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# The Courtesy Copy Trap: Untimely Removal from State to Federal Court

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# THE COURTESY COPY TRAP: UNTIMELY REMOVAL FROM STATE TO FEDERAL COURT

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## INTRODUCTION

Day 1: The scene is familiar. Seated around a conference-room table are two antagonists (*A* and *B*) and their attorneys. "By the way," says *A*, "we filed this today—to protect ourselves." He hands over a copy of a civil complaint filed in *A*'s home state court alleging all sorts of bad faith, breaches of duty, violations of law, and so forth. After the shouting subsides, *A* and *B* resume their discussions and agree to meet two weeks later to "see if we can settle this thing." That meeting (on Day 14) produces no results, nor does a second settlement negotiation a week later (Day 21). Four days thereafter (Day 25), *A* formally serves *B* with process, thereby commencing the action under state law.

Now *B*'s lawyer takes a closer look at the complaint and sees that it contains a federal question or two. After weighing the pros and cons of staying in a state forum, she files a notice of removal to federal court just one week after her client was served. But it is now Day 32, and she is too late; the removal time has expired.

The period within which a state court defendant may remove the action to federal court[1] is severely limited by the federal removal provisions, which provide in pertinent part:

> The notice of removal of a civil action or proceeding shall be filed *within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading* setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on

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1. For the general provisions on removal of cases from state to federal court, see 28 U.S.C. §§ 1441-52 (1988).

the defendant, whichever period is shorter.[2]

In our scenario, *B* filed her notice of removal more than thirty days after receiving a so-called "courtesy copy" of the filed complaint. Therefore, despite the natural assumption that important time periods do not commence until service, and despite the narcotic effect of settlement negotiations on litigation planning and research, the notice of removal is untimely under 28 U.S.C. § 1446(b), and a federal court should, upon proper motion, remand the action to state court.[3]

The issue is not that simple, however, as indicated by a host of conflicting court decisions. This Article examines the application of 28 U.S.C. § 1446(b) to those instances, such as courtesy copy cases, in which the removal period commences before the action does.[4] Part I analyzes the language of the statute and concludes that the majority line of cases, exemplified by *Tyler v. Prudential Life Insurance Co. of America*,[5] correctly adopts the "Receipt Rule," which finds removal untimely when the notice is filed *more than* thirty days after receipt of the copy but *less than* thirty days after formal service of

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2. 28 U.S.C. § 1446(b) (emphasis added). The alternative 30-day trigger for the removal period based on receipt of a summons applies only to those few states, such as Kentucky, where there is no requirement that the complaint ever be served on the defendant. *See* S. REP. No. 303, 81st Cong., 1st Sess., *reprinted in* 1949 U.S.C.C.A.N. 1248. This alternative removal period is outside the scope of this Article.

3. *See* 28 U.S.C. § 1447(c).

4. The academic literature is virtually silent on this subject. Indeed, several writings tend to mislead the reader into believing that timeliness of removal is a simple inquiry. *See* Richard Bisio & Cynthia M. York, *Changes in Federal Diversity and Removal Jurisdiction*, 68 MICH. B.J. 649 (1989) (stating inaccurately that "defendants normally must remove a case within 30 days after service of the complaint"); Charles Rothfeld, *Rationalizing Removal*, 1990 B.Y.U. L. REV. 221, 225 (stating confidently that "[r]emoval procedure is fairly straightforward"); Michael T. Gibson, *Private Concurrent Litigation in Light of* Younger, Pennzoil, *and* Colorado River, 14 OKLA. CITY U. L. REV. 185, 197 n.51 (1989) (commenting inaccurately that "[a] defendant in an otherwise removable state court case loses her right to remove by failing to file the necessary papers within 30 days after she is served with the complaint or with a later document from which the federal nature of the action first is ascertainable"); Edward C. DeVivo, *Removal Jurisdiction*, 31 TRIAL LAW. GUIDE 225, 227 (1987) (stating inaccurately that "[a] petition for removal of an action must be filed with a federal court within 30 days from the date service of the summons and complaint is effected on the moving party").

5. 524 F. Supp. 1211 (W.D. Pa. 1981). *Tyler* is generally considered to be the leading case in support of a broad reading of § 1446(b). *See* Kerr v. Holland America-Line Westours, Inc., 794 F. Supp. 207, 211 (E.D. Mich. 1992); Lindley v. DePriest, 755 F. Supp. 1020, 1021 (S.D. Fla. 1991); Pic-Mount Corp. v. Stoffel Seals Corp., 708 F. Supp. 1113, 1115 (D. Nev. 1989); Conticommodity Servs. v. Perl, 663 F. Supp. 27, 30 (N.D. Ill. 1987).

process.[6] Part II is a critique of the so-called *Love*[7] line of cases, which laudably but incorrectly holds that such removals are timely under the "Proper Service Rule."[8] However, while this Article con-

