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Defense Practitioners, Slumber No More: Pennsylvania Courts Deliver an Unexpected Wake- up Call Concerning the Section 1446(b) Removal Time-Period*

Your client, ABC Company, calls. ABC was served with a writ of summons 29 days ago. The writ simply states that an action has been commenced against ABC. Your client thinks the case relates to an accident that occurred last year in its Pennsylvania plant involving Bob Smith, an Ohio resident who was delivering some materials to the plant. ABC does not know the extent of Smith's injuries. They ask you what they should do. You recite, as Pennsylvania lawyers have for years when their clients have been served with a writ, that there are two options: 1) rule the plaintiff for a complaint or 2) simply wait for a complaint to be filed.¹ You think to yourself, if Smith files a complaint showing that diversity jurisdiction exists, you might recommend that ABC remove the case to federal court. Then you put the file aside and move on to your next case.

Believe it or not, under recent Pennsylvania district court decisions, you may have just foreclosed your client's right to remove the case.

INTRODUCTION

A Pennsylvania defense practitioner who wishes to remove a state court action to federal court, pursuant to 28 USC section 1446,² must file a notice of removal within 30 days after receiving a copy of the "initial pleading" setting forth a removable claim.³

* Special thanks to Michael J. Betts of Reed Smith Shaw & McClay, who, through diligent work in the litigation field, identified the present section 1446(b) controversy in Pennsylvania. Mike's inspiration and guidance made this Article possible.

1. See note 14.

2. The requirements and procedures for removal are set forth at 28 USC sections 1441-46. In general, notice of removal is initially filed in federal district court. Promptly thereafter, the defendant(s) must give a written notice thereof to all adverse parties. A copy of the notice of removal must also be filed with the clerk of the state court from which the action was removed. This in turn "effects" the removal and the state court shall proceed no further unless and until the case is remanded. The federal court jurisdiction attaches as soon as the notice of removal is filed. 1A Moore's Federal Practice ¶ 0.168[3. -8 -2, -3] at 619-26.

3. 28 USC § 1446(b) (West 1988). See note 16 and accompanying text. "Removal . . . gives a defendant who has been sued in a state court of competent jurisdiction the right to

Failure by a defense practitioner to adhere to this requirement results in an absolute barrier to removal into federal court.

In states such as Pennsylvania that allow the commencement of an action by the filing of a document other than a complaint, which may not clearly set forth the basis for removal, the question arises as to whether the commencement of an action in this manner triggers the 30-day period for removal.⁴ Recent Pennsylvania district court decisions require computation of removal time from the receipt of a writ of summons, which does not provide the details required for determining if diversity jurisdiction exists.⁵ These holdings force the defense attorney to engage in guess-work regarding both the decision to remove and what judicial outcome will follow non-removal.⁶

Ultimately, the decision to remove a cause belongs to defense counsel; many cases will be won or lost depending on this initial strategic decision. The removal provisions, from their inception, have been rather cryptic. However, the one pervading theme has been the goal of achieving national uniformity in both commencement of the removal time period and the minimum information required to allow the defendant to intelligently determine removability.⁷ The statutory language employed in 28 USC section 1446 failed to establish the desired uniformity, however, because the statute governs the the removal of actions from the states, which have divergent procedures regarding the commencement of actions.⁸

substitute a forum of his or her own choosing for that originally selected by the plaintiff. . . ." Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3721 (West, 2d ed 1985).

4. In fact, the commentary following the 1988 revisions to section 1446 explicitly recognizes this problem and states, "[A]part from the 1988 amendments, but rekindled by their address to the time element applicable to removal, is the problem a defendant meets in considering to remove the case from a state court whose practice does not always entail the service of a full-fledged complaint [for example, Pennsylvania]." Siegel, *Commentary on 1988 Revision, 28 USC §1446* (West, 1990 Cumulative Annual Pocket Part at 5).

5. Diversity jurisdiction is governed by 28 USC sections 1332 and 1441 (West 1988). The majority of the cases addressing the removal problem discussed in this Comment involve diversity jurisdiction. However, defense counsel may encounter the same problem in a case based on federal question jurisdiction. See *Nero v. Amtrak* at note 73.

6. Specifically, will non-removal from receipt of the writ bar future removal?

7. This theme was made clear by Congress during the early amendments to section 1446. See notes 18-24 and accompanying text.

8. The several states had adopted various procedures for commencing civil actions, and, as such, the federal government initially experienced difficulty in creating national uniformity. See note 20 and accompanying text.

Through an initial flurry of activity,⁹ cases generally held that the removal time commenced only upon receipt of a *complaint*, thereby achieving national uniformity.¹⁰ The Pennsylvania district courts, however, have since attempted to fix something that was not broken, resulting in a practical dilemma for the defense practitioner. This Comment will analyze section 1446 and its history, highlight the flaw in the Pennsylvania district courts' logic, discuss the practical problems created by this flaw and provide the Pennsylvania practitioner with guidelines for dealing with a removal situation. Finally, the judiciary, particularly the Pennsylvania Supreme Court since it alone has the power to amend the Pennsylvania Rules of Civil Procedure, is called upon to resolve this question and free defense counsel from the enigma placed upon them by a few district court holdings.

