of these perspectives by juxtaposing them to one another, beginning with the first two positions (e.g., the large minority and the majority), which comprise the actual practice of most federal district jurisdictions.

A. *Large Minority v. Majority*

In arguing that the plaintiff's motion to amend itself should trigger § 1446(b)'s thirty-day clock, the large minority of federal jurisdictions points to the plain language of the statute for support. In an older case representative of the large minority,⁴² Judge Caffrey held that "Congress did not condition the running of the twenty [now thirty] day period upon receipt by defendant of knowledge that a motion had been allowed but, rather, on the receipt by defendant of a document which would bring home to that defendant the fact that plaintiff had changed his claim"⁴³ Since a motion is included in the statutory language as a valid trigger, the large minority asserts that the plain meaning of the statute (evidencing congressional intent) moots the majority's concern that such an approach forces the defendant to remove prematurely.⁴⁴

The majority, on the other hand, contends that an action is not removable on the basis of a motion to amend until the motion is granted by the state trial court. As Judge Farnan held:

The State court, by adjudicating the motion in the plaintiff's favor, alters the character of the plaintiff's action from a purely state-based cause of action to one involving a federal basis of jurisdiction. It is only at the time of the state court's ruling that a party becomes certain of the removability of the case.⁴⁵

Until such an order is handed down, argues the majority, there is no basis for removal, and the federal district court is without valid removal jurisdiction.⁴⁶

⁴⁰ See, e.g., *Miller v. Stauffer Chem. Co.*, 527 F. Supp. 775 (D. Kan. 1981); see also *Finley v. Higbee Co.*, 1 F. Supp. 2d 701 (N.D. Ohio 1997).

⁴¹ 28 U.S.C.A. § 1446(b) (West 2003).

⁴² *Harriman v. Liberian Maritime Corp.*, 204 F. Supp. 205 (D. Mass. 1962).

⁴³ *Id.* at 206.

⁴⁴ See *Webster*, 836 F. Supp. at 630-31 ("But to accept [the majority's] reading of the statute is to ignore its clear language – language that does not make the commencement of the thirty day period conditional on the motion being granted.").

⁴⁵ *Graphic Scanning v. Yampol*, 677 F. Supp. 256, 258 (D. Del. 1988).

⁴⁶ In a rare instance of a circuit court reviewing this issue, Judge Posner reaffirmed the majority's position:

Until the state judge granted the motion to amend, there was no basis for removal. Until then, the complaint did not state a federal claim. It might never state a claim, since the state judge

In asserting a “strict construction” approach, the large minority’s logic breaks down upon further inspection. While a motion to amend may trigger the thirty-day clock, the latter part of § 1446(b)’s second paragraph states that the motion will do so only if it indicates that “the case is one which *is or has become* removable.”⁴⁷ The large minority position assumes that a proffered motion to amend *itself* triggers removability, where the statute, on its face, indicates that receipt of a motion starts the removal clock only where the underlying action is *already*, or *presently*, removable. As Judge Posner held in the single circuit decision on the issue, “[t]he statutory language [of § 1446(b)] speaks of a motion or other paper that discloses that the case *is or has become* removable, not that it *may sometime in the future* become removable if something happens, in this case the granting of a motion by the state judge.”⁴⁸

Such an approach as that advocated by the large minority would invade the state trial court’s responsibility and prerogative to rule on the motion before it. Once the time to amend of right has passed, amendment generally occurs only by leave of court.⁴⁹ However, the large minority would remove such a

might deny the motion . . . When the motion was granted, the case first became removable . . . It would be fantastic to suppose that the time for removing a case could run *before* the case became removable[.]

Sullivan, 157 F.3d at 1094. Fantastic or no, a large number of courts so hold.

⁴⁷ 28 U.S.C.A. § 1446(b) (West 2003) (emphasis added).

⁴⁸ Sullivan v. Conway, 157 F.3d 1092, 1094 (7th Cir. 1998) (emphasis added). *Sullivan* is the only circuit decision to directly address the debate over when § 1446(b)’s second paragraph triggers start the removal clock to run.

While the Tenth Circuit’s decision in *DeBry v. Transamerica Corp.*, 601 F.2d 480 (10th Cir. 1979) addressed the issue regarding when the thirty-day clock is triggered, it did so on facts that are not helpful to this note’s analysis. In *DeBry*, the plaintiff orally made a motion to amend the complaint, and the state trial court granted the motion orally, thereby putting the defendant on notice of its grounds for removal for the first time. *Id.* at 489. The *DeBry* opinion does not inform the reader whether the amended complaint was submitted as part of the oral motion to amend, and whether the court’s order granting amendment included entering the amendment on the record at that time; the opinion states only that the defendant removed the action within its thirty-day limit. These missing facts make it impossible to determine exactly what was meant by the *DeBry* court’s statements in its discussion of the §1446(b) removal issue:

The plain purpose of § 1446(b) is, then, to permit the removal period to start only after the defendant is able to ascertain intelligently that the requisites of removability are present. Therefore, a voluntary motion on the part of the plaintiffs and the trial court’s order granting the motion ought to be sufficient notice within the statute.

Id. at 489.

