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A Survey of Recent Developments in the Law: Civil Procedure

Janet Ampe

CIVIL PROCEDURE

A. *Referee Recommendations are Unauthorized when Unconfirmed by a District Court Judge*

In one brief unanimous decision, the Minnesota Court of Appeals recently invalidated five years worth of Ramsey County referees' decisions.[1] In *Griffis v. Luban*,[2] the court struck down a 1995 standing order that automatically assigned referees to certain cases in Ramsey County.[3] The standing order, signed by then-Acting Chief Judge Gordon Shumaker, applied to cases such as default judgments, motions to vacate, forfeiture actions, name changes and cancellations of a contract for deed.[4] The purpose behind "the standing order was to increase efficiency and improve the procedures for processing uncontested matters."[5]

The standing order allowed for automatic case assignment to referees and directed the court administrator to enter referee recommendations without a judge's signature.[6] The court decided the chief judge had the power to assign matters to referees through a standing order.[7] However, the chief judge lacked the authority to allow referee decisions to be entered without a district court judge's confirmation.[8] As the *Griffis* decision was not applied prospectively, potentially up to 10,000 Ramsey County referee orders may be invalid.[9]

The validity of the standing order first arose when Katherine

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1. *See* Brian Becker, *Many Ramsey Referee Orders Could be Invalid*, MINN. LAW., Nov. 22, 1999, at 1.
2. 601 N.W.2d 712 (Minn. Ct. App. 1999).
3. *See id.* at 715.
4. *See* Becker, *supra* note 1, at 9; *see also Griffis*, 601 N.W. 2d at 713.
5. Becker, *supra* note 1, at 9.
6. *See Griffis*, 601 N.W. 2d at 714-15.
7. *See id.* at 714. "[T]he legislature has given the chief judges of the district courts broad administrative and assignment authority, which extends to assigning referees . . . and [the standing order as an assignment order] appears to be within the scope of the administrative authority and assignment power of the chief judge." *Id.*
8. *See id.* at 715.
9. *See* Becker, *supra* note 1, at 9.

Griffis, an Alabama resident, brought a defamation claim against Minnesota resident Marianne Luban.[10] The claim was brought in Alabama district court and alleged "that Internet communications by Luban damaged Griffis in Alabama."[11] Luban did not answer the complaint and a default judgment was entered against her.[12] Griffis filed the judgment in Ramsey County; Luban asserted the Alabama District Court lacked personal jurisdiction over her and moved to vacate.[13]

Pursuant to the 1995 standing order, the case was assigned to a referee.[14] In August 1998, the referee recommended the motion to vacate be granted; Griffis moved for reconsideration and amendment.[15] Later Griffis also requested review by a district court judge, and Luban requested that a district court judge sign the referee's order.[16] Several months later, without a hearing, the referee issued an order affirming the Alabama judgment.[17] In March 1999, the court administrator entered the judgment against Luban based upon the referee's order.[18] The referee's order was not countersigned by a district court judge.[19] Luban appealed from the judgment.[20]

The court of appeals examined the standing order issue.[21] A day or two before oral argument the appellate court clerk contacted the attorneys, requesting a copy of the standing order.[22] At oral argument Luban's attorney requested the standing order not be struck down, but if the court did strike it, to do so prospectively.[23] The court declined to grant this request, ruled that the referee's order was invalid due to lack of judicial confirmation,

10. *See Griffis*, 601 N.W.2d at 713.
11. *Id.*
12. *See id.*
13. *See id.*
14. *See id.* at 713-14. Neither party objected to the referral. *See id.* at 714. Any party can object to the assignment to a referee. *See* MINN. R. GEN. PRAC. 107.
15. *See Griffis*, 601 N.W.2d at 714. Griffis also filed objections to the referee's findings. *See id; see also* MINN. R. CIV. P. 53.05(b) (explaining that either party may serve written objections to referee's report).
16. *See Griffis*, 601 N.W.2d at 714.
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.*
22. *See* Becker, *supra* note 1, at 9.
23. *See id.*

and vacated the case without reaching the merits.[24]