In Pennsylvania, a state court "action may be commenced by filing with the prothonotary

- (1) a praecipe for writ of summons
- (2) a complaint or
- (3) an agreement for an amicable action."¹¹

The focus of this Comment is the obligation to remove a case commenced by the filing of a praecipe for writ of summons (hereinafter, the "writ"). Pennsylvania Rule of Civil Procedure 1351 contains the form for the writ.¹² The only pertinent information required to be included in the writ by rule 1351 is the plaintiff's name and the date of filing.¹³ The scant details provided by the

9. This activity included both statutory amendments and cases which interpreted and refined section 1446. See notes 18-41 and accompanying text.

10. See note 42 and accompanying text.

11. PaRCP 1007.

12. The reasons for employing the writ, as opposed to a complaint, may vary. The most common reason for using the writ is that it is nearly effortless to draft and file and, in general, the filing of the writ is sufficient to toll the running of any applicable statute of limitations. Furthermore, even if the writ is not served within the 30-day time period it can usually be reissued and served any time within a new two-year period, provided plaintiff made a good faith effort to serve the writ after the first issuance. PaRCP 400, 401. See also, *Bowman v Mattei*, 309 Pa Super 480, 455 A2d 714 (1983).

The writ's tolling effect on any applicable statute of limitations and the guidelines a practitioner should follow when attempting service of the writ are beyond the scope of this Comment. For details concerning these topics, see "The Lamp Rule," *Lamp v Heyman*, 469 Pa 465, 366 A2d 882 (1976); *Feher v Altman*, 357 Pa Super 50, 515 A2d 317 (1986). See also, *Farinacci v Beaver County Industrial Development Authority*, 510 Pa 589, 511 A2d 757 (1986); *Watts v Owens-Corning Fiberglass Corp.*, 353 Pa Super 267, 509 A2d 1268 (1986); *Robinson v Trenton Dressed Poultry*, 344 Pa Super 545, 496 A2d 1240 (1985); *Jacob v New Kensington Y.M.C.A.*, 312 Pa Super 533, 459 A2d 350 (1983).

13. PaRCP 1351. The full text of Rule 1351 is as follows:

writ ordinarily pose no peculiar problem for the defendant.¹⁴ However, as the result of two anomalous district court decisions,¹⁵ the writ has the potential of posing a conundrum for the defendant who contemplates removing the action to federal district court.

Achieving National Uniformity

The removal statute, 28 USC section 1446(b), requires the notice of removal to be filed within 30 days after receiving a copy of the "initial pleading" setting forth a removable claim.¹⁶ The removal-

The Writ of Summons shall be directed to the defendant and shall be substantially in the following form:

Commonwealth of Pennsylvania
County of _____
(caption)

To _____

You are hereby notified that _____
(Names of Plaintiff(s))
has (have) commenced an action against you.

Date _____
(Name of Prothonotary or Clerk)

By _____
(Deputy)

Seal of the Court

Id.

14. Two options are available to the defendant once the writ is served: (1) "Rule the plaintiff for a complaint," as it is known in common parlance. "The prothonotary, upon praecipe of the defendant, shall enter a rule upon the plaintiff to file a complaint. If a complaint is not filed within twenty (20) days after service of the rule, the prothonotary, upon praecipe of the defendant, shall enter a judgment of non pros." PaRCP 1037; or (2) Simply wait for the plaintiff to proceed with the law suit by filing a complaint. PaRCP 1019.

Black's Law Dictionary defines *non pros* as follows:

If in the proceedings in an action at law, the plaintiff neglects to take any of those steps which he ought to take within the time prescribed by the practice of the court for that purpose, the defendant may enter judgment of non pros. against him, whereby it is adjudged that the plaintiff does not follow up (non prosequitur) his suit as he ought to do, and therefore the defendant ought to have judgment against him. Under current rules practice, such failure would result in a dismissal of the action or in a default judgment for defendant.

Black's Law Dictionary (West, 5th ed 1979).

15. *Presidential Dev. and Inv. Corp. v Travelers Ins. Cos.*, Civil Action No. 89-6278, Lexis 14499 (E D Pa 1989); *Nero v Amtrak*, 714 F Supp 753 (E D Pa 1989). See notes 81-86 and notes 73-80 and accompanying text.

16. The pertinent language of section 1446(b) is:

The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth a claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if

bility dilemma has been rejuvenated by altering the definition of the statutory term "initial pleading." The legislative history of section 1446 provides authoritative guidance for interpreting the language of the statute.¹⁷

Section 1446, initially enacted in 1940, was amended in 1948 in an attempt to create national uniformity in the time period allotted for removal.¹⁸ The 1948 amended statute started the removal clock after "commencement of the action or service of process, whichever was later."¹⁹ The amendment, however, was largely ineffective in establishing uniformity because the procedural practice of commencing an action varied from state to state.²⁰

The statute was amended again in 1949 in an attempt to correct the problems created by the divergent state practices. The Senate Report explained that the 1948 statute placed "the defendant in the position of having to take steps to remove a suit to federal court before he [knew] what the suit [was] about."²¹ The 1949 amendment was an attempt to ensure that all defendants would have adequate information to enable them to ascertain removability from the face of the initial pleading before the 20 day clock started to run.²² This, in turn, would allow the defendant to make a short and plain statement of the facts which justified the removal.

such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

28 USC section 1446(b) (emphasis added).

The final portion of section 1446(b) is addressed to states which allow the complaint to be filed with the court, and then permit service of a summons to notify the defendant that a complaint has been filed. For an example of this practice, see note 31 and accompanying text.