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6. *See Tyler*, 524 F. Supp. at 1213 ("All that is required is that the defendant receives, through service or otherwise, a copy of an 'initial pleading' from which the defendant can ascertain that the case is one which is or has become removable."); *Kerr*, 794 F. Supp. at 213; Trepel v. Kohn, Milstein, Cohen, & Hausfeld, 789 F. Supp. 881, 882 (E.D. Mich. 1992); Teamster's Local 773 v. Central Pa. Teamsters Health & Welfare Fund, No. 91-5498, 1991 U.S. Dist. LEXIS 16401, at *1-3 (E.D. Pa. Nov. 13, 1991); Brizendine v. Continental Casualty Co., 773 F. Supp. 313, 320 (N.D. Ala. 1991); James v. Pan Am. Life Ins. Co., No. 91-0821, 1991 U.S. Dist. LEXIS 11564, at *5-6 (E.D. La. Aug. 13, 1991) (dicta); Pillin's Place, Inc. v. Bank One, Akron, N.A., 771 F. Supp. 205, 206-08 (N.D. Ohio 1991); Silverwood Estates Dev. Ltd. Partnership v. Adcock, 793 F. Supp. 226, 228 (N.D. Cal. 1991); *Lindley*, 755 F. Supp. at 1021-26; Thompson v. Telephone & Data Sys., No. 90-783-JU (D. Or. Jan. 7, 1991), *aff'd without opinion*, (D. Or. May 15, 1991); Dawson v. Orkin Exterminating Co., 736 F. Supp. 1049, 1053 (D. Colo. 1990); Schwartz Bros. v. Striped Horse Records, 745 F. Supp. 338, 340 (D. Md. 1990); IMCO USA, Inc. v. Title Ins. Co., 729 F. Supp. 1322, 1323-24 (M.D. Fla. 1990); Uhles v. F.W. Woolworth Co., 715 F. Supp. 297, 298 (C.D. Cal. 1989); *Pic-Mount Corp.*, 708 F. Supp. at 1115; Kear v. Sentry Ins. Co., No. 89-2884, 1989 WL 54035, at *2 (E.D. Pa. May 18, 1989); York v. Horizon Fed. Sav. & Loan Ass'n, 712 F. Supp. 85, 89-90 (E.D. La. 1989); Harding v. Allied Prods. Corp., 703 F. Supp. 51, 52 (W.D. Tenn. 1989); Blair v. City of Chicago, No. 87 C 2592, 1988 WL 6918, at *2 (N.D. Ill. Jan. 26, 1989); Neomed Corp. v. Air-Shields Vickers, No. 88-8148, 1989 U.S. Dist. LEXIS 330, at *4-5 (E.D. Pa. Jan. 12, 1989), *vacated on other grounds sub nom.* Air-Shields, Inc. v. Fullam, 891 F.2d 63, 65-66 (3d Cir. 1989); North Jersey Sav. & Loan Ass'n v. Fidelity & Deposit Co., 125 F.R.D. 96, 99-100 (D.N.J. 1988); Beckley, Singleton, DeLanoy, Jemison & List, Chartered v. Spademan, 694 F. Supp. 769, 771-72 (D. Nev. 1988); Green v. Johnson, No. 88-4269, 1988 WL 83786, at *1 (E.D. Pa. Aug. 8, 1988); Pressman v. Days Inn of Am., Civ. A. No. 88-7001, 1988 WL 123199, at *2-3 (E.D. Pa. Nov. 14, 1988); Kirby v. OMI Corp., 655 F. Supp. 219, 222 (M.D. Fla. 1987), *aff'd*, 561 So. 2d 666 (Fla. Dist. Ct. App. 1990), *cert. denied*, 111 S. Ct. 1108 (1991); Scott v. Toyota Motor Corp., No. 86 C 6639, 1987 WL 8982, at *2 (N.D. Ill. Mar. 30, 1987); *Conticommodity*, 663 F. Supp. at 30-31; Dial-In, Inc. v. ARO Corp., 620 F. Supp. 27, 28-29 (N.D. Ill. 1985); Williams v. Farmers Home Admin., 623 F. Supp. 1175, 1176 (E.D. Va. 1985); General Beverage Sales Co. v. Zonin S.P.A., 589 F. Supp. 846, 848 (W.D. Wis. 1984); Maglio v. F.W. Woolworth Co., 542 F. Supp. 39, 41 (E.D. Pa. 1982); Perimeter Lighting, Inc. v. Karlton, 456 F. Supp. 355, 359 (N.D. Ga. 1978); International Equity Corp. v. Pepper & Tanner, Inc., 323 F. Supp. 1107, 1111 (E.D. Pa. 1971); Kulbeth v. Woolnought, 324 F. Supp. 908, 910 (S.D. Tex. 1971); *In re* 73rd Precinct Station House, 329 F. Supp. 1175, 1177-78 (E.D.N.Y. 1971); Kurtz v. Harris, 245 F. Supp. 752, 754 (S.D. Tex. 1965); Benson v. Bradley, 223 F. Supp. 669, 671 (D. Minn. 1963); Barr v. Hunter, 209 F. Supp. 476, 477 (W.D. Mo. 1962); French v. Banco Nacional de Cuba, 192 F. Supp. 579, 580-81 (S.D.N.Y. 1961); McCargo v. Steele, 151 F. Supp. 435, 438 (W.D. Ark. 1957); Raymond's, Inc. v. New Amsterdam Casualty Co., 159 F. Supp. 212, 214-15 (D. Mass. 1956); Mahoney v. Witt Ice & Gas Co., 131 F. Supp. 564, 568 (D. Mo. 1955); Richlin Advertising Corp. v. Century Florida Broadcasting Co., 122 F. Supp. 507, 509 (S.D.N.Y. 1954); Potter v. Kahn, 108 F. Supp. 593, 594 (S.D.N.Y. 1952).

7. *See* Love v. State Farm Mut. Auto. Ins. Co., 542 F. Supp. 65 (N.D. Ga. 1982).