⁴⁹ Of course, this rule is governed by state rules while the case remains under the purview of the state court. However, FED. R. CIV. P. 15(a) is the federal system’s corollary, and is representative of state law on the issue:

A party may amend his pleading once as a matter of course . . . before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise, a party may amend his pleading *only by leave of court* or by written consent of the adverse party[.]

Id. (emphasis added). Thus, within the federal rules themselves, the ability to amend is a matter of discretion with the court (e.g., “by leave of court”). While the rule goes on to declare that “leave shall be freely given when justice so requires,” the discretion to determine the exigencies of justice resides within the trial court, and such permission is hardly a

decision from the state trial court, predicating removal upon the plaintiff's apparent intent, regardless of the state trial court's disposition on the issue.⁵⁰

The implication of the large minority's position – that the state court's judgment on a motion to amend is unnecessary, where amendment by right has expired – flies in the face of fundamental policy concerns driving federal removal jurisdiction. One of the more unique aspects of the American experiment with a federal government is the concept of concurrent state and federal judiciaries. In this duality of jurisdiction, the federal judiciary has traditionally been extremely hesitant to impose on the state trial court's function and autonomy.⁵¹ Justice Stone, writing the opinion of the Supreme Court in *Shamrock Oil & Gas Corp. v. Sheets*,⁵² considered federal removal jurisdiction in light of this traditional deference:

[T]he policy of the . . . acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined."⁵³

foregone conclusion for the plaintiff in either the state or federal judicial systems. *See, e.g., Hamilton v. Hertz Corp.*, 607 F. Supp. 1371 (S.D.N.Y. 1985):

Generally, defendant's receipt [of] plaintiff's motion papers requesting leave to amend the complaint would give sufficient notice that the case may be removable and the thirty-day period would start to run. However, "the time within which to amend the pleading as of course had expired and leave of court had to be obtained for such amendment . . . Thus, the service of the motion papers [cannot] serve as the date from which the thirty day period would be measured."

Id. at 1371 (quoting *Gibson v. Atl. Coast Line R.R. Co.*, 299 F. Supp. 268, 269 (S.D.N.Y. 1969)).

⁵⁰ *See, e.g., Crump v. Wal-Mart Group Health Plan*, 925 F. Supp. 1214, 1218-19 (W.D. Ky. 1996):

[The motion] was not actually filed or made a part of the record until the state court entered its order dated October 2, 1995. Prior to that time neither a federal claim nor a federal case existed to be removed. The distinction may seem a technical one but it is important. A defendant cannot be required to remove a case which does not exist.

. . . [The plaintiff's] motion requested permission to assert entirely new claims. Until the state court actually granted the motion, there simply was no case or claim to remove, only speculation about the court's intentions.

⁵¹ *See Wilson v. Intercollegiate (Big Ten) Conference Athletic Ass'n*, 668 F.2d 962, 967 (1982):

[It is] our conviction that the district courts, in interpreting and applying section 1446(b), should bear in mind, and where possible avoid, the frictions in a harmonious federal system that result when litigation involving state-law as well as federal-law issues is abruptly shifted into federal court and the state proceedings, including here a preliminary adjudication on the merits, are set at naught.

See also Chad Mills, Caterpillar Inc. v. Lewis: Harmless Error Applied to Removal Jurisdiction, 35 Hous. L. Rev. 601, 618 (1998) ("[R]emoval is an extraordinarily invasive action that wrests control of a case from a state court without that court's involvement in the process. Due to this invasiveness, federal courts have long recognized that the process raises significant federalism questions.").

⁵² 313 U.S. 100 (1941).

⁵³ *Id.* at 108-09 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

Out of this federalism-inspired concern that the national respect the local, it has become axiomatic within the federal judiciary that doubts regarding the efficacy of removal cut against such removal.⁵⁴ By forcing defendants to remove on the basis of a motion to amend, the large minority disregards the sensitive federalism issues that have traditionally counseled against removal, and robs the state court system of its most basic authority – that of defining the scope of a cause of action.

The majority also contends that the large minority's approach injects uncertainty into the removal process, and inefficiency by association. As Judge Farnan noted, the large minority's approach "would force a defendant to speculate as to the state court's ruling and require a defendant to file his removal petition before the grounds for removal actually exist."⁵⁵ By encouraging such premature removal by defendants – and, more damning, by allowing plaintiffs to assert that the removal clock has run against unsuspecting defendants – the large minority undermines the efficiency of both the state and federal court systems, and subjects all litigants to the threat of increased forum wrangling and the costs associated therein.⁵⁶ Efficiency arguments will be discussed in greater detail below.

The minority's approach is both inconsistent with the text of the statute it purports to strictly construe, and intimates disrespect for the authority of the state court from whence an action is removed. Such an approach is at odds with the policy concerns traditionally underpinning removal jurisprudence. Moreover, the minority position promotes judicial inefficiency, for both state and federal court systems, and raises the costs of litigation for the parties involved therein. The majority's position, while imperfect (as discussed below), is therefore vastly preferable to that of the large minority.