Removability under section 1446 has traditionally been elusive for the practitioner. The focus of this Comment concerns removability based on a writ, and therefore the additional complications generated by section 1446 will not be discussed in detail herein. However, see section of this Comment entitled *Dealing with the Dilemma* for a discussion of guidelines for the practitioner who intends to remove under section 1446.

17. See *Hallstrom v Tillamook County*, 493 U S —, 110 S Ct 304, 107 LEd2d 237, 245, 247-50 (1989).

18. Rydstrom, *When Period For Filing Petition For Removal of Civil Action From State Court To Federal District Court Begins To Run Under 28 USCS Section 1446(b)*, 16 ALR Fed 287, 291 (1973).

19. Rydstrom, 16 ALR Fed 291. See also, Reviser's Note to section 1446(b).

20. Rydstrom, *What Constitutes "Initial Pleading" For Purposes Of Computing Time For Removal Of Civil Action From State To Federal Court Under 28 USCS Section 1446(b)*, 15 ALR Fed 733, 736 (1973).

21. SR No 303, 81st Cong 2d Sess, USCCAN 1254 (1949).

22. Rydstrom, 15 ALR Fed 733, 735 (cited in note 23). The 1949 amendment allotted only 20 days for removal. A 1965 amendment extended the time to 30 days. Id.

From the enactment date of the 1949 amendment there was never a great dispute as to what was meant by "initial pleading" as used in the statute. For example, the District Court of Maryland in *Potter v McCauley*²³ discussed the changes made by the 1949 amendment, noting that the 1948 amendment did not require service of a copy of the complaint. The court continued,

[T]he omission of the latter [service of a complaint] was thought to be unreasonable because the defendant could not fairly be required to decide whether he wished to remove the case until he had received a copy of the complaint and to learn therefrom the basis for the suit . . . [The 1949 amendment] provide[s] that the . . . [20] days [begin] to run if a copy of the complaint was given the defendant with personal service . . .²⁴

Thus, the *Potter* court obviously interpreted the 1949 amendment as requiring a complaint to commence the removal time period.

As early as 1952, the precise issue of whether a writ constituted an "initial pleading" was squarely before the District Court of Massachusetts. In *Stewart v St. Regis Paper Company*,²⁵ the plaintiff sought to have the case remanded to state court²⁶ claiming the removal action was untimely because it was not initiated within 20 days of service of the writ.²⁷ The court rejected this argument and stated, "[I]t seems clear . . . [that] a writ is not a pleading. Moreover, a writ does not make a sufficient disclosure of the details of an action to enable a defendant to determine . . . [removability]."²⁸

The same conclusion was reached in *Cipriano v Monarch Life Insurance Co.*,²⁹ supposedly based on the plain language of the statute. In *Cipriano*, the defendant attempted to remove the suit prior to the return date of a writ of summons³⁰ and before a complaint or declaration had been filed in court.³¹ The plaintiff sought

23. 186 F Supp 146 (D C Md 1960).

24. *Potter*, 186 F Supp at 148.

25. 102 F Supp 195 (D C Mass 1952).

26. A federal court, upon determining that a removal action was not properly removable, shall remand the case to state court. A dismissal of the removal petition is not proper. See *First National Bank v Johnson & Johnson*, 455 F Supp 361, 363 (E D Ark 1978).

27. *Stewart*, 102 F Supp at 195.

28. *Id* at 196 (citations omitted).

29. 138 F Supp 50 (D C RI 1956).

30. The district court noted that the writ of summons issued by the Superior Court of Rhode Island was dated September 20, 1955 and returnable to that court on October 20, 1955. *Cipriano*, 138 F Supp at 51. Rhode Island state practice required that the plaintiff's writ and declaration [complaint] be filed by the return date of the writ. *Id*.

31. *Id* at 52. The practice in Rhode Island at the time of *Cipriano* required only personal service of the summons, and permitted the complaint to be filed with the court. *Id*.

to remand the action to state court.³² The court held that service of a summons triggers the commencement of the removal time only if the plaintiff's initial pleading has been filed and is available to the defendant.³³ Most importantly, the court stated, "in the face of the plain language of section 1446(b) it cannot be successfully contended that the plaintiff's writ was the initial pleading to which reference was made in section 1446(b)."³⁴

Another example of a court refusing to consider a writ as an initial pleading was *Ardison v Villa*.³⁵ In that case, the defendant was informed by summons that the plaintiff had initiated a lawsuit seeking \$25,000 as a result of an automobile accident.³⁶ The summons did not set forth a claim for relief upon which the action was based and the defendant did not remove the action until after receiving the complaint.³⁷ The plaintiff moved to remand to state court for untimely filing of the petition for removal.³⁸

The court declared that the summons was insufficient for commencing removability.³⁹ According to the court's holding, the summons was merely a writ, not a pleading, and therefore was insufficient to enable the defendant to "intelligently ascertain removability."⁴⁰ Therefore, the time for removability commenced on the date the defendant received the complaint.⁴¹

The abundance of federal decisions which refused to commence the removal clock from service of a writ left little room for speculation as to how the time period would be calculated. As one scholar boldly stated, "[T]he courts have carried out Congressional intent in construing §1446(b), *uniformly* holding that a summons or similar writ does not furnish a defendant the sort of information intended by the statute in order for him to determine removability,

32. *Id.*

33. *Id.*

34. *Id.* at 52-3.