8. *Id.* at 67-68 (holding removal timely if defendants had not been "properly served" more than 30 days before the removal petition); *see also* Estate of Baratt v. Phoenix Mut. Life Ins. Co., 787 F. Supp. 333, 336-37 (W.D.N.Y. 1992); Marion Corp. v. Lloyds Bank, 738 F. Supp. 1377, 1379 (S.D. Ala. 1990); Valentine Sugars, Inc. v. Phillips

cludes that the "Receipt Rule" is the correct interpretation of 28 U.S.C. § 1446(b), it should not be taken as an endorsement of that result. Part III urges Congress to resolve the case conflict[9] by removing this unnecessary pitfall for the unwary defendant, while retaining to the fullest possible degree a uniform *federal* trigger for the removal period.

## I. CONGRESSIONAL CLARITY OF EXPRESSION

Since the Judiciary Act of September 24, 1789,[10] Congress has assumed the power to provide for removal of civil and criminal actions from state to federal courts.[11] This power derives from Article III[12] in conjunction with the Necessary and Proper Clause of Article I[13] and is, for all practical purposes, plenary.[14] Pursuant to this essentially unrestricted authority, Congress has provided for the re-

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Petroleum Co., No. 89-2524, 1989 U.S. Dist. LEXIS 16028, at *6 (E.D. La. Jan. 19, 1990); Hunter v. American Express Travel Related Servs., 643 F. Supp. 168, 170 (S.D. Miss. 1986); Thomason v. Republic Ins. Co., 630 F. Supp. 331, 333-34 (E.D. Cal. 1986); Skinner v. Old S. Life Ins. Co., 572 F. Supp. 811, 813 (W.D. La. 1983); Quick Erectors, Inc. v. Seattle Bronze Corp., 524 F. Supp. 351, 353-54 (E.D. Mo. 1981); Gibbs v. Paley, 354 F. Supp. 270, 271-72 (D. P.R. 1973); Moore v. Firedoor Corp. of Am., 250 F. Supp. 683, 685 (D. Md. 1966); Potter v. McCauley, 186 F. Supp. 146, 149 (D. Md. 1960); Rodriguez v. Hearty, 121 F. Supp. 125, 126-28 (S.D. Tex. 1954); Merz v. Dixon, 95 F. Supp. 193, 197 (D. Kan. 1951); Alexander v. Peter Holding Co., 94 F. Supp. 299, 301 (E.D.N.Y. 1950). It appears that *Potter*, which had been considered a strong articulation of the congressional intent on this issue, *see* 14A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3732, at 515 (1985), and *Moore* have been discarded by the District of Maryland. *See Schwartz Bros.*, 745 F. Supp. at 340 n.5 ("[T]he modern trend of the cases and the preferable understanding of [sic] statute compels the Court to depart from these two holdings.").

9. Appellate decisions on this issue are scarce because 28 U.S.C. § 1447(d) generally prevents review of an order remanding a case to state court. *See infra* notes 122-123 and accompanying text.

10. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80 (providing for the removal of actions from state courts when the amount in controversy was greater than $500 and the defendant was an alien or a citizen of another state).

11. *See* Tennessee v. Davis, 100 U.S. 257, 265 (1879) (noting that Congress's power to remove civil cases "was exercised almost contemporaneously with the adoption of the Constitution," and adding "it is impossible to see why the same power may not order the remand of a criminal prosecution").

12. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . [and to controversies] between Citizens of different States . . . .").

13. U.S. CONST. art I, § 8, cl. 18 (vesting in Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"); *see Davis*, 100 U.S. at 265-66 (tracing constitutional derivation of power); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 349 (1816) ("This power of removal is not to be found in express terms in any part of the

moval of state court proceedings whenever the federal court would have had original jurisdiction, whether based on a federal question or diversity of citizenship.[15]

In the process, Congress has imposed various restrictions on the removal right. Only defendants, for instance, may remove the action,[16] and, if the action is founded on diversity jurisdiction, it may not be removed if any of the properly aligned defendants is a citizen of the forum state.[17] All defendants, moreover, must join in the removal petition.[18] Most notably, though, Congress has imposed a very short time period—thirty days—in which a defendant may file a notice of removal.[19] The problem explored by this Article, simply stated, is: Thirty days from when?

To repeat, 28 U.S.C. § 1446(b) requires removal within thirty days following "receipt by the defendant, through service or otherwise, of a copy of the initial pleading . . . ."[20] This language seems to negate formal service of process as the exclusive trigger for the removal period. However, cases following *Love v. State Farm Mutual*

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constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power.").

14. *See* City of Greenwood v. Peacock, 384 U.S. 808, 833 (1966) ("We may assume that Congress has constitutional power to provide that all federal issues be tried in the federal courts, that all be tried in the courts of the States, or that jurisdiction of such issues be shared. And in the exercise of that power, we may assume that Congress is constitutionally fully free to establish the conditions under which civil or criminal proceedings involving federal issues may be removed from one court to another.").

15. *See* 28 U.S.C. § 1441(a).

16. *Id.* This provision proceeds from the logical assumption that plaintiffs are stuck with the forum they originally chose.

17. *Id.* § 1441(b). Because removal jurisdiction is based in part on the premise that a defendant may not get a fair hearing in a foreign state court, allowing a resident defendant to remove a case filed by an out-of-state plaintiff makes no sense. *See* Ford Motor Credit Co. v. Aaron-Lincoln Mercury, Inc., 563 F. Supp. 1108, 1115 n.28 (N.D. Ill. 1983) (reiterating that "only out-of-staters may remove diversity cases" and explaining that "[t]he only rationale for this distinction is the local prejudice argument that in-staters need not fear their own courts, but out-of-staters have reason to seek a federal forum").