⁵⁴ See, e.g., *Zbranek v. Hofheinz*, 727 F. Supp. 324, 326 (E.D. Tex. 1989) ("[I]t is the duty of the federal court reviewing a motion to remand to resolve all doubt in favor of the plaintiff . . . The removal statutes must be strictly construed to protect the states from infringement by the federal government."); see also *Kuns v. Brunswick Corp.*, 871 F. Supp. 1444, 1446 (N.D. Ga. 1994) ("Removal is a purely statutory right. Accordingly, a court should strictly construe removal statutes in favor of state court jurisdiction."); *People of N.Y. v. Muka*, 440 F. Supp. 33, 35 (N.D.N.Y. 1977):

The right to remove a case from a local forum into federal court is solely one conferred by statute, rather than one which is constitutionally derived . . . Inasmuch as the removal statutes represent Congressionally-authorized encroachments by the federal courts into the various states' sovereignties, those provisions must be strictly construed, and their established procedures rigidly adhered to.

Id. (citations omitted).

⁵⁵ *Graphic Scanning v. Yampol*, 677 F. Supp. 256, 259 (D. Del. 1988).

⁵⁶ Ironically, the leading large minority case, *Webster*, argued that it acted, in part, out of an attempt to conserve judicial resources. The *Webster* court asserted that if it were to trigger the thirty-day clock later than the motion to amend, and the clock is held by an appellate court to have run from the motion to amend, that its original jurisdiction on the matter appealed would be corrupted. "[T]he court is hesitant from the standpoint of judicial economy to proceed to final judgment in this court only to learn on appeal that there was no jurisdiction to decide the issues presented by the parties." *Webster v. Sunnyside Corp.*, 836 F. Supp. 629, 631 (S.D. Iowa 1993). It is interesting to note that Congress' proscription of review of remand but allowance of review of successful removal apparently gives rise to this fear. See 28 U.S.C.A. § 1447(d) (West 2003).

B. Majority Position v. Small Minority Position

As stated above, the majority's position is much preferred to that of the large minority, due in large part to the fact that it avoids the large minority's great sin of trampling the state court's authority, and the state's sovereignty thereby. However, the majority's position raises many of the same concerns, apart from state sovereignty, that make the large minority's position untenable. And ironically, these concerns result in some of the very inefficiency that the majority accuses the large minority of fostering.

1. The Shortcomings of the Majority Position

In determining the removal period, the majority triggers the thirty-day clock at the moment the state trial judge approves a motion to amend. While this preserves the state court's decision-making voice, the majority's trigger is premature. Two deficiencies are presented in the majority's approach: first, the statutory triggers under § 1446(b)'s second paragraph start the removal clock only where they indicate present removability; second, the area between 'permission to amend' and 'actual amendment' creates a non-uniform gray area that may result in the practical frustration of removal for the defendant.

In turning to the first of the majority's shortcomings, § 1446(b) requires that the defendant be either physically present when a state trial judge grants a plaintiff's motion to amend or that the defendant receive a 'paper' indicating that the complaint has been amended: section 1446(b) triggers the removal period upon "receipt by defendant . . . of an amended pleading, motion, order, or other paper [that indicates] that the case *is or has become* removable."⁵⁷ If the defendant is in the courtroom when the judge hands down an order, it is expected that the defendant will receive a copy of the order at that time, thereby satisfying the statute's receipt requirement. However, if the defendant is not present for the order's issuance, the statute's removal period is in abeyance until the defendant receives notice in the form of one of the triggers listed in § 1446(b), namely "an amended pleading, motion, order, or other paper."

For most of pretrial preparation, a court reviews and decides parties' motions *in camera*; even where parties present oral argument for or against such motions, the court's early decisions in litigation must often occur outside the presence of the parties involved. The principle flaw with the majority's argument is that it starts the clock from the court's actual order, and not from defendant's receipt of information indicating that the plaintiff has acted upon the court's determination, as required by the statutory language of § 1446(b). The majority's approach, within its own paradigm, presents a real timing problem for absent or removed defendants, whose removal period may dissipate over the course of several days while the court's order is in transit. Even for in-forum litigants, the loss of a few days' time to evaluate removal may be crucial, especially for issues involving complicated federal questions.⁵⁸

To rebut such concerns, one could argue that a courtesy copy of a proposed amended complaint is usually (but not always) attached to the motion to

⁵⁷ 28 U.S.C.A. § 1446(b) (West 2003) (emphasis added).

⁵⁸ See, e.g., S. REP. NO. 712, *supra* note 30, at 3 (Letter of Deputy Attorney General Katzenbach to the House Committee chair).

amend served on the defendant, leaving the defendant fully cognizant of the plaintiff's intentions, should the amendment be allowed. While such practice is certainly to be desired as a means of promoting communication between litigating parties, and may very well put a defendant on notice of her grounds for removal (should the state court grant the motion and the plaintiff act thereon), it should not legitimize disregard for the removal statute's requirements. First, such a reading is directly contrary to the statutory language and sets a dangerous precedent for statutory interpretation. Second, such an approach forces the defendant to incur the costs of preparing a removal petition, monitoring the state court's decision on the motion, and monitoring the plaintiff's filing action following a favorable order, in addition to possibly preparing an opposition to plaintiff's motion to amend. For a defendant whose only link to an action is generally a lawyer who charges by the hour, such monitoring and potentially needless trial preparation may be extremely expensive and may place additional burdens on the state court to field such inquiries. Third, where delivery of the motion, or a subsequent order allowing the motion, has been delayed for whatever reason, a defendant's period to prepare for removal may be slight indeed, especially where the plaintiff acts immediately on the order and files an amended complaint with the state court. The effects of this delay may be exacerbated by the availability and time restraints of defendant's counsel. Thus, for all of the foregoing difficulties, the majority's practice of triggering the removal clock upon an order that merely creates discretion in the plaintiff to act is untenable and unworkable.