35. 248 F2d 226 (10th Cir 1957).

36. *Ardison*, 248 F2d at 227. The amount in controversy requirement at this time was only "in excess" of \$10,000. 28 USC § 1332 (1964).

37. *Ardison*, 248 F2d at 226-27.

38. *Id.* at 226.

39. *Id.* at 227.

40. *Id.*

41. *Id.* Similar conclusions were reached in *Grogan v Jones*, 273 SW2d 700, (D C Tenn 1954); *Munsey v Testworth Laboratories*, 227 F2d 90 (6th Cir 1955); *Stewart v St. Regis Paper Co.*, 102 F Supp 195 (D C Mass 1952); *Markantonatos v Maryland Dry Dock Co.*, 110 F Supp 862 (D C NY 1953); *Mahony v Witt Ice and Gas Co.*, 131 F Supp 564 (D C Miss 1955); *Jacobs v Manning Mfg. Co.*, 171 F Supp 393 (S D NY 1959).

and so does not constitute an 'initial pleading.'"⁴²

New York's Liberal Approach Alters National Uniformity

In 1977, the United States District Court for the Western District of New York was faced with the issue of whether a summons with notice stating the object of the action was sufficient to commence the removal clock.⁴³ The court noted that neither New York nor the federal court recognized a summons or similar writ as an "initial pleading" within the meaning of section 1446(b).⁴⁴ The summons with notice was therefore held to provide insufficient information to qualify as an initial pleading under the statute.⁴⁵

In 1978, the New York Legislature attempted to remove any doubt from the issue of when the removal time period commenced. A revision to New York's Civil Practice Law⁴⁶ added the requirement that a summons served without a complaint shall have attached a notice stating the nature of the action and the relief sought.⁴⁷ This revision solved New York's removability problems. As the court noted in *DeMeglio v Italia Croceire Internazionale*,⁴⁸ a New York summons now provides the defendant with as much information bearing on removability as a complaint⁴⁹ and therefore is an initial pleading for purposes of the federal removal statute.⁵⁰

The *DeMeglio* holding has been construed as offering a case-by-case test for removability. The test, as recently stated in *Universal Motors Group v Wilkerson*,⁵¹ provides: "to constitute an 'initial pleading' under the federal statute, the summons and notice, on their face, need only have allowed the defendants intelligently to

42. 15 ALR Fed 733, 735 (emphasis added) (cited in note 23).

43. *Mfrs. and Traders Trust Co. v Hartford A.C.C.*, 434 F Supp 1053 (W D NY 1977). The notice stated that the object of the action "was recovery on fidelity bond regarding various frauds, forgeries, and other misdeeds . . ." *Traders Trust*, 434 F Supp at 1054.

44. *Id.* at 1054-55.

45. *Id.* For similar holdings, see *Milton A. Jacobs Inc. v Manning Mfg. Corp.*, 171 F Supp 393 (S D NY 1959); *Markantonatos v Maryland Dry Dock Co.*, 110 F Supp 862 (S D NY 1953).

46. Act of July 24, 1978, CH 528, 1978 NY Laws 936 (Mckinney's) (codified at CPLR 305(b)).

47. Act of July 24, 1978, CH 528, 1978 NY Laws 936. The 1978 Amendment states, in relevant part, "If the complaint is not served with the summons, the summons shall contain or have attached thereto a notice stating the nature of the action and the relief sought, and except in a medical malpractice claim, the sum of money for which judgment may be taken in case of default." *Id.*

48. 502 F Supp 316 (S D NY 1980).

49. *DeMeglio*, 502 F Supp at 317.

50. *Id.*

51. 674 F Supp 1108 (S D NY 1987).

ascertain removability."⁵² This "generic document test"⁵³ has led to consistency in commencing the removal clock and has been almost unanimously followed in New York.⁵⁴

The Pennsylvania Response

Some Pennsylvania district courts have adopted a test similar to the generic document test:⁵⁵

a petition for removal must be filed by the defendant within 30 days after the receipt by the defendant of a pleading, a summons, a motion, order, or other paper 'from which it may first be ascertained that the case is one which is removable' . . . [including] notice of the State proceeding, the nature of it, the issues involved and the parties involved so that, with this information, the defendant can determine the removability of the action.⁵⁶

Obviously, a standard Pennsylvania writ⁵⁷ following minimum statutory requirements⁵⁸ will never contain information sufficient to pass this test.⁵⁹

Pennsylvania courts appear to have followed the New York lead and adopted a generic document test, despite the fact that Pennsylvania's Supreme Court has taken no action regarding the rather stale section 1446 controversy. The Pennsylvania Supreme Court, unlike New York's legislature, has failed to amend the state civil

52. *Universal*, 674 F Supp at 1113. This "new" test is actually a resurfacing of the original Senate language which was the foundation upon which courts held that a writ could not be considered an initial pleading. See note 21 and accompanying text. The New York writ with the notice requirement is no longer similar to a "generic" writ, so the court's holding in *Universal* does not break new ground and is statutorily consistent. Note however, that the writ still must be reviewed to determine if it does, in fact, provide sufficient information to allow the defendant to intelligently ascertain removability.