18. *Id.* § 1441(a). It is well settled that "all defendants in a state action must join in the petition for removal, except for nominal, unknown or fraudulently joined parties." Emrich v. Touche Ross & Co., 846 F.2d 1190, 1193 n.1 (9th Cir. 1988). *See also In re* Federal Sav. & Loan Ins. Corp., 837 F.2d 432, 434 n.2 (11th Cir. 1988). Failure to join proper defendants in the removal petition renders it procedurally defective. *Emrich*, 846 F.2d at 1193 n.1 (citing Cornwall v. Robinson, 654 F.2d 685, 686 (10th Cir. 1981)); Getty Oil Corp. v. Insurance Co. of N. Am., 841 F.2d 1254, 1262 (5th Cir. 1988). Indeed, failure to explain why a codefendant has not consented to the removal may render the petition defective. *See* P-Nut Carter's Fireworks v. Carey, 685 F. Supp. 952, 953 (D. S.C. 1988).

19. *See* 28 U.S.C. § 1446(b).

20. *Id.*

*Automobile Insurance Co.*[21] contend, either expressly or implicitly, that the statute is susceptible of another, more limited meaning based on legislative purpose.[22] Such contentions are founded in judicial sympathy for chagrined defendants and their counsel,[23] not in a well-reasoned and reasonable reading of the statute itself.

### *A. The Language of the Statute*

A practitioner's analysis of 28 U.S.C. § 1446(b) must begin and end with two judicially imposed principles of statutory construction. First, the plain-meaning rule states that when a court "find[s] the terms of a statute unambiguous, judicial inquiry is complete except in rare and exceptional circumstances . . . where the application of the statute as written will produce a result 'demonstrably at odds with the intentions of its drafters.' "[24] Corollary statements of this rule are that a court must "assume that Congress said what it meant and meant what it said,"[25] that the statutory language "must ordinarily be regarded as conclusive,"[26] and that the language of a statute must be accorded "its plain, obvious, and rational meaning."[27]

Second, removal statutes must be construed narrowly in favor

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21. 542 F. Supp. 65 (N.D. Ga. 1982).

22. *See* cases cited *supra* note 8. As one court explained, "The *Love* line of cases tends to look to the legislative history behind the statute and conclude that Congress meant to solve problems which had arisen in certain states under the former statute, and not to shorten the removal period." Marion Corp. v. Lloyds Bank, 738 F. Supp. 1377, 1378 (S.D. Ala. 1990).

23. Witness, for example, Bennett v. Allstate Insurance Co., 753 F. Supp. 299 (N.D. Cal. 1990), wherein Judge Conti chastised Receipt Rule cases for failing to "weigh[] the practical consequences of their decision." *Id.* at 303. In response, it must be noted that the "practical consequences" of a plain reading of a relatively clear statute are by and large irrelevant, except to the extent that the most logical reading may lead to absurd results. *See infra* text accompanying notes 24-27. As set forth in the text below, the "practical consequences" of the Receipt Rule may be surprising, but they clearly are not absurd.

24. Demarest v. Manspeaker, 111 S. Ct. 599, 604 (1991) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)); *see also* Burlington N.R.R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987); Rubin v. United States, 449 U.S. 424, 430 (1981); TVA v. Hill, 437 U.S. 153, 187 n.33 (1978).

25. Pettis *ex rel.* United States v. Morrison-Knudsen Co., 577 F.2d 668, 672 (9th Cir. 1978).

26. Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); *see also* Mills Music, Inc. v. Snyder, 469 U.S. 153, 164 (1985) ("In construing a federal statute it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.' " (quoting Park 'N Fly Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 194 (1985))).

27. American Trucking Ass'ns v. United States, 602 F.2d 444, 450 (D.C. Cir.), *cert. denied*, 444 U.S. 991 (1979).

of remand.[28] As the Supreme Court explained in *Shamrock Oil & Gas Corp. v. Sheets*:[29]

> Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. . . . "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."[30]

Thus, even if 28 U.S.C. § 1446(b) were ambiguous, that ambiguity should be construed in favor of remand and against the untimely defendant.

The cases rejecting a requirement of formal service[31] generally rely upon a "presumption-in-favor-of-remand" or "plain-meaning" rationale. For example, in *Tyler v. Prudential Life Insurance Co. of America*,[32] the defendant received a copy of the complaint on March 4, accepted formal service on April 10, and filed for removal on May 4, more than thirty days after receipt but less than thirty days after service.[33] In concluding that removal was untimely, the *Tyler* court noted that 28 U.S.C. § 1446(b) "is to be strictly construed against removal and in favor of remand"[34] and held that "[s]ervice of process under state law does not control for removal purposes."[35]

Although *Tyler* is generally cited as the leading case on this question,[36] the decision itself is rather sparse and conclusory. A more extensive analysis of the statute appears in *Pic-Mount Corp. v. Stoffel Seals Corp.*[37] Again, that case involved the lapse of more than thirty days between the receipt of a courtesy copy of the complaint

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28. *See* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941); Libhart v. Santa Monica Dairy Co., 592 F.2d 1062, 1064 (9th Cir. 1979).

29. 313 U.S. 100 (1941).

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

31. *See supra* note 6.

32. 524 F. Supp. 1211 (W.D. Pa. 1981).

33. *Id.* at 1212-13.