The court reasoned that the standing order produced invalid judgments as the chief judge who signed the order had no authority to alter the system.[25] The court emphasized that referees lack final decision authority, and that the referees' recommendations only become orders of the court when confirmed by a judge.[26] Neither party submitted authority showing that the chief judge could abrogate the statutory requirement of judicial countersignature on referee recommendations.[27] While one referee pilot project did allow for automatic referee assignment for certain matters, this project explicitly retained the requirement of judicial signature, indicating "the continuing vitality of that requirement."[28]

Because the 1995 standing order was unauthorized, judgments entered under it were invalid.[29] Griffis will have to re-file the judgment in Ramsey County before the Minnesota courts will have the opportunity to hear this Internet jurisdiction landmark case.[30]

Because the standing order was not struck down prospectively, the *Griffis* holding will have a broad impact.[31] There appears to be no reason why any Ramsey County referee decision, issued under the standing order, could not come under attack based on *Griffis*.[32] However, Ramsey County has not yet seen excessive activity resulting from *Griffis*.[33] However, one judge granted a motion to quash and another vacated a monetary judgment of sanctions, both apparently motivated by *Griffis's* treatment under the standing

24. *See Griffis*, 601 N.W.2d at 715-16.

25. *See id.* at 714-15.

26. *See id.* at 715. "Confirmation by a district court judge also establishes the propriety of the initial referral to the referee." *Id.*

27. *See id.*

28. *See id.*

29. *See id.* at 716.

30. Interview with C. Peter Erlinder, Council for Griffis and Professor of Law, William Mitchell College of Law, in St. Paul, Minn. (Feb. 7, 2000). Luban has filed bankruptcy, thus the case may be tied-up in bankruptcy court for some time. *Id.* However, Erlinder indicated Griffis may forego monetary damages and seek only an injunction, which will not be hindered by the bankruptcy proceeding and allow the case to move forward. *Id.*

31. *See* Becker, *supra* note 1, at 9. "[T]he Griffis decision does not appear to contain language limiting the reach of its holding." *Id.*

32. *See id.*

33. Telephone Interview with Michael Moriarity, Ramsey County Civil Court Administrator (Feb. 17, 2000).

order.[34] Chief Judge Lawrence Cohen has amended the standing order, which now requires district court judges to co-sign or confirm all referee orders.[35] Thus future cases will not be vulnerable to motions to vacate based on the faulty standing order.

B. Appealable Orders

1. Sanctions Order not Subject to Immediate Appeal

On June 14, 1999 the United States Supreme Court clarified a disagreement between the federal appellate courts and ruled that a sanctions order against an attorney is not immediately appealable.[36] In Cunningham *v. Hamilton County,* the Court held "that a sanctions order imposed on an attorney is not a 'final decision' under §1291" of the Judicial Code.[37] The Court conceded that some discovery sanctions are immediately appealable, but not those sanctions that are "inextricably intertwined with the merits of the action."[38] The Court further stated that the congruence of interests between clients and attorneys implicates that attorneys should not be treated as non-parties for purposes of appeal.[39]

In *Cunningham,* the petitioner was an attorney representing Darwin Starcher in a federal civil rights suit against Hamilton County.[40] During the course of discovery, which was overseen by a magistrate judge, Cunningham failed to respond timely to discovery requests.[41] The magistrate judge ordered Cunningham to comply.[42] The magistrate judge also ordered that four witnesses be

34. *See id.*

35. *See* Becker, *supra* note 1, at 9.

36. *See* Cunningham v. Hamilton County, 119 S. Ct. 1915, 1918 (1999). *Compare, e.g.,* Eastern Maico Distribs., Inc. v. Maico-Fahrzeugfabrik, 658 F.2d 944, 951 (3d Cir. 1981) (holding that the order was not immediately appealable), *with* Telluride Mgmt. Solutions, Inc. v. Telluride Inv. Group, 55 F.3d 463, 465 (9th Cir. 1995) (holding that the order was immediately appealable).

37. *See Cunningham,* 199 S. Ct. at 1923; *see also* 28 U.S.C. § 1291 (1994) (vesting courts of appeals with jurisdiction over appeals from "final decisions").

38. *See Cunningham,* 199 S. Ct. at 1920-21.

39. *See id.* at 1921. "[A] decision does not automatically become final merely because it is directed at someone other than a plaintiff or defendant." *Id.* at 1920 n.4.