53. The term "generic document test" was formulated by the authors of this Comment and refers to the test in which courts ignore the actual state court name given to a document (i.e., writ) and require removal by a defendant upon service of the first document that provides sufficient information to allow the defendant to intelligently ascertain removability.

54. See for example, *Worthy v Schering Corp.*, 670 F Supp 653 (E D NY 1985); *Wells-ville v Atlantic Richfield Co.*, 608 F Supp 497 (W D NY 1985); *Day v Zimmer Inc.*, 636 F Supp 451 (N D NY 1986).

55. *INT Equity Corp. v Pepper and Tanner, Inc.*, 323 F Supp 1107 (E D Pa 1970); *Piler v Prudential Ins. Co. of Am.*, 524 F Supp 1211 (W D Pa 1981). See also, *Permanent Lighting, Inc. v Karlton*, 456 F Supp 355 (N D Ga 1978).

56. *INT Equity Corp. v Pepper and Tanner, Inc.*, 323 F Supp 1107, 1109 (E D Pa 1970) (emphasis added).

57. See note 13 for the form of a Pennsylvania writ.

58. The artful pleader will most likely state only enough information in the writ to place the defense counsel in the conundrum discussed herein. See *Flossie Flamer v Trump's Castle Assoc. Ind.*, Civil Action No. 89-0752, Lexis 4212 (E D Pa 1989) at *2.

59. See note 53.

procedure laws to simply require a writ of summons to contain information sufficient to allow the defendant to intelligently ascertain removability.⁶⁰ As a result, the case law in Pennsylvania dealing with removability is fragmented. Practitioners might as well look into a crystal ball for answers to the removal dilemma.

*Craig v Lake Asbestos of Quebec, Ltd.*⁶¹ is illustrative of the removal policy which Pennsylvania courts have traditionally followed. In that case, the court was directly faced with the issue of whether a praecipe for a writ of summons and the summons, when served together, constituted an initial pleading for removal purposes.⁶² Consistent with established precedent, Judge Newcomer unambiguously proffered a blanket rule that "in Pennsylvania a praecipe and writ of summons are not usually similar to a pleading, and that they should not, as a rule, be considered the initial pleading in a case for purposes of the removal statute."⁶³ This holding is consistent with the plain meaning of PaRCP 1017(a) which defines a pleading as a "complaint, an answer thereto, a reply if the answer contains new matter or a counterclaim, a counterreply if the counterclaim contains new matter, a preliminary objection and an answer."⁶⁴ The writ is not included in the "pleadings" as listed in Rule 1017(a) and therefore should not be considered an "initial pleading."⁶⁵

60. The New York statute requires that a summons state the nature of the action and the relief sought. Act of July 24, 1978, CH 528 1978 NY Laws 936 (Mckinney's) (codified at CPLR 305(b)). See notes 46-47 and accompanying text.

61. 541 F Supp 182 (E D Pa 1982).

62. *Craig*, 541 F Supp at 183.

63. *Id* at 186. *Nero v Amtrak*, note 73, later labels this the "*Craig* rule." The *Craig* holding was subsequently interpreted as standing for the bright line test that a praecipe and summons do not constitute an initial pleading. See *Presidential Dev. and Inv. Corp. v Travelers Ins. Cos.*, Civil Action No. 89-6278, Lexis 14499 at *3 (E D Pa 1989).

64. PaRCP 1017.

65. This argument was rejected in *Universal Motors Group v Wilkerson*, 674 F Supp 1108 (S D NY 1987). In *Wilkerson*, the court was faced with the issue as to whether a summons and notice served upon the defendant constituted an "initial pleading." *Wilkerson*, 674 F Supp at 1110. In holding that the writ and summons at issue were sufficient to commence the removal clock, the court stated:

The removal statute, which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is applied. Hence the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts.

Id (citing *Shamrock Oil & Gas Corp. v Sheets*, 313 US 100, 104 (1941)).

The *Wilkerson* court's explanation was a direct consequence of the 1978 amendment, which had the practical effect of converting the writ into an initial pleading. See note 47. Therefore, if this case were cited as persuasive authority in Pennsylvania it should have

In deciding that the praecipe did not constitute an initial pleading, the *Craig* court discounted a line of cases which appeared to apply a radically different test. The "diligent defendant test,"⁶⁶ as applied in *Kaneshiro v North American Co. For Life and Health Ins.*,⁶⁷ places a burden on the defendant to be diligent and to promptly remove even when the initial pleading is less than clear on removability. According to this test, "where the initial pleading is indeterminate, absent fraud by the plaintiff or where the pleadings provide 'no clue' that the case is 'not removable,' the burden is on the defendant desiring removal to scrutinize the case and to remove it in a timely fashion."⁶⁸

A Pennsylvania district court applied the diligent defendant test in *Stokes v Victoria Carriers, Inc.*⁶⁹ As applied in *Stokes*, the diligent defendant test was logically and legally sound. The initial pleading, the plaintiff's *complaint*, did not allege citizenship of the first defendant and therefore a second defendant did not remove.⁷⁰ The court held that the second defendant had an affirmative duty to remove, or ascertain removability, within 30 days from the "indeterminate" complaint.⁷¹ The second defendant did not remove within the allotted time and the case was remanded to the state court on the grounds of untimely removal.⁷²

limited impact since no similar statutory corollary exists in this Commonwealth.