34. *Id.* at 1213 (citing Crompton v. Park Ward Motors, Inc., 477 F. Supp. 699, 702 n.3 (E.D. Pa. 1979)).

35. *Id.* (citing Perimeter Lighting, Inc. v. Karlton, 456 F. Supp. 355, 359 (N.D. Ga. 1978)).

36. *See, e.g.*, Lindley v. DePriest, 755 F. Supp. 1020, 1021 (S.D. Fla. 1991); Pic-Mount Corp. v. Stoffel Seals Corp., 708 F. Supp. 1113, 1115 (D. Nev. 1989); Conticommodity Servs. v. Perl, 663 F. Supp. 27, 30 (N.D. Ill. 1987).

37. 708 F. Supp. 1113 (D. Nev. 1989).

and the filing of a petition for removal. After surveying the case law on the timeliness issue, the *Pic-Mount* court concluded, *inter alia*, that (1) the statute clearly and unambiguously did *not* require formal service to trigger the removal period,[38] and (2) any ambiguity should be resolved in favor of the *Tyler* approach under "the well established rule that removal statutes are to be construed strictly against removal."[39]

Most recently, the Northern District of Ohio rendered a Receipt Rule opinion teeming with judicially conservative canons of statutory interpretation.[40] In *Pillin's Place, Inc. v. Bank One, Akron, N.A.*,[41] the plaintiffs sent by facsimile transmission to one of the defendants "a '[c]ourtesy copy of the [c]omplaint' filed by the [p]laintiffs that day."[42] The defendants were served nine days later. They removed twenty-five days after that, thus creating a 28 U.S.C. § 1446(b) issue.[43] The court held removal to be untimely, reasoning as follows:

> It has long been settled that as a general principle the removal statutes are to be construed strictly out of "[d]ue regard for the rightful independence of state governments . . . ." Further, "[t]he party seeking removal bears the burden of establishing its right thereto."
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> "The [§ 1446] requirement for timely filing is not jurisdictional, but it is mandatory and must be strictly applied."
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> As the Supreme Court of the United States has frequently noted, "[i]nterpretation of a statute must begin with the statute's language." "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' "
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> The arguments supporting adoption of the Receipt Rule are highly compelling and ultimately persuasive. First, the Receipt Rule arises from a straightforward interpretation of the clear statutory language. Second, the legislative history does not lead to the conclusion that the Receipt Rule is "demonstrably at odds" with Congress' in-

38. *Id.* at 1116.
39. *Id.* at 1118.
40. *See* Pillin's Place, Inc. v. Bank One, Akron, N.A., 771 F. Supp. 205 (N.D. Ohio 1991).
41. 771 F. Supp. 205 (N.D. Ohio 1991).
42. *Id.* at 206.
43. *Id.*

> tent in amending § 1446(b). And third, the Receipt Rule is most in keeping with the strict interpretation of the removal statute required by Supreme Court and Sixth Circuit precedent.[44]

This mantric recitation of stock phrases adds little to the growth of legal reasoning, but it does underscore the increasing importance of such canons in resolving this issue.

Intellectually troublesome as these shorthand rules of construction may be,[45] the language of 28 U.S.C. § 1446(b) is relatively plain

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44. *Id.* at 206-07 (alterations in original) (citations omitted).

45. As legal realists and critical legal students have reminded us, there is never a "plain meaning" in any piece of writing. *See* Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1441, 1468 (1990) (commenting that current members of the Supreme Court "are not very likely to hear, let alone be persuaded by, an argument from within the indeterminacy critique—whether the unknowability of the framers' intent, the polysemous character of language, or the contextuality of all meaning"); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 452 (1989) ("[Legal] realists argued that the canons [of statutory construction] substituted unhelpful, misleading, and mechanical rules for a more pragmatic and functional inquiry into statutory purposes and structure . . . . Almost no one has had a favorable word to say about the canons in many years."); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 867-69 (1930) (criticizing the logical underpinnings of the plain meaning rule).

It is also troubling that, despite the *Shamrock Oil & Gas Corp. v. Sheets* emphasis on congressional concerns regarding federal court jurisdiction, *see* 313 U.S. 100, 108-09 (1941), the "strict construction" principle is frequently applied to *procedural* defects in the notice of removal, including untimeliness. *See* Shadley v. Miller, 733 F. Supp. 54, 55 (E.D. Mich. 1990) (strictly construing the rule that all defendants must join in removal petition); Hom v. Service Merchandise Co., 727 F. Supp. 1343, 1344-45 (N.D. Cal. 1990); Rezendes v. Dow Corning Corp., 717 F. Supp. 1435, 1438 (E.D. Cal. 1989) (strictly construing the maximum one-year limit on removal under § 1446(b)). A moment's reflection reveals that *Shamrock Oil* does not necessarily support a narrow interpretation of the procedural provisions in the removal statutes. There is clearly more reason to construe strictly removal *jurisdiction* than to construe strictly the 30-day removal period, which is really more akin to the time period in which to file a responsive pleading than to a statute of limitations. It is difficult to imagine that the drafters of the removal statutes would be disturbed over an untimely but otherwise nonprejudicial and appropriate removal, whereas they could well be outraged if a federal court improperly divested a state court of its jurisdiction.