40. *See id.* at 1917.

41. *See id.* Starcher was served with requests for interrogatories and documents, to which responses were due within 30 days after service; Cunningham failed to comply with the requests. *See id.; see also* FED. R. CIV. P. 33(b)(3), 34(b) (requiring prompt responses to requests).

42. *See Cunningham,* 199 S. Ct. at 1918.

deposed on July 25, 1996, but only after Cunningham produced "full and complete" responses to the discovery requests.[43] Cunningham did not comply with these orders.[44] She failed to produce the requested documents, gave incomplete responses to several of the interrogatories, and noticed the deposition of one witness before responding to the County's requests.[45]

Hamilton County filed a motion for sanctions, which the magistrate judge granted.[46] The magistrate judge ordered Cunningham to pay Hamilton County $1,494 for attorney's fees.[47] The magistrate judge carefully noted that there was no contempt hearing and that Cunningham had never been found in contempt of court.[48] The district court affirmed the sanctions order and further granted a motion to disqualify Cunningham, as she was a material witness in the case.[49] Cunningham appealed.[50]

The Sixth Circuit Court of Appeals dismissed the case for lack of jurisdiction.[51] The court of appeals "considered whether the sanctions order was immediately appealable under the collateral order doctrine."[52] That doctrine provides exceptions to the final judgment rule for orders that are "conclusive . . . resolve important questions separate from the merits, and . . . are effectively unreviewable on appeal from the final judgment in the underlying action."[53] The Sixth Circuit determined the issues here were not separate from the merits, and that a non-participating attorney must await final disposition of the underlying case before filing an appeal.[54]

The Supreme Court affirmed the court of appeals.[55] The Court first examined the history of the final judgment rule, which descended from the Judiciary Act of 1789.[56] The rule's main

43. *See id.*
44. *See id.*
45. *See id.; see also* FED. R. CIV. P. 37(a)(3) (stating that incomplete answers are treated as a failure to disclose).
46. *See Cunningham*, 199 S. Ct. at 1918. The magistrate judge found Cunningham's conduct "egregious." *See id.*
47. *See id.*
48. *See id.*
49. *See id.*
50. *See id.* at 1919.
51. *See id.*
52. *Id.*
53. *Id.* (internal quotes omitted).
54. *See id.*
55. *See id.* at 1923.
56. *See id.* at 1919.

purposes are to "emphasize the deference that appellate courts owe to the trial judge" and to avoid clogging the system with expensive appeals filed for harassment purposes.[57] The Court noted that no decision is final unless it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."[58]

The Court then examined the exceptions to the final judgment rule.[59] The exceptions apply to "decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment."[60] Hamilton County conceded that the sanctions order was conclusive.[61] However, the Court stated that appellate review of a sanctions order cannot be completely separate from the merits, as the sanctions order is often inextricably intertwined with the merits of the action.[62] To determine if sanctions were proper here, the Court would have to consider completeness of interrogatory responses, which would require substantial inquiry into the merits of the case.[63] Thus, the sanctions order does not fall under the exception of a decision resolving important questions separate from the merits.[64]

Even if the order were separate from the merits of the case, the order must be effectively unreviewable on appeal from the final judgment to qualify for exception.[65] The Court concluded the sanctions order was effectively reviewable.[66] The Court first struck down Cunningham's argument that a non-party generally cannot appeal a judgment.[67] The Court explained that when the non-party is an attorney whose personal interests in vindication are subordinate to the client's interests, the decision to appeal depends entirely on the client.[68] Thus the attorney should not be treated

57. *See id.* at 1919-20.
58. *Id.* at 1920 (quoting Van Cauwenberghe v. Biard, 486 U.S. 517, 521-22 (1988)).
59. *See Id.*
60. *Id.* (quoting Swint v. Chambers County Comm'n, 514 U.S. 35, 42 (1995)).
61. *See id.*
62. *See id.*
63. *See id.* at 1921.
64. *See id.* at 1923.
65. *See id.* at 1921.
66. *See id.*
67. *See id.*
68. *See id.* "As a matter of professional ethics, however, the decision to appeal should turn entirely on the client's interest." *Id.* (quoting Richardson-Merrell, Inc. v. Koller, 472 U.S. 424, 434-35 (1985)).