In fact, both *Campbell v Associated Press*, 223 F Supp 151, 153 (E D Pa 1963) and *Craig v Lake Asbestos*, 541 F Supp 183, 184 (E D Pa 1982) used the Pennsylvania Rule of Civil Procedure definition as persuasive in construing section 1446(b).

66. The term "diligent defendant test" was formulated by the authors of this Comment.

67. 496 F Supp 452 (D C Hawaii 1980).

68. *Kaneshiro*, 496 F Supp at 462. The court stated:

In effect, the defendant is put on inquiry notice by the plaintiff's initial pleading and must inquire of the plaintiff the jurisdictional facts necessary to the petition to remove. The rule does place a burden on the defendant: he has the burden of promptly choosing his forum and of not causing undue delay or duplicative litigation. It is a burden that rightly rests on him, since it is he who seeks access to a court of limited jurisdiction.

Id.

69. 577 F Supp 9 (E D Pa 1983).

70. *Stokes*, 577 F Supp at 10-11. Defendant #2, Victory, was served with a copy of the complaint on August 26, 1983. Id at 10. Apparently, defendant #1, OSG, was served with a complaint on August 18, 1983. Id. On September 19, 1983 defendant OSG sought timely removal of the action. Id. Defendant Victory filed a concurrence to this petition for removal on September 26, 1983. Id at 11. Defendant Victory argued that this removal was timely because Victory did not know the case was removable, via diversity, until Victory learned of OSG's citizenship. Id. Victory alleged that this occurred on September 19, 1983 when OSG filed their removal petition. Id at 10-11.

71. Id at 11.

72. Id at 12. Note that the reasoning of *Stokes* was not broad enough to encompass a writ.

The hard and fast rule of *Craig*, that a praecipe and summons do not constitute an initial pleading, was apparently viewed as insufficient by certain judges. Consequently, the identical issue was addressed again in *Nero v Amtrak*.⁷³ The court's formulation of the issue left little doubt as to how the court would rule: "[T]he issue is whether such summons, when it permits the defendant to ascertain an action's removability, constitutes an 'initial pleading' within the meaning of section 1446(b) and thereby triggers the . . . [30] day period for removal."⁷⁴ The *Nero* court was confronted with case precedent offering opposite conclusions to the question presented:⁷⁵ the *Craig* rule answered the question in the negative,⁷⁶ while *Moore v City of Philadelphia* adopted a case-by-case test and answered the question in the affirmative.⁷⁷ In adopting the case-by-case test, Judge Pollak stated,

[A]lthough I recognize that the *Craig* rule is easier to administer than the *Moore* rule, the latter approach seems to me more consistent with the federal policy that 'federal removal jurisdiction is to be strictly construed'. . . Pennsylvania summonses will not in every case provide sufficient informa-

73. 714 F Supp 753 (E D Pa 1989).

74. *Nero*, 714 F Supp at 754-55.

75. *Id* at 755.

76. *Craig*, 541 F Supp at 185. See note 63 and accompanying text.

77. *Moore v City of Philadelphia*, Civil Action 88-1424, slip op at 3, 1988 WL 50382 (E D Pa 1988). Subsequently labelled as the "*Moore* rule" in *Nero v Amtrak*.

In *Moore*, plaintiff commenced an action against the City of Philadelphia by writ of summons in the Philadelphia Court of Common Pleas on December 12, 1987. *Moore*, slip op at 1. On the same day, plaintiff filed a motion for leave to take an oral deposition within 30 days of institution of the suit; the motion was hand delivered to the defendant's counsel. *Id*. The motion included plaintiff's desire to obtain the names and addresses of all persons potentially liable to plaintiff and also informed defendants of the nature of the cause of action. *Id*.

On December 15, 1987, defense counsel provided plaintiff's counsel with names and addresses of the police officers involved in the incident. *Id*. On December 30, 1987, plaintiff filed the writ of summons against the City of Philadelphia and the individual police officers whose names were supplied by defendants. *Id*. The writ was served on January 4, 1988. *Id*.

The complaint was filed on February 4, 1988, and alleged the same causes of action identified in plaintiff's notice of deposition. *Id*. The defendants filed a petition for removal on February 24, 1988. *Id*.

The court held that the writ of January 4, 1988 commenced the removal clock. *Id*. The rationale proffered by the court was that "Congress intended to obtain the earliest possible removal of an action to federal court once defendant has the opportunity to determine the action's removability." *Id* at 2. (The court's analysis constitutes an obvious application of the generic document test). The court reasoned that "plaintiff's notice of deposition and subsequent correspondence between plaintiff's counsel and defense counsel evidenced that defendants knew . . . [of the action's removability]." *Id*. In requiring the defendant to look beyond the face of the first document received, the writ, the court applied the diligent defendant test.

tion to ascertain the removability of an action. But that should not lessen a defendant's obligation to act promptly when it has sufficient notice of such removability.⁷⁸

In adopting the lenient standard, the Pennsylvania district court ignored the congressional intent behind §1446(b) and the numerous federal decisions which explicitly state that a writ simply is not an "initial pleading" for purposes of section 1446(b).⁷⁹ To justify the "new" test, the district court pointed to the test used in the sister jurisdiction of New York.⁸⁰ However, New York's test is logical only in light of the legislative amendment which preceded the case law. Although the logic in requiring a Pennsylvania defendant to remove a case as soon as practically possible is understandable, for a district court to initiate such a change in light of the previously unquestioned statutory purpose is rather remarkable.