A proposed order to allow plaintiff's motion to amend presents an interesting spin on the issue, but should fail on the same grounds. Even where the court itself serves a proposed order on a defendant, including the time at which the proposed order may become valid, the court is only proposing to allow the plaintiff to amend her complaint, not informing the defendant that the complaint has been amended.⁵⁹ Given that the statute requires receipt of a communication that indicates an action is *presently* removable ("is or has become removable"), a proposed order's prospective nature fails to trigger the removal period.⁶⁰

A second concern raised in the majority's position concerns the state court's approach to amendment generally. Both the large minority and the majority assume that a motion to amend (granted or pending) is tantamount to actual amendment, where it may very well not be.⁶¹ A plaintiff who asks for (minority position) – and even receives (majority position) – permission to amend a complaint may choose not to act upon the court's permission, depend-

⁵⁹ *But cf.* Gibson v. Atl. Coast Line R.R. Co., 299 F. Supp. 268 (S.D.N.Y. 1969) (triggering the removal clock from the defendant's receipt of a proposed order).

⁶⁰ If, by operation of postal delay or administrative error, a defendant should receive a proposed order *after* its proposed date of effect, and the court amended plaintiff's complaint on the proposed date of effect, such a notice would seem to qualify under the statute's 'presently removable' requirement. However, the relevant question is: has the defendant been informed that plaintiff's amended complaint has been entered on the record? Here, notice of a proposed order – even after its proposed effective date – does not communicate that information (e.g., actual entry of the amended complaint into the litigation record); consequently, the removal clock is not triggered.

⁶¹ See *supra* notes 47-48 and accompanying text.

ing on the practice rules of the state in which the plaintiff brings her litigation. In *Miller v. Stauffer Chemical Co.*,⁶² Judge O'Connor noted that such scenarios "encourage defendants to seek removal before the filing of an amended complaint to avoid forfeiting their right to remove *even though such a complaint might never be filed.*"⁶³

By raising the possibility of federal removal jurisdiction, a plaintiff may be testing the waters to see whether the defendant will rise to the bait of a federal forum and remove the contest. If such a removal is attempted, and state procedure vests the plaintiff with discretion (or even final responsibility) to submit the amendment for inclusion in the record, the plaintiff may use non-filing as a weapon to force remand. The plaintiff may maintain that permission to amend alone was sought, and that she simply chose not to act upon the court's permission. Since the plaintiff has not actually altered the substantive character of the action *on the record*, such an argument would seem to constitute valid grounds for remand.⁶⁴ In such forum-selection shenanigans, the plaintiff could both feel out the defendant's removal inclinations and defeat any such attempts to remove, at the cost of judicial efficiency and additional expense to all involved.

Such scenarios raise additional questions: once the case has been remanded in such a situation as that described above, would the large minority/majority positions reset the thirty-day removal clock? If yes, then the threat of future attempts to amend, and their associated costs, could be endlessly on the horizon for all would-be removed defendants, at least where federal question jurisdiction is involved.⁶⁵ If no, then the plaintiff may exhaust the thirty-day clock on a decoy motion to amend, and then advance the true motion after the removal clock has expired. While a defendant may seek Rule 11 sanctions⁶⁶ against the plaintiff for such conduct, this recourse represents cold comfort for a defendant without the desire, means, and/or time to pursue such litigation, even assuming such sanctionable conduct could be proven.

While it is hallowed tradition in both state and federal court that the "plaintiff is master of the complaint," the advantages apparently secured to the plaintiff by both the large minority and the majority positions are both wasteful and disruptive to the processes of justice. By starting the removal clock to run before the defendant receives notice of a court's order on a motion to amend and the plaintiff's subsequent actions thereon, the majority promotes either constant monitoring of the court's activities or premature removal by defend-

⁶² 527 F. Supp. 775 (D. Kan. 1981).

⁶³ *Id.* at 777 (emphasis added).

⁶⁴ See, e.g., *Air Ill., Inc. v. Approved Aircraft Accessories, Inc.*, 1986 WL 12808 (N.D. Ill. 1986) ("it is well established that the propriety of a removal petition is 'established on the basis of the record as it stands at the time the petition for removal is filed.'") (quoting *Nu-Way Systems of Indianapolis, Inc. v. Belmont Mktg.*, 635 F.2d 617, 621 (7th Cir. 1980)).

⁶⁵ See 28 U.S.C.A. § 1446(b) (West 2003) (where removal is based on diversity jurisdiction, a one-year limit on removal exists, beginning from the commencement of the action by service of summons or the complaint).