The stronger justification for strictly construing procedural removal provisions rests not on jurisdiction, but on more practical concerns of fairness and judicial expediency. Assume, for example, that the district court denies a motion to remand, that the case goes to trial, that the defendant prevails, and that, on appeal, the plaintiff-appellant argues, *inter alia*, that the removal was untimely. A reversal and eventual remand on this issue would be immensely unfair to the defendant, who won fair and square on the merits in a court of competent jurisdiction, and, ironically, to the plaintiff as well, whose potentially valid substantive points of error would not be reviewed by the federal appellate court. More importantly, our national judicial system would be forced to suffer the burden of redundant trials. Under these circumstances, and considering the decreasing prejudicial differences between state and federal courts, it may be appropriate to weight the inquiry in favor of remand. *Cf.* Collins v. American Red Cross, 724 F. Supp. 353,

in the sense that one may conclude, with a reasonably high degree of confidence, that Congress intended—or at least thoughtlessly commanded[46]—the removal period to commence once the defendant received a copy of the initial pleading, whether through formal service of process or not. Focusing specifically on the "through service or otherwise" language, the only defensible reading is that Congress said that the removal period must commence upon the defendant's *receipt*, through service *or not through service*, of a copy of the initial pleading.[47]

### *B. Ambiguity*

One court, however, has expressly claimed that 28 U.S.C. § 1446(b) is ambiguous.[48] In *Marion Corp. v. Lloyds Bank*,[49] Chief Judge Howard, after mechanically reciting the strictures against departing from the plain meaning and against liberal construction of the removal statutes, nevertheless concluded: "Here, however, the words 'or otherwise' are so vague as to have no meaning. Receipt of a complaint through service 'or otherwise' taken to its literal conclu-

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358 (E.D. Pa. 1989) (noting that the possibility of reversal on appeal and remand to state court underscored the prudence of resolving doubts in favor of remand).

46. "[W]hile legislative history is helpful, this court finds that the law which must be applied is found in what Congress actually said, not in *speculation about what it meant to say*." Lindley v. DePriest, 755 F. Supp. 1020, 1025 (S.D. Fla. 1991) (emphasis added). It is, of course, quite possible that Congress never thought about courtesy copies or defective service when it drafted the statute.

47. Indeed, numerous courts have concluded that the language of § 1446(b) clearly and unambiguously does not require formal service to commence the removal period. *See* Silverwood Estates Dev. Ltd. Partnership v. Adcock, 793 F. Supp. 226, 228 (N.D. Cal. 1991) ("This court, however, remains convinced that 'receipt by defendant, through service or otherwise' means 'receipt by defendant, through service or otherwise.' "); Pic-Mount Corp. v. Stoffel Seals Corp., 708 F. Supp. 1113, 1118 (D. Nev. 1989) (describing the language of § 1446(b) as "straightforward" and "unambiguous"); General Beverage Sales Co. v. Zonin S.P.A., 589 F. Supp. 846, 848 (W.D. Wis. 1984) ("The statute specifically reads 'receipt by the defendant,' and the statute clearly does not require service."); Maglio v. F. W. Woolworth Co., 542 F. Supp. 39, 41 (E.D. Pa. 1982) ("The language of § 1446(b) is very clear and unambiguous."); Potter v. Kahn, 108 F. Supp. 593, 594 (S.D.N.Y. 1952) (noting the "clear language" of the "or otherwise" clause).

48. *See* Marion Corp. v. Lloyds Bank, 738 F. Supp. 1377, 1379 (S.D. Ala. 1990). Other cases have referred to § 1446(b) as being less than clear, but none has emphasized this finding. For instance, the Southern District of Florida adopted the Receipt Rule after noting that Congress had convened over 40 times since another court had commented on the section's "lack of clarity." Lindley v. DePriest, 755 F. Supp. 1020, 1025 (S.D. Fla. 1991) (citing Raymond's, Inc. v. New Amsterdam Casualty Co., 159 F. Supp. 212, 215 (D. Mass. 1956)) ("[T]he language chosen while not altogether happy is at least consistent with the Congressional purpose."). *See also* Hunter v. American Express Travel Related Servs., 643 F. Supp. 168, 169 (S.D. Miss. 1986) ("The difference in interpretation stems from the ambiguous 'or otherwise' portion of the statute.").

49. 738 F. Supp. 1377 (S.D. Ala. 1990).

sion could mean that any receipt of a complaint is sufficient to start the removal time period running."[50] From this premise, Judge Howard concluded that resort to legislative history was appropriate and that, based on his reading of the congressional purpose, formal service of process under state law was required to commence the removal period.[51] This finding of ambiguity, though perhaps intuitively praiseworthy as an attempt to circumvent a harsh statute, is incorrect for several reasons.

As a preliminary observation, the "literal conclusion" of "or otherwise" is not as broad as the *Marion* court implies. The time period would not begin to run, for example, if the defendant received a copy of a complaint that had not yet been filed.[52] Likewise, the receipt of an inexact version of the filed complaint would not trigger the time period because such a document would not constitute a "copy."[53] Finally, if the copy of the complaint, combined with

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50. *Id.* at 1379.

51. *Id.* As discussed below, I contend that the available legislative history does not support a requirement of service. *See infra* notes 103-120 and accompanying text.