The eastern district's trend toward liberality, unfortunately, did not cease after their adoption of the generic document test. The next foreseeable step, adoption of the diligent defendant test, occurred in *Presidential v Travelers*.⁸¹ The eastern district court, in *Presidential*, recognized the debate surrounding removability by stating, "cases in this [d]istrict have answered the question whether under Pennsylvania law a summons constitutes an initial pleading both affirmatively and negatively."⁸² The *Presidential* court also explicitly recognized the generic document test: "[A] common theme is analysis of the summons to assess whether it

78. *Nero*, 714 F Supp at 755. A close reading of *Nero* leads one to question whether the diligent defendant test was applied. In *Nero*, one of the plaintiff's causes of action rested upon a federal statute. Id at 753-54. In its holding, the court stated that Amtrak, being a federally-chartered and federally-owned corporation, was "on notice upon receipt of any summons that the action against it [was] removable." Id at 755 (emphasis in original) (citing *Osborn v Bank of the United States*, 22 US (9 Wheat) 738 (1824)).

The court's rationale for reaching this conclusion is not surprising. The writ, on its face, was sufficient to allow the defendant to intelligently ascertain removability. In fact, any suit against this defendant would be removable. Id. Traditionally however, in this situation the writ would not constitute an initial pleading and therefore would not commence the removal clock.

79. See notes 18-42 and accompanying text.

80. *Nero*, 714 F Supp at 755 (citing *Universal Motors Group v Wilkerson*, 674 F Supp 1108 (S D NY 1987) (see note 68 and accompanying text) (New York summons is an "initial pleading for purposes of 28 USC section 1446(b)). See also, *Presidential Dev. and Inv. Corp. v Travelers Ins. Cos.*, Civil Action No. 89-6278, Lexis 14499 (E D Pa 1989) at note 84.

81. Civil Action No. 89-6278, Lexis 14499 (E D Pa 1989). In *Presidential*, the exact point at which the removal period began to run controlled the dispute. If the time commenced upon service of the summons, then removal was time barred. If the removal time commenced with the complaint, then the removal petition was timely. *Presidential*, Lexis 14499 at *2.

82. Id at *3.

provided the defendant with the information necessary for the defendant to determine if original federal jurisdiction existed."⁸³

In finding the writ sufficient to commence the removal clock, the court opined: "The summons identified *Presidential's* [the plaintiff's] place of business [as Pennsylvania] and the defendants knew they were both Connecticut corporations with their principle places of business in Hartford, Connecticut . . . [A] review of the Sworn Statement of Proof of Loss would have indicated . . . [an] amount . . . in excess of [\$10,000]."⁸⁴ Although this court's holding may not be the full scale diligent defendant test as set forth in *Kaneshiro*,⁸⁵ the *Presidential* holding certainly requires the defendant to use diligence to determine removability. Even the generic document test does not require the defendant to look beyond the face of the initial pleading to ascertain removability. Section 1446(b) clearly states that removal must occur 30 days after receiving a copy of the initial pleading setting forth a removable claim. In *Presidential*, the writ passed as an initial pleading under the generic document test, but the writ itself did not clearly state a removable claim. Yet, because the defendant could have ascertained the removability of the claim by exercising diligence and looking to the Sworn Statement of Proof of Loss provided to the defendant by the plaintiff, the writ was held sufficient to commence the removal clock. Apparently, some form of the diligent defendant test was applied.

The Practical Dilemma

The practitioner must question the amount of prudent foresight engaged in by the Pennsylvania district courts which have adopted these "new wave" tests. Admittedly, the trend toward the generic document and diligent defendant tests has a justifiable theoretical

83. *Id.*

84. *Id.* at *5. Interestingly, in *Flossie Flamer v Trump's Castle Assoc., Ind.*, Civil Action No. 89-0752, Lexis 4212 (E D Pa 1989), decided in the same year as *Presidential*, the court reached a contrary result.

The writ of summons and the praecipe served by the plaintiff in *Flossie* disclosed only that the plaintiff resided in Pennsylvania, the defendants in New Jersey, and that the action was a "Major Non-jury matter." *Flossie*, Lexis 4212 at *2. The court referenced *Craig v Lake Asbestos of Quebec, Ltd.*, see note 64, in holding that the information provided was insufficient notice of a removable action. *Flossie*, Lexis 4212 at *2-3. The court did not comment on the defendant's diligence or lack thereof. However, the court apparently did apply the generic document test and also subtly illustrated the trend toward liberality by stating, "I do not hold that a praecipe and writ of summons can never be initial papers for purpose [sic] of §1446, only that in this case they are not." *Id.* at *3.