⁶⁶ FED. R. CIV. P. 11.

ants anxious to avoid forfeiting a federal forum.⁶⁷ While the majority is preferable to the large minority for its respect of state trial courts and their jurisdiction, the two positions fail equally in that they waste judicial resources and make the litigation process unpredictable, expensive, and prolonged for litigants, as well as the state and federal court systems in which they present their contest.

2. *The Advantages of the Small Minority Position*

In order to address such economical and procedural concerns, a small minority (which could be fairly considered a subset of the majority)⁶⁸ has taken the majority approach one step further. The small minority starts the thirty-day clock running only upon receipt by the defendant of some form of notice from the state trial court that the plaintiff has been granted permission to amend her complaint, and that the amended complaint has been entered into the court's record.

Such an approach gives maximum deference to the processes of the state trial court, since it triggers the thirty-day clock only following the state court's decision on the amendment petition. In addition, the small minority position improves the removal process by making the basis of removal certain, predicating removal on a verifiable, *presently* amended complaint. This approach conserves judicial resources by discouraging improvident or premature removal, since the removal period is triggered by the much more sure and reliable event of actual amendment and subsequent notice of that fact. As a result, the small minority approach reduces the costs of litigation for both plaintiff and defen-

⁶⁷ One federal district court encouraged defendants to remove on less-than-certain grounds in order to avoid the risk of an expired removal clock. In *McGraw v. Lyons*, 863 F. Supp. 430, 433 n.8 (W.D. Ky. 1994), the court noted:

The defendant in [another case] took the course of action that this court recommends . . . in the face of indeterminate pleadings . . . the defendant filed a notice of removal promptly, within the thirty-day limit required by §1446(b). The Court remanded the case, but significantly, noted that if [grounds for removal] emerged later, the second paragraph of § 1446(b) would apply, giving the defendant thirty days after receipt of the amended pleadings to file for removal . . . Thus, defendants who petition for removal promptly are protected if the plaintiff later changes the claim because § 1446(b) gives such defendants *another* thirty-day window of opportunity to remove.

Id. (emphasis added). While the court's dicta applies specifically to the interchange between § 1446(b)'s first and second paragraphs, such a course of conduct would seem to also be the "safest" for a defendant facing a motion to amend. Such defensive procedural posturing by the defendant is surely inconsonant with congressional intent to make removal predictable and efficient.

Note that this court seems to side with the small minority, since it would start the clock "after receipt of the amended pleading." *Id.* Interestingly, the case that the *McGraw* court is describing, *Cole v. Great Atlantic & Pacific Tea Co.*, 728 F. Supp. 1305 (E.D. Ky. 1990), made no specific reference to what action would trigger the removal clock; the *McGraw* court voiced its own opinion on the polemic of the removal clock's trigger.

⁶⁸ Indeed, in examining the issue, some commentators have erroneously combined the majority and the small minority positions. See, e.g., Ellen Relkin, *The Sword or the Shield: Use of Governmental Regulations, Exposure Standards and Toxicological Data in Toxic Tort Litigation*, 6 DICK. J. ENVTL. L. & POL'Y 1, 21 (1997) ("The majority, on the other hand, holds that the 30-day removal period begins to run only after the motion to amend has been granted *and the amended complaint has been served.*" (emphasis added)).

dant and streamlines judicial proceedings to promote a more timely conclusion of litigation.

Both the large minority and the majority might assert that the small minority's position reads "motion" and "order" out of the statute altogether, leaving only "amended pleading" or "other paper" as valid triggers. In rebutting this assertion, it is useful to note that the statute does not indicate that state action alone qualifies a matter for removal; rather, the statute requires that the defendant receive a "copy" of some sort of written notice, indicating that the case is "one which *is or has become* removable."⁶⁹ As a result, incorporating the amendment into the record, without also informing the defendant *after the fact* of this action by way of one of the papers contemplated in the statute, does not trigger the thirty-day clock. The small minority does not read 'motion' and 'order' out of the statute, but rather considers these two triggers inapposite where amendment triggers the thirty-day clock. A state court order granting a plaintiff's motion to dismiss a non-diverse party from a suit may trigger the removal clock when the order is given in the defendant's presence or afterwards received by the defendant.⁷⁰ Similarly, a motion that amounts to a judicial admission may compromise the plaintiff's choice of forum and trigger the removal clock upon defendant's receipt of such a motion. In both instances, the small minority's read of § 1446(b) leaves the triggers of "motion" and "order" intact, where they indicate to a defendant that an action "*is or has become* removable."⁷¹