the same as a non-party for the purpose of appeal.[69]

Cunningham next argued that sanctions are similar to contempt orders, which are immediately appealable.[70] The Court clarified the difference between a sanction and a finding of contempt.[71] The purpose of civil contempt is to "force the contemnor to comply with an order of the court," while sanctions are "not designed to compel compliance."[72] Further, the purpose of the sanction rule to "protect courts and opposing parties from delaying or harassing tactics during the discovery process," would be defeated by immediate appeal from a sanction.[73] Judges could forego sanctions, despite abusive conduct, to avoid further delay in the proceeding.[74]

The Court recognized the hardship their ruling could impose on attorneys and offered possible solutions.[75] The Court suggested Congress could amend the Judicial Code to provide explicitly for immediate appellate review of sanction orders.[76] Otherwise, a district court could wait until the end of the trial to decide whether to impose sanctions or when to order collection.[77] Justice Kennedy, concurring, mentioned the possibility of a writ of mandamus in cases of exceptional hardship.[78]

Thus, the Supreme Court has effectively overturned a long line of Eighth Circuit decisions that held sanctions orders to be immediately appealable.[79] Now attorneys must await a final judgment in the underlying action before they may appeal sanctions, as with most other discovery rulings.

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69. *See id.*

70. *See id.*

71. *See id.*

72. *Id.* A civil contempt finding is immediately appealable because before final judgment is reached, the non-party will have either given up information sought or suffered incarceration or fines, which are probably irreparable harms. *See id.* at 1922.

73. *See id.* "[Immediate appealability] also could forestall resolution of the case as each new sanction would give rise to a new appeal." *Id.*

74. *See id.*

75. *See id.* at 1922-23.

76. *See id.* at 1923. Recent amendments have provided for immediate appeal of certain orders. *See id.*

77. *See id.*

78. *See id.* (Kennedy, J., concurring).

79. *See* Josh Jacobson, *Notes & Trends—Federal Practice*, BENCH & B. OF MINN., Aug. 1999, at 55.

2. Denial of Request for Reconsideration is not an Appealable Order

On January 1, 1999, new appellate rules became effective in Minnesota that dramatically changed the timing and availability of appeals.[80] In *Baker v. Amtrak National Railroad Passenger Corp.*, the Minnesota Court of Appeals clarified the application of the new rules to post-trial motions.[81] The new rules of appellate procedure enumerate the post-trial motions that will toll the running of the time to appeal.[82] However, the rules specifically exclude motions for reconsideration.[83]

In *Baker*, David R. Baker sued Amtrak, alleging disabling back injuries and impotence resulting from work-related incidents.[84] The jury found, on a special verdict form, that Baker was 95% negligent and that Amtrak was 5% negligent.[85] The trial court misread the jury's form and ordered judgment for Baker for ninety-five percent of the total award.[86] The trial court discovered its error and amended the award to reflect the jury's findings, leaving Baker with only five percent of the total award.[87] Baker moved for a judgment notwithstanding the verdict, or a new trial.[88]

The court denied Baker's motion.[89] Baker then submitted a written request to make a motion for reconsideration of his post-trial motions, based on incidents that cast "suspicion on the jury's verdict."[90] The trial court refused to allow Baker to make the motion for reconsideration, and Baker appealed from the final judgment.[91]

Baker challenged the court's denial of his request to move for

80. *See* David F. Herr & Eric J. Magnuson, *New Steps to Climb: Amendments to the Appellate Rules*, BENCH & B. OF MINN., Apr./May 1999, at 29; *see also* MINN. R. CIV. APP. P. 104.01 (effective Jan. 1, 1999).

81. *See* Baker v. Amtrak Nat. R.R. Passenger Corp., 588 N.W.2d 749, 755-56 (Minn. Ct. App. 1999).

82. *See* MINN. R. CIV. APP. P. 104.01.

83. *See id.* (advisory committee's note, 1998 amendments) (stating that the rules exclude motions for reconsideration, because those motions are never required and are considered only if the trial court permits the reconsideration motion to be filed).

84. *See Baker*, 588 N.W.2d at 751-52.