85. See note 67.

basis. Where the initial writ plainly presents a removable case, these tests even appear equitable, although contrary to the congressional intent behind section 1446(b) of national uniformity in the commencement of the removal time. The tests become seriously inequitable, however, when the writ falls within a "gray area," for example when the defendant truly cannot readily and intelligently determine removability. The current status of Pennsylvania law merely exacerbates the practitioner's removability dilemma.

If the Pennsylvania writ will continue to constitute an "initial pleading," then surely a revision to Pennsylvania's practice is mandated. Pennsylvania Rule of Civil Procedure 1351 can easily be amended to require the plaintiff to include his citizenship, the citizenship of other named defendants, and whether or not damages in excess of \$50,000 will be sought. The minimal additional burden that this will place upon the plaintiff pales in comparison to the burden which is currently placed upon the defendant.⁸⁶ Such an amendment would have the additional benefits of eliminating the unnecessary guess-work, as well as the inequities caused by the present law. Additionally, federal court remands based on untimely removal should decline, thus making the judicial process more economical to both plaintiffs and defendants. A hypothetical situation which is likely to occur illustrates problems which may be encountered. A defendant receives a writ of summons which on its face does not preclude removal. Upon further investigation (the extent of how elaborate the investigation must be remains a mystery), the defendant is unable to ascertain for certain whether or not the claim is removable. Application of the generic document test suggests removing the cause and the defendant therefore removes.

The defendant is now in the federal system holding nothing more than a state writ. The defendant is helpless to move the matter along in a timely fashion. The defendant certainly cannot apply state process and rule the defendant for a complaint, nor is there a federal procedural law to assist with the matter.⁸⁷ As such, the de-

86. The burden on defense counsel is not limited to strategic planning. An improper removal can subject both defendant and defense counsel to financial loss through an award of attorney fees to plaintiff as a result of the improper removal. See note 91 for the pertinent text of 28 USC section 1447(c); see also, FRCP 11 which provides for sanctions commonly known as "Rule 11 Sanctions."

87. In fact, an action is not commenced for federal court purposes until a *complaint* is filed. FRCP 3.

defendant must motion for assistance or wait for the plaintiff's next move. Waiting however can be unnerving to a defendant, since the plaintiff can take advantage of the tolling statute and delay the action for years. Alternatively, the plaintiff may have received information which lead to the conclusion that the lawsuit should not be pursued. The defendant may not know about this decision for years.

Dealing with the Dilemma

The conclusions to be derived from the recently rekindled controversy are not as important as the practical guidelines which can be followed. Initially, the practitioner must recognize that 28 USC section 1446 is, once again, plagued with problems. Extreme care should be taken to avoid the trap which has begun to ensnare unsuspecting practitioners.

Conservative lawyering suggests the following tips when faced with the issue of removal following service of a writ:

- 1) Closely scrutinize the first form of judicial process received to determine if the action is *not* removable;
- 2) If doubt exists as to removability, conduct a moderate investigation in an attempt to ascertain the details required to determine removability;
- 3) Methods available for obtaining the desired information include interrogatories and a request for admission;⁸⁸
- 4) The scope of *Nero* is unclear, but at a minimum the defendant cannot ignore knowledge in his possession that clearly establishes removability. Furthermore, according to *Presidential*, a combination of the writ and other information supplied by a plaintiff to a defendant may be adequate to commence the removal clock.
- 5) If still in doubt, consider ruling the plaintiff for a complaint, *immediately*, so that if the complaint demonstrates a removable claim, the complaint is received in time to remove within the 30 day period.⁸⁹

88. See *Kaneshiro v North American Co. for Life & Health*, 496 F Supp 452, 462 n.22 (D C HI 1980).

89. See note 14. Defense counsel may not prefer this option for several reasons: he may not believe the plaintiff will carry the suit through to its conclusion; he may not be prepared to defend the suit; or perhaps he is not prepared to answer if plaintiff should file a complaint. Remember that the defendant has every right to sit on his hands and do nothing until the complaint is filed.

Additionally, the plaintiff, until he is ruled for a complaint or is facing the lapse of the applicable statute of limitations period, is also permitted to wait and do nothing.

6) If one chooses not to rule for a complaint, and doubt still exists as to removability, REMOVE THE CASE.⁹⁰ A federal remand is less harmful than a dismissal on grounds of untimely removal.⁹¹

7) IN ANY EVENT, the new amendment to section 1446(b) provides that "a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title [diversity] more than 1 year after commencement of the action."⁹²

Hopefully, future cases or this Comment will provoke a judicial or legislative response eliminating the unnecessary problems which have been created. In the meantime, defense practitioners, keep an eye on the clock.

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90. "Indeed, the rule of thumb for defendants determined to remove a case is to resolve all doubts in favor of prompt removal." Siegel, Commentary on 1988 Revision, 28 USC §1446 (West, 1990 Cumulative Annual Pocket Part at 5).

91. 28 USC §1447(c) provides in pertinent part:

If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded. An order remanding the case *may* require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. (Emphasis added.)

92. 28 USC section 1332 grants district courts original jurisdiction in diversity of citizenship cases where the amount in controversy exceeds \$50,000. Removal claims based on federal question jurisdiction, 28 USC §1331, are not barred by the one year limitation of section 1446(b). See *Nero v Amtrak*, 714 F Supp 753-54 (E D Pa 1989).