⁶⁹ Here, the author assumes that the communication must generally be a writing; the fourth trigger listed reads "or other paper," indicating that the foregoing are some sort of "paper." While beyond the pale of this Note, there is presently much varied (and sometimes conflicting) innovation in defining the term "other paper" to include other communications. Under this heading, judicial admissions stemming from depositions and interrogatories have triggered the thirty-day clock, especially where the prospective federal jurisdiction will be based on diversity. While such depositions are not technically "paper" or a "writing," they are part of the court's record, and, as such, might be conceptually defined as a "writing" for § 1446(b)'s purposes. *See, e.g.,* *Jong v. Gen. Motors Corp.*, 359 F. Supp. 223, 226 (D.C. Cal. 1973) ("the time period to remove an action cannot depend on defendant's actual knowledge, because the statute expressly allows a defendant to rely on papers presented to it."); *but cf.* Alice M. Noble-Allgire, *Removal of Diversity Actions When the Amount in Controversy Cannot Be Determined From the Face of Plaintiff's Complaint: The Need for Judicial and Statutory Reform to Preserve Defendant's Equal Access to Federal Courts*, 62 Mo. L. Rev. 681 (1997) (discussing current split among federal courts regarding whether defendant has an affirmative duty to investigate an ambiguous *ad damnum* clause); *see also* *Camden Indus. Co. v. Carpenters Local Union*, 246 F. Supp. 252 (D.N.H. 1965) (informal answers to interrogatories are "other paper" and may trigger removal period); *Fisher v. United Airlines, Inc.*, 218 F. Supp. 223 (S.D.N.Y. 1963) (oral examination as "other paper"); *Eyak Native Vill. v. Exxon Corp.*, 25 F.3d 773 (9th Cir. 1994) (plaintiff's reply to defendant's answer constitutes other paper); *Gilardi v. Atchinson*, 189 F. Supp. 82 (D. Ill. 1960) (deposition held as other paper); *but S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489 (5th Cir. 1996) (defendant's affidavit of telephone conversation with plaintiff does not constitute "other paper" because it results from defendant's own actions).

⁷⁰ *See, e.g.,* *DeBry v. Transamerica Corp.*, 601 F.2d 480 (10th Cir. 1979) ("[T]he oral motion [to amend] of plaintiffs and the trial court's oral order granting the motion [to amend], on the record, certainly must be that sufficient notice with which the statute is concerned.")

⁷¹ 28 U.S.C.A. § 1446(b) (West 2003) (emphasis added).

IV. FURTHER CONSIDERTION OF STATUTORY INTENT AND LEGITIMACY

In reviewing the foregoing arguments, one might consider the possibility that the three approaches to § 1446(b)'s second paragraph are nothing more than the result of imprecise statutory language and hardly deserving of more exhaustive inquiry. However, beyond the small minority's claims to superior efficiency and logical statutory construction, the small minority may also claim consonance with a half-century of legislative intent driving §1446(b) and its development, as well as with the Supreme Court's latest word on the nature of legitimate jurisdiction and removal.

A. *Congressional Intent and the Small Minority*

In refuting the large minority and the majority's approaches to triggering the removal clock, this note argues that only the small minority's approach to removal both respects the state court's prerogatives and adequately conserves judicial resources. But beyond these benevolent attributes – and of greater moment – the small minority's approach is most faithful to the plain language of § 1446(b), as illustrated in Part III above, and best satisfies the congressional intent behind this statute, as illustrated below.

Again, in divining the congressional will behind § 1446(b)'s second paragraph, we look initially to the statute's first paragraph. The time limitations for both removal periods have been paired with one another since the second paragraph's advent in 1949; when Congress amended § 1446 in 1965, it continued this parity by expanding the removal clock for both removal scenarios to thirty days. Congress' avowed purposes in the 1948 codification of removal, and its subsequent development, have been to create predictability in the area of removal and to ensure that the defendant has adequate notice of an action's nature to effect timely removal.⁷² As stated in the Senate Report accompanying the 1949 amendment of § 1446(b), Congress was concerned that the defendant would be placed "in the position of having to take steps to remove a suit to Federal court before he knows what the suit is about."⁷³

Under the small minority approach, a motion to amend is of no consequence until the state court has spoken to the substance of the motion and the plaintiff has responded accordingly. To start the clock prior to actual amendment is to potentially force (and certainly encourage) the defendant to remove before he has had adequate time to determine if grounds for removal exist. Under the large minority and majority approach, the defendant is forced to remove either prior to actual amendment or within a significantly-reduced removal period, or he forfeits that option. In either scenario, congressional intent to grant defendant adequate time to determine the basis for removal is compromised, at best.

In approaching removal, Congress has tried to balance the interests of the plaintiff, defendant, and court.⁷⁴ In 1988, in an attempt to end disruptive and

⁷² See *supra* note 17 and accompanying text.

⁷³ S. REP. NO. 303, at 6 (1949).

⁷⁴ See, e.g., Meade, *supra* note 9, at 493:

The concept of removal presents itself when the plaintiff could have filed the lawsuit in federal court but selected a state court instead. The plaintiff may do so for many reasons: to take

late-game removals, Congress amended the second paragraph of § 1446(b) to proscribe diversity-jurisdiction removal attempted by the defendant more than one year after an action has commenced.⁷⁵ Congress indicated, at that time, that its intent was to avoid removal where significant judicial effort and resources have been invested in an action at the state trial-court level, and the duplication of the trial's development in federal court would be wasteful.⁷⁶ Indeed, Congress' very intent to codify removal procedure belied the intent to standardize a process that varied greatly from forum to forum.⁷⁷ The driving force behind this desire for standardization was to promote conservative and efficient use of judicial resources.⁷⁸ Both the majority and large minority positions undermine this efficiency by forcing a defendant to second-guess the court's determination on a plaintiff's motion to amend; such uncertainty is prone to elevate judicial and litigious waste through unnecessary monitoring of a motion's status and/or forcing the defendant to remove an action prematurely, resulting in an unreviewable remand. Such an outcome is inconsonant with the manifest intent of Congress to balance and preserve the interests of all parties at the litigation table.