85. *See id.* at 752.

86. *See id.*

87. *See id.*

88. *See id.*

89. *See id.*

90. *See id.*

91. *See id.*

reconsideration of his post-trial motions.[92] The court of appeals ruled that the motion was not appealable under Minnesota Rules of Appellate Procedure.[93] The rules permit appeals only from orders that, in effect, determine the action and prevent a judgment from which an appeal might be taken.[94] The court held that the denial of Baker's request neither determined the action, nor prevented a judgment from which Baker could appeal.[95] Thus the court concluded, "the trial court's denial of Baker's request to bring a motion to reconsider is not appealable."[96]

The court then used the new Minnesota Appellate Rules to further support its ruling.[97] The new rules enumerate specific motions that will stop the clock from running on time to appeal until those motions are decided.[98] The list is meant to be exhaustive.[99] Motions for reconsideration are explicitly excluded because they are "never required by the rules and are considered only if the trial court permits the motion to be filed."[100] The appellate court reasoned that if the new appellate rules provided a reconsideration motion did not toll the running for the time to appeal, then the reconsideration motion should not be independently appealable.[101]

The court decided that the moving party would not suffer injustice from the denial of the motion to reconsider.[102] Trial court errors that would have been discovered upon reconsideration

92. *See id.* at 754. Prior to passage of the Minnesota Rule of General Practice 115.11 on January 1, 1998, motions to reconsider were not entertained. *See id.* The new rule provides that motions to reconsider are allowed only by express permission of the court, which will be granted only upon a showing of compelling circumstances. *See* MINN. R. GEN. PRACT. 115.11.

93. *See Baker*, 588 N.W.2d at 755. Amtrak argued Baker's request was not reviewable as the trial court did not issue an order, but merely refused a hearing request. *See id.* at 754. The court "decline[d] to deny review of the denial of Baker's request . . . simply because the trial court did not respond in an order." *Id.* at 755.

94. *See* MINN. R. CIV. APP. P. 103.03 (e).

95. *See Baker*, 588 N.W.2d at 755.

96. *Id.*

97. *See id.* The court's conclusion is "consistent with a recent amendment to MINN. R. CIV. APP. P. 104.01" effective on January 1,1999. *Id.*

98. *See* MINN. R. CIV. APP. P. 104.01, subd. 2. The rule applies to motions for JNOV, to amend or make findings of fact, to amend the judgment, and for new trial. *See id.*

99. *See id.* (advisory committee cmt., 1998 amendments).

100. *Id.*

101. *See Baker*, 588 N.W.2d at 756.

102. *See id.*

would be corrected on appeal.[103] Also, errors relating to the reconsideration motion could be corrected on an appeal from the final judgment.[104] Furthermore, if the trial court made no reversible error in its consideration of the case, its refusal to allow a motion for reconsideration would be harmless.[105] By sparing a distinct appeal, the new appellate rules serve to streamline the appellate process by consolidating appeals, which aids judicial economy.

C. *Jurisdiction Present Over Discovery Proceedings Where the Main Case is Pending in Another District*

Recently the Eighth Circuit first confronted the issue of its jurisdiction over a discovery order involving a non-party in an out-of-district action.[106] In *Miscellaneous Docket Matter #1 v. Miscellaneous Docket Matter #2*, the court of appeals claimed jurisdiction to review an order to quash, and ruled that the order was subject to immediate appeal.[107]

The plaintiffs in *Miscellaneous Docket Matter* filed a class action suit against West Publishing Company (West) alleging gender discrimination in West's stock ownership program.[108] One attorney, acting for several parties, filed one suit in Colorado district court and another in Florida district court.[109] All parties agreed depositions taken in either case could be used in both proceedings.[110]

Dwight Opperman, West's former CEO and a non-party to the action, was fully deposed for two days in Colorado.[111] West sent a letter to the plaintiffs requesting that any questions relating to either action be asked at the Colorado deposition, and pointed out that the Federal Rules of Civil Procedure require parties to avoid imposing undue burdens.[112] At the end of the second day the