52. This assertion may be proved in three related ways. First, § 1446(b) requires that the defendant receive a copy of an "initial pleading." 28 U.S.C. § 1446(b). By any fair construction, a document purporting to be a complaint, which has not been filed, is not an "initial pleading" because nothing has been "initially pled." *See, e.g.*, Kerr v. Holland America-Line Westours, 794 F. Supp. 207, 213 n.5 (E.D. Mich. 1992) (stating the court's factual assumption "that the copy of the 'initial pleading' provided to the defendant has previously been properly filed in the state court"). Second, § 1446(b) further requires that the "copy" set "forth the claim for relief upon which such action or proceeding is based." 28 U.S.C. § 1446(b). An unfiled complaint "is certainly not one from which [the defendant] could intelligently ascertain removability since it [is] subject to later amendment or complete change." James v. Pan American Life Ins. Co., No. 91-0821, 1991 U.S. Dist. LEXIS 11564, at *6-7 (E.D. La. Aug. 13, 1991) (adopting Receipt Rule but holding that "[a] defendant's right to removal should not be governed by a letter containing a pleading which has not, and may not be filed by the plaintiff"); *see also Kerr*, 794 F. Supp. at 213; Campbell v. Associated Press, 223 F. Supp. 151, 153 (E.D. Pa. 1963) (holding that draft complaint, subsequently altered before filing, could not constitute an initial pleading). Third, the enabling language of the statute provides in pertinent part:

> Except as otherwise expressly provided by Act of Congress, any civil action *brought in a State court* of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place *where such action is pending*.

28 U.S.C. § 1441(a) (emphasis added). It is inconceivable that an unfiled complaint, which is really no more than a draft, could commence the removal period when no action has been "brought in a State court" and, consequently, no "action is pending."

53. *See* 28 U.S.C. § 1446(b); *see also Campbell*, 223 F. Supp. at 153 (holding that a draft complaint that was ultimately filed in amended form was "not a 'copy of the initial pleading' as required by 28 U.S.C.A. § 1446(b)"). It is probably not necessary, however, that the copy be time-stamped. *See* North Jersey Sav. & Loan Ass'n v. Fidelity & Deposit Co., 125 F.R.D. 96, 100 (D. N.J. 1988).

other facts known to the defendant, did not reveal the existence of federal subject matter jurisdiction, the time period would not commence.[54] Accordingly, the conclusion that "or otherwise" means what the dictionary says it means[55] would not lead to the outrageous or absurd results that Judge Howard feared, because the statutory language surrounding it provides necessary clarifications and qualifications. In other words, aside from the potential for surprise in the exercise of 28 U.S.C. § 1446(b), there is no substantive unfairness in requiring removal within thirty days from receipt of a document from which removability could be ascertained, whether or not such "receipt" was attended by state law formalities.[56]

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54. *See* 28 U.S.C. § 1446(b) ("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 . . . ."). As the *Tyler* court explained:

> An initial pleading must include a statement of the case which will allow the defendant to examine the basis for the action. To qualify as an initial pleading for removal purposes, the document received by the defendant must contain such notice of the state proceeding that the defendant can ascertain the removability of the action or proceeding.

Tyler v. Prudential Ins. Co. of Am., 524 F. Supp. 1211, 1214 (W.D. Pa. 1981) (citation omitted). For the proposition that the complaint *and* other facts known to the defendant are sufficient, see Thompson v. Telephone & Data Systems, No. 90-783-JU (D. Or. Jan. 7, 1991), *aff'd without opinion*, (D. Or. May 15, 1991) (noting that though the complaint allegedly misaligned parties to conceal diversity jurisdiction, defendants knew of the alleged misalignment when they received the complaint); Richman v. Zimmerman, Inc., 644 F. Supp. 540, 542 (S.D. Fla. 1986) (noting that while complaint did not allege the amount in controversy, defendant had sufficient "clues" of removability).

55. *See, e.g.*, RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 958 (1991) (defining "otherwise" as "under other circumstances," "in another manner; differently," and "in other respects").

56. This is not to say that the phrase "or otherwise" cannot be ambiguous or susceptible, under proper circumstances, to a limiting construction. Indeed, Judge Howard could have cited Nicholson Construction Co. v. Standard Fire Insurance Co., 760 F.2d 74 (3d Cir. 1985), in which the words "or otherwise" were held to be ambiguous in the context of a construction payment bond. *Id.* at 77 (" '[T]he word "otherwise" . . . is always a relative word . . . .' " (quoting Philadelphia *ex rel.* Geshwind v. Fidelity & Deposit Co., 46 Pa. Super. 313, 318 (1911))). Nevertheless, courts specifically addressing the phrase in other contexts have almost always concluded that "or otherwise" is intentionally broad, not ambiguous. *See* United States v. McCabe, 812 F.2d 1060, 1062 (8th Cir. 1987) (" '[A]n expansive interpretation [of "or otherwise" as used in the federal kidnapping statute, 18 U.S.C. § 1201 (1988)] has been uniformly adhered to by the federal courts . . . .' " (quoting United States v. Crosby, 713 F.2d 1066, 1070-71, (5th Cir.), *cert. denied*, 464 U.S. 1001 (1983))); United States v. Yoshida Int'l, Inc., 526 F.2d 560, 576 (C.C.P.A. 1975) ("The phrase ['or otherwise' as used in the Trading with the Enemy Act, 50 U.S.C. app. § 5 (1988)] appears to us to be expansive, not restrictive."); Dunham v. Omaha & C.B. St. Ry., 106 F.2d 1, 3 (C.C.P.A. 1939) ("The words 'or otherwise' [as used in disputed municipal bonds] . . . can only enlarge the reference . . . ."). It should

More importantly, the courts addressing the implications of this statutory language have failed to see that a broad reading of 28 U.S.C. § 1446(b) does *not* depend on the phrase "through service or otherwise." Plucking the offending clause from the statute merely leaves "receipt by the defendant . . . of a copy of the initial pleading." So edited, this language certainly does not advance the argument that service is required to begin the removal period. In fact, having chosen the broad word "receipt" rather than the available phrase "formal service upon,"[57] Congress appears to have used the phrase "through service or otherwise" to make explicit what is already implied by the rest of the statement: service under state law is not required to trigger the removal period.

