

New Jersey Law Journal

VOL. 206 - NO 13

DECEMBER 26, 2011

ESTABLISHED 1878

IN PRACTICE

CIVIL PRACTICE

When It Comes to Removal, Timing Is Everything

BY PETER J. GALLAGHER

Corporate defendants sued in state court often reflexively seek removal to federal court because they believe it is a more fair and efficient forum. In contrast, plaintiffs generally fight removal because they view state court as a friendlier venue. Because both sides perceive venue as being outcome determinative, removal is often the first battle in complex commercial litigation. Despite its apparent simplicity, however, the removal process remains a minefield for the uninitiated, rife with potentially disastrous procedural pitfalls.

Determining when the 30-day removal clock begins to run — particularly in complex, multiparty litigation — is one such pitfall that has not only confused litigants, but also split the lower federal courts. In a recent decision, *Delalla v. Hannover Ins.*, 660 F.3d 180 (3d Cir. 2011), the United States Court of Appeals for the Third Circuit became the latest court to join the debate on this issue, ruling that each defendant in a multidefendant lawsuit has 30 days from when it was served

Gallagher is a commercial litigator with Porzio, Bromberg & Newman P.C. in Morristown, and teaches legal research and writing at the Seton Hall University School of Law. He thanks Suzanne Peters, a summer associate with the firm, for her contributions to this article.

to seek removal. However, this approach has not been universally accepted by its sister courts. Rather, it is only one of three different rules established by various circuit courts. Unless the removal statute is amended to eliminate the source of this split, or the Supreme Court intervenes to resolve it, attorneys practicing in different jurisdictions must understand which of these three different rules applies in the jurisdiction in which their particular matter may be pending.

In all cases, the removal clock is triggered by formal service of the complaint. Under 28 U.S.C. § 1446(b), a defendant must file its notice of removal no later than 30 days after it receives “a copy of the initial pleading” through “service or otherwise.” The plain language of this provision does not immediately suggest that formal service is required to trigger the removal clock, but formal process is exactly what is required since the U.S. Supreme Court handed down its decision in *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347-48 (1999). In that case, the Supreme Court ruled that a defendant’s time to remove is triggered “by simultaneous service of the summons and complaint, or receipt of the complaint, ‘through service or otherwise,’ after and apart from service of the summons, but not by mere receipt of the complaint unattended by any formal service.”

Calculating the removal date under this rule is easy in cases with a single de-

fendant. However, problems arise when there are multiple defendants served on different dates. Does the removal clock begin for all defendants when the first defendant is served? Does it begin independently for each defendant when that defendant is served? Is there some middle ground that could accommodate all of these options? The short answer to these questions is yes. Some circuits have adopted a “first-served defendant rule,” others have adopted a “later-served defendant rule,” and at least one circuit has adopted what it calls an “intermediate rule.”

To make matters more confusing, while it appears that the trend in the law is toward greater acceptance of the later-served defendant rule, some courts have openly bucked this trend. E.g., *Barbour v. Int’l Union*, 640 F.3d 599 (4th Cir. 2011).

Under the “first-served defendant rule,” the removal clock begins to run when the first defendant is served, and if that defendant fails to remove the matter within 30 days of service, it cannot be removed even where other defendants may not even be served until after this 30-day window closes. The rationale most often cited in favor of this rule is that it is the only approach that is consistent with the rule of unanimity — the requirement that all defendants join in removal. If the first-served defendant chooses not to remove the case, it is irrelevant whether a later-served defendant wants to remove because the first-served defendant’s decision to forego removal destroys unanimity. E.g., *Brown v. Demco, Inc.*, 792 F.2d 478, 481-82 (5th Cir. 1986). Courts favoring this rule also suggest that it is consistent with the requirement that any doubts about the propriety of removal be strictly

construed against removal.

By contrast, courts adhering to the “later-served defendant rule” hold that all defendants have 30 days from service of the complaint to seek removal. Courts that have adopted this approach generally claim that it is the better approach because: (1) the “first-served defendant” rule impermissibly reads words into section 1446(b) that Congress never intended to include; (2) the “first-served defendant” rule is simply unfair to later-served defendants; and/or (3) adopting such a rule would be inconsistent with the Supreme Court’s holding in *Murphy Bros.* because it would bind the later-served defendant to a 30-day removal time limit that was triggered prior to its having been formally served. E.g., *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 533 (6th Cir. 1999), *cert. denied*, 528 U.S. 1076 (2000). Courts adhering to the “later-served defendant rule” accommodate the rule of unanimity by also holding that all previously-served defendants must consent to removal even if their own 30-day periods have expired.

Finally, the Fourth Circuit has adopted what it characterizes as a middle ground in an attempt it to address what it perceived to be the flaws in both the first-served and later-served defendant rules. *Barbour v. Int’l Union*, 640 F.3d 599, 612 (4th Cir. 2011). Under this approach, like the first-served defendant rule, a later-served defendant cannot remove a lawsuit if the first-served defendant failed to remove within 30 days of service. However, unlike the first-served defendant rule, if the first-served defendant does remove within 30 days of service, a later-served defendant must still consent to removal to satisfy the rule of unanimity.

The Fourth Circuit explained that this approach places later-served defendants in

a position that is no worse than they would have been in if any other defendant had removed the case. In doing so, it corrected what it perceived to be the “fatal flaw” in the later-served defendant rule:

The Last-Served Defendant Rule only applies § 1446(b) to one defendant — the last-served. 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. It strains credulity to conclude that Congress intended to allow defendants to flagrantly ignore § 1446(b).

Similarly, the Fourth Circuit concluded that its intermediate rule is more consistent with the language of Section 1446(b), and thus best carries out Congress’ intent, because it avoids reading “first-served” or “last-served” into the statute.

The reason there are three answers to what would appear to be a fairly simple question may lie in an observation the New Jersey Supreme Court made many years ago, albeit in a different context: “Litigation proceeding from the poverty of language is constant.” *Atlantic Northern Airlines, Inc. v. Schwimmer*, 12 N.J. 293, 303 (1954). The removal statute is somewhat internally inconsistent.

Section 1446(a) provides that “[a] defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file ... a notice of removal” This portion of the statute thus contemplates that one or more defendants may seek removal. In contrast, Sec-

tion 1446(b) provides that “[t]he notice of removal ... shall be filed within thirty days after receipt by *the defendant* ... of a copy of the initial pleading” (emphasis added). On its face, this provision does not appear to account for the possibility that more than one defendant could seek removal. The Third Circuit, in the course of adopting the later-served defendant rule in *Delalla*, addressed this issue as follows:

Section 1446(a) sets out the general rule that defendants in a civil action must file a notice of removal in order to initiate the removal process. Section 1446(b) then sets out a specific rule governing the timeliness of each notice of removal that is eventually filed. This reading follows from the text of the two provisions, which must be read together in order to give effect to congressional intent regarding the procedure for removal.

660 F.3d at 186; *see also Bailey v. Janssen Pharmaceutica, Inc.*, 536 F.3d 1202, 1207 (11th Cir. 2008).

Ultimately, while it appears that the later-served defendant rule has gained in popularity recently, it has not been universally accepted, and the Fourth Circuit’s recent opinion confirms that unanimity is not coming soon. Moreover, while the question of when the removal clock is triggered in multid defendant litigation remains unsettled across several circuits, it remains unresolved in more than half of all of the circuit courts. To avoid a costly misstep at the very outset of a lawsuit, practitioners must understand which rule applies wherever their case may be venued. ■