103. *See id.*
104. *See id.*
105. *See id.*
106. *See* Miscellaneous Docket Matter #1 v. Miscellaneous Docket Matter #2, 197 F.3d 922, 925 (8th Cir. 1999).
107. *See id.*
108. *See id.* at 923-24.
109. *See id.* at 924.
110. *See id.*
111. *See id.*
112. *See id.*; *see also* FED. R. CIV. P. 45 (c) (1).

plaintiff's council concluded the deposition "in its entirety."[113] However, plaintiffs sought to depose Opperman again.[114] Opperman filed a suit in Minnesota District Court seeking to quash the subpoena under Federal Rules of Civil Procedure 26 and 45.[115] The district court granted his motion, "holding that another deposition would constitute an undue burden and subject Opperman to an invasion of privacy and embarrassment."[116]

To determine whether to grant the motion, the district court balanced the plaintiffs' need for the information against Opperman's burden.[117] The court found the planned areas of inquiry were either entirely irrelevant, or of limited relevancy.[118] Thus the plaintiffs' need for information was negligible.[119] The court also found Opperman, as a non-party, was entitled to special protection.[120] Additionally the court believed another deposition would constitute undue burden, as appellants had the opportunity to ask their questions at the Colorado deposition, but failed to do so.[121]

The court of appeals first considered their jurisdiction over the order.[122] The court noted the general lack of immediate appeal of discovery orders in pending cases.[123] However, the court concluded that because the proceeding involved a non-party and the main action was pending in a non-Eighth Circuit district court, Opperman would have no other means to obtain appellate review.[124] Thus the court claimed jurisdiction over the ancillary action.[125] The court cited only decisions from the Ninth and Tenth Circuits in supporting its jurisdiction decision.[126]

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113. *See Miscellaneous Docket Matter*, 197 F.3d at 924.

114. *See id.* The second request was made pursuant to an alteration in a protective order limiting the deposition question subject matter. *See id.* However, the protective order had not forbidden the questions that the appellants sought to ask in the second deposition. *See id.* at 927.

115. *See id.* at 924; *see also* FED. R. CIV. P. 26 (c) and 45 (c).

116. *See Miscellaneous Docket Matter*, 197 F.3d at 924.

117. *See id.*

118. *See id.*

119. *See id.*

120. *See id.*

121. *See id.*

122. *See id.* at 925.

123. *See id.*

124. *See id.*

125. *See id.*

126. *See id.; see also* Hooker v. Continental Life Ins. Co., 965 F.2d 903, 905 (10th Cir. 1992); In re Subpoena Served on California Pub. Util. Comm'n, 813

The court reasoned that liberal discovery rules have high potential for abuse, thus the rules confer broad discretion on the district court in discovery matters.[127] The court of appeals agreed with the district court that the proposed inquiry in the second deposition was not relevant, and that Opperman had the burden to show that his claim of harm must be based upon more than "stereotypical and conclusory statements."[128] The court decided that Opperman had satisfied his burden, in part due to the plaintiffs' press releases accusing Opperman of sexual harassment.[129] Furthermore, it noted that non-parties are subject to unwanted burden, and are thus entitled to special deference when balancing competing needs.[130] After considering the balance between the plaintiffs' needs and Opperman's burden, the court of appeals ruled that the district court did not abuse its discretion in quashing the subpoena.[131]

As a result, the Eighth Circuit established its jurisdiction over discovery orders involving non-parties to cases outside of the district.[132] It joins at least two other circuits in this area, and provides additional protection to local non-parties involved in out-state disputes.

D. Formal Service of Summons Required to Trigger Removal Clock

The U.S Supreme Court recently resolved a long-standing split between the circuits as to whether formal service of process is a prerequisite for the running of the thirty-day removal period under 28 U.S.C. section 1446 (b).[133] In *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, the Court held that the defendant's time to remove is triggered by formal service of summons, and not by receipt of the complaint without formal service.[134] Thus, faxing a copy of the complaint, as the respondent did in *Murphy Bros.*, is insufficient to

F.2d 1473, 1476 (9th Cir. 1987).

127. *See Miscellaneous Docket Matter*, 197 F.3d at 925.

128. *See id.* at 926.

129. *See id.*

130. *See id.*

131. *See id.* at 927.

132. *See id.* at 925.