Under both the large minority and the majority's approach to the removal clock, a defendant is forced to remove a case on something other than the basis of the plaintiff's complaint-of-record;⁷⁹ these approaches would leave removal jurisprudence on a shaky foundation. Only where the plaintiff's complaint is explicitly defined and a part of the court's record may the defendant avoid improvident removal and benefit from the congressional intent underlying § 1446(b): to standardize removal procedure. The small minority's position best enables the defendant to avoid being forced to "remove a suit to Federal court before he [or she] knows what the suit is about,"⁸⁰ and best furthers Congress' intent to economize the court's resources.

B. *Murphy Brothers and § 1446(b)'s Second Paragraph*

In *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*⁸¹ the Supreme Court addressed § 1446(b)'s first paragraph and the statutory removal period for an action that is initially removable. Its decision thereon logically extends to a discussion of second-paragraph removal.⁸² Since the 1949 amendment of the statute, lower federal courts had split on the issue of whether receipt of a courtesy copy of a complaint alone triggered the removal clock (the "receipt rule") or whether formal service upon the defendant was required to commence

advantage of jury bias; to avoid federal judges who may have more experience applying federal law; to inconvenience the defendant by making him travel to a remote state court, etc. To counteract these advantages, Congress allows a defendant to remove a civil action filed in state court to federal court if the requirements of either § 1331 or § 1332 are satisfied.

(emphasis added).

⁷⁵ Diversity-jurisdiction removal is codified in 28 U.S.C.A. § 1332 (West 2003).

⁷⁶ See *supra* note 28 and accompanying text.

⁷⁷ Revision Notes, 1948 Act, in 28 U.S.C.A. § 1446(b) (West 2003).

⁷⁸ *Id.*

⁷⁹ See *supra* note 46 and accompanying text.

⁸⁰ S. REP. NO. 303, at 6 (1949).

⁸¹ 526 U.S. 344 (1999).

⁸² For a broad discussion of the background history of *Murphy*, see Meade, *supra* note 9.

the thirty-day period.⁸³ The *Murphy Brothers* Court, per Justice Ginsburg, invalidated the receipt rule and held that formal service alone triggered § 1446(b)'s first paragraph removal clock.⁸⁴ The Court based its decision on the "bedrock principle" that "an individual . . . is not obliged to engage in litigation unless notified of the action, and brought under a court's authority by formal process."⁸⁵ After reviewing the legislative history of § 1446, the Court determined that Congress did not intend to change the formal notification requirement with respect to removal triggers.⁸⁶

The Court then examined the four possible scenarios of service contemplated under § 1446,⁸⁷ and determined that all of them provide the defendant with at least thirty days to determine the removability of an action. The court noted that to interpret the § 1446(b) clock to run only upon formal service "adheres to tradition, makes sense of the phrase 'or otherwise,' and assures defendants adequate time to decide whether to remove an action to federal court."⁸⁸

While *Murphy Brothers* specifically addresses the first paragraph of § 1446(b) and the process by which a court secures initial jurisdiction over an individual, the Court's analysis is relevant in considering discussion of § 1446(b)'s second paragraph as well. First, the fact that the trigger language in the two paragraphs is identical intuitively links their consideration.⁸⁹ In expounding the Court's opinion in *Murphy Brothers*, Justice Ginsburg noted that the initial pleading had to be formally served to satisfy the "through service or otherwise" language of § 1446(b)'s first paragraph, rejecting the appellate court's assertion that the "or otherwise" language authorized informal service, such as that formerly sanctioned by the receipt rule.⁹⁰ The Court's reinforcement of the service requirement, in tandem with discounting the "or otherwise"

⁸³ See generally D. Troy Blair, *Receipt of a Complaint, Prior to or Unattended By Formal Service of Process, Does Not Trigger a Defendant's Thirty-Day Period to Remove A Case: Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 38 DUQ. L. REV. 663 (2000).

⁸⁴ *Murphy Brothers*, 526 U.S. at 350-51.

⁸⁵ *Id.* at 347.

⁸⁶ *Id.* at 352-53:

Nothing in the legislative history of the 1949 amendment so much as hints that Congress, in making changes to accommodate atypical state commencement and complaint filing procedures, 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.

⁸⁷ *Id.* at 354-55:

First, if the summons and complaint are served together, the 30-day period for removal runs at once. Second, if the defendant is served with the summons but the complaint is furnished to the defendant sometime after, the period for removal runs from the defendant's receipt of the complaint. Third, if the defendant is served with the summons and the complaint is filed in court, but under local rules, service of the complaint is not required, the removal period runs from the date the complaint is made available through filing. [Fourth], if the complaint is filed in court prior to any service, the removal period runs from the service of summons.

The Court borrows these categories from *Potter v. McCauley*, 186 F. Supp. 146, 149 (D. Md. 1960).

⁸⁸ *Murphy Brothers*, 526 U.S. at 354.

⁸⁹ Both paragraphs state that a notice of removal is to be filed "within thirty days after the receipt by the defendant, through service or otherwise, of a copy of [the triggering paper]." 28 U.S.C.A. § 1446(b) (West 2003).