133. *See* Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 119 S. Ct. 1322, 1326 (1999); *see also* 28 U.S.C. §1446 (b) (1994) (providing that notice of removal of a civil action shall be filed within 30 days after the receipt by the defendant).

134. *See Murphy Bros.*, 119 S. Ct. at 1325.

begin running the removal clock.[135]

In *Murphy Bros.*, Michetti filed a complaint in Alabama State Court on January 26, 1996, alleging breach of contract and fraud by Murphy.[136] Michetti did not serve Murphy then, but on January 29, 1996 faxed a "courtesy copy" of the complaint to one of Murphy's vice presidents.[137] On March 13, 1996 Murphy removed to the district court under 28 U.S.C. section 1441.[138] Michetti moved to remand to state court on the ground that Murphy had filed the removal notice too late.[139] Section 1146 (b) requires notice of removal to be filed within thirty days after the receipt by the defendant, "through service or otherwise, of a copy of the initial pleading."[140]

The district court denied the remand motion, as it found the removal period commenced upon official service of the summons.[141] The court reasoned the language "or otherwise" in the statute was not meant to govern in these situations.[142] The district court certified the issue for interlocutory appeal,[143] and the Eleventh Circuit Court of Appeals reversed and remanded.[144] The court of appeals based its ruling on a plain meaning interpretation of the words "receipt" and "otherwise."[145] The court determined all that was required to start the removal clock was for the defendant to come into possession of the complaint by some means.[146]

The U.S. Supreme Court rejected the court of appeals' reasoning.[147] It noted that in the absence of service of process, courts may not exercise power over a party, and that service of a

135. *See id.*
136. *See id.*
137. *See id.* at 1326. The parties had attempted to settle until February 12, 1996, when Michetti officially served Murphy. *See id.*
138. *See id.; see also* 28 U.S.C. § 1441 (1994) (governing removal from state to federal district courts).
139. *See Murphy Bros.*, 119 S. Ct. at 1326.
140. *See* 28 U.S.C. § 1146 (b) (1994).
141. *See Murphy Bros.*, 119 S. Ct. at 1326.
142. *See id.*
143. *See* 28 U.S.C. § 1292 (1994) (allowing for immediate appeal when a district judge states that an order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation).
144. *See Murphy Bros.*, 119 S. Ct. at 1326.
145. *See id.*
146. *See id.* at 1328.
147. *See id.*

summons or some other authority-asserting measure was required for one to officially become a party.[148] Furthermore, the Court examined legislative history and determined the words "or otherwise" in section 1446(b) were added solely to rectify a problem posed by states such as New York, where an action commenced upon service of the summons, which could precede the filing of the complaint.[149] The Court found no evidence to support the theory that Congress intended to dispense with service of process as the official trigger for removal actions.[150] In addition, the Court reasoned that if the plain meaning of the statute was so clear, the circuits would not be so hopelessly split over its proper interpretation.[151] The Court also noted that in other areas of the Federal Rules of Civil Procedure,[152] "receipt through service or otherwise" is interpreted consistently with its holding in *Murphy Bros.*[153]

The dissenting justices, Rehnquist, Scalia and Thomas, argued that the plain meaning interpretation followed by the court of appeals was proper.[154] They also pointed out that the Court's practice of strictly construing removal statutes indicated a contrary result.[155]

In states like Minnesota, which require that the complaint be served with the summons, the removal clock will now start to run when summons and complaint are served together.[156] Service of a "courtesy complaint" will not be sufficient to start the removal clock.

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148. *See id.* at 1327.

149. *See id.* In such jurisdictions, the defendant would potentially have to remove the suit before he even knew what the suit was about. *See also* S. REP. NO. 303, at 6 (1949).

150. *See Murphy Bros.*, 119 S. Ct. at 1328.

151. *See id.*

152. *See e.g.*, FED. R. CIV. P. 81(c) (specifying the time the defendant has to answer a complaint after removal as being within 20 days after the receipt of a copy of the initial pleading through service or otherwise).

153. *See Murphy Bros.*, 119 S. Ct. at 1329.

154. *See id.* at 1330 (Rehnquist, C. J., dissenting).

155. *See id.*

156. *See* MINN. R. CIV. P. 3.02 ("A copy of the complaint shall be served with the summons.").