⁹⁰ *Murphy Brothers*, 526 U.S. at 353-56.

language, surely qualifies a reading of the second paragraph and indicates which means of communicating present removability are to be preferred, where the statutory language is identical as between the two paragraphs.

Second, the nature of removability would seem to link the interpretation of the two paragraphs. Section 1446(b)'s second paragraph contemplates a scenario where the plaintiff has so crafted her complaint that she is immunized from removal, but her subsequent actions have so changed the complaint that it is now fairly considered a new litigation, one that qualifies for federal jurisdiction.⁹¹ If the action is a "new litigation," as asserted, it follows that a "new service of process," or an analogous notice from the state trial court, should issue to alert the defendant that he should be on guard from a new offensive. Where a plaintiff so changes the nature of an action that it becomes a new action, thereby reviving removal, the Supreme Court's reasoning in *Murphy Brothers* would seem to require state trial court notification of the changed circumstances, regardless of the previous proceedings before the court.

The third reason to apply *Murphy Brothers* to a discussion of § 1446(b)'s second paragraph springs from the common underlying purpose that Congress has given to § 1446(b)'s two paragraphs: to provide the defendant with uniform and adequate time to intelligently determine removal, while restricting unlimited access to that option. In finding that Congress did not intend to abrogate the service of summons process, the Court based its decision largely on Congress' intent to afford a defendant adequate time to determine the viability of removal, opining that it is fundamentally unjust to allow a defendant's removal period to expire without first providing the defendant with an opportunity to remove.⁹² Although a courtesy copy of the complaint may indeed put the defendant on notice of the plaintiff's intended litigation, the Court would predicate the defendant's removal options on the surer footing of actual communication from the trial court.⁹³ The *Murphy Brothers* Court viewed such an approach as the best way to preserve and safeguard the § 1446(b) first paragraph removal period, consciously acting to effectuate Congress' intent to objectify the removal clock.⁹⁴ With little effort, the same logic extends to § 1446(b)'s second paragraph triggers.

⁹¹ See *Wilson v. Intercollegiate (Big Ten) Conference Athletic Ass'n*, 668 F.2d 962, 965 (7th Cir. 1982) (section 1446(b)'s second paragraph revives removal "where the plaintiff files an amended complaint that so changes the nature of his action as to constitute 'substantially a new suit begun that day'") (quoting *Fletcher v. Hamlet*, 116 U.S. 408, 410 (1886)).

⁹² See, e.g., *Murphy Brothers*, 526 U.S. at 356, where the Court indicates its dissatisfaction with one of the effects of the receipt rule: "Furthermore, the so-called 'receipt rule' – starting the time to remove on receipt of a copy of the complaint, however informally, despite the absence of any formal service – could, as the District Court recognized, operate with notable unfairness to individuals and entities in foreign nations."

⁹³ *Id.*

⁹⁴ See *id.* at 351, 354:

Congress soon recognized, however, that § 1446(b), as first framed, did not "give adequate time and operate uniformly" in all States. . . . To ensure that the defendant would have access to the complaint before commencement of the removal period, Congress in 1949 enacted the current version of § 1446(b) The interpretation of § 1446(b) adopted here adheres to tradition, makes sense of the phrase 'or otherwise,' and assures defendants adequate time to decide whether to remove an action to federal court.

In consideration of the foregoing discussion, it would appear that *Murphy Brothers* has much more application in interpreting § 1446(b)'s second paragraph than might appear at first blush. Such application suggests that the small minority's approach is most consonant with this latest word from the Supreme Court on the subject of obtaining legitimate jurisdiction over removed court proceedings, given that the small minority's approach provides a more reliable means of communicating present removability and best effectuates the congressional intent to provide the defendant with adequate time to consider the decision to remove.

V. CONCLUSION

From its stormy inception in the Constitutional Convention and its traumatic birth in the First Congress, the federal judiciary has been eyed with more than a little suspicion by states and their courts and accused of a design to displace local government, principally local judiciaries. Proponents of the federal courts have argued for two centuries that such claims are unfounded, and that plaintiffs and defendants should have access to a forum devoid (or at least significantly purged) of local prejudices. By creating concurrent federal courts, such a forum was made available to all who met certain requirements imposed by Congress.

However, the great majority of cases that become removable by way of one of the statutory triggers of § 1446(b) endanger the actual availability of that forum for the defendant. First, by interfering with the state trial court's jurisdiction, the large minority disregards the federalism concerns that have ever plagued the federal judiciary, thereby aggravating the tension extant between the states and the federal government. Second, by giving the plaintiff apparently unlimited ability to defeat removal, both the majority and the large minority defeat one of the principle purposes of the federal district courts: to allow the defendant to remove an action to a federal court free of actual or perceived bias. In addition, predictability in the law and its procedure, that axiomatic aspiration of both legislature and judiciary, is done a great disservice in the large minority and majority positions. Only the small minority's approach to triggering § 1446(b)'s removal clock alleviates federalism concerns inherent in the American experience, preserves the federal forum for qualified defendants, and effectuates the legislative intent to promote judicial efficiency and fairness in the removal process.