Thus, to support his assertion that 28 U.S.C. § 1446(b) is vague, Judge Howard should have concluded not only that "or otherwise" is unclear, but that "receipt . . . of a copy" could reasonably be restricted to mean only "proper service of a copy." This he cannot do. As the earliest court to address this issue aptly noted, the proposition that formal service is required to trigger the removal period "can be sustained only by reading into the statute a provision which is not only not there but which Congress seems deliberately to have omitted."[58]

## II. THE *LOVE* LINE OF CASES

### *A. The Reasoning of the* Love *Decision*

Judge Howard is not alone in his distaste for the "plain meaning" of 28 U.S.C. § 1446(b). Indeed, the *Marion* decision, though perhaps representing the most vehement rejection of "or otherwise" as a meaningful term, merely followed the reasoning set forth earlier in *Love v. State Farm Mutual Automobile Insurance Co.*[59] The so-called "*Love* line" or "Proper Service Rule" constitutes a strong and enduring minority position on the meaning of 28 U.S.C. § 1446(b).[60]

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also be noted in this regard that Congress has not changed the wording of § 1446(b) despite a continuing significant conflict in the case authority.

57. As discussed in the text below, an earlier version of this statute expressly tied the removal period to formal service under state law. *See infra* notes 69-70 and accompanying text.

58. Potter v. Kahn, 108 F. Supp. 593, 594 (S.D.N.Y. 1952), *quoted in* Pic-Mount Corp. v. Stoffel Seals Corp., 708 F. Supp. 1113, 1116 (D. Nev. 1989) *and in* Kulbeth v. Woolnought, 324 F. Supp. 908, 910 (S.D. Tex. 1971).

59. 542 F. Supp. 65, 67-68 (N.D. Ga. 1982).

60. *See* cases cited *supra* note 8.

In *Love*, the plaintiffs sent a courtesy copy of a complaint to opposing counsel on the same day it was filed.[61] Fifty-six days later, the defendants filed a petition for removal.[62] The plaintiffs had not properly served the defendants as of thirty days before removal.[63] The issue, then, was whether receipt of the courtesy copy commenced the removal period. While noting that, "on the surface, there is much to recommend" the argument that a courtesy copy is sufficient,[64] the Northern District of Georgia held that "the removal period . . . cannot commence until a plaintiff properly serves defendant with process."[65]

The *Love* court justified its decision on three grounds. First, finding truth in numbers, it stated that "most district courts" had held that formal service of process was required to trigger the removal period.[66] Second, the court suggested that any other holding would "permit[] a plaintiff to circumvent the already existing requirement of personal service through informal service."[67] Finally, and most importantly, it held that triggering removal upon informal "receipt" would contravene the legislative intent.[68] The *Love* decision provides an extensive view of the history of 28 U.S.C. § 1446(b), revealing as follows:

> Prior to 1948, a removal petition was in essence a state court responsive pleading; it was filed in that court within the time permitted to answer a complaint as established by the state's rules of civil practice. In 1948, in an attempt to make the removal period more uniform, Congress revised section 1446(b) to provide that the removal petition be filed in federal court "within twenty days[69] after commencement of the action or service of process, whichever is later." 62 Stat. 939 (1948). Under this formulation, of course, the removal period could not begin until service of process had been obtained. A problem arose, however, in

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61. *Love*, 542 F. Supp. at 66.
62. *Id.*
63. *Id.*
64. *Id.* at 67.
65. *Id.* at 68.
66. *Id.* at 67. *But see infra* note 73 and accompanying text.
67. *Love*, 542 F. Supp. at 68. For a similar contention, see Rodriguez v. Hearty, 121 F. Supp. 125, 128 (S.D. Tex. 1954) (noting that a strict reading of the statute would present out-of-state plaintiffs with a choice "between removing and waiving their right to proper service or waiting for service and waiving their right to remove").
68. *Love*, 542 F. Supp. at 67-68.
69. The removal period was set at 20 days in the 1948 Act and expanded to 30 days in a 1965 amendment. Act of Sept. 29, 1965, Pub. L. No. 89-215, 79 Stat. 887. (*Editor's note.*)

> those states such as New York which permitted a plaintiff to commence a suit without serving or filing a complaint, merely by serving the defendant with a summons. Under the 1948 version of section 1446(b), in such cases the removal period could expire before a defendant received a copy of the complaint, thus depriving him of an opportunity to remove the action. It was in response to this problem that Congress revised section 1446(b) to permit removal "within twenty [now thirty] days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading." *See* H.R. Rep. No. 352, 81st Cong. 1st Sess., *reprinted in* [1949] U.S. Code Cong. Serv. 1254, 1268. Thus, the "through service or otherwise" language was intended to expand the removal period in states following the New York Rule.[70]

Consequently, the *Love* court (1) determined that 28 U.S.C. § 1446(b) was worded to correct an anomaly in the 1948 revision, (2) derived from this narrow goal a broader purpose to enlarge the removal period, and (3) concluded that a plain-meaning reading of the statute would contravene that broader purpose.[71]

*Love*'s legislative history argument is addressed more fully below.[72] It should be noted here, however, that the court's other justifications—its reference to the weight of authority and its fear that service-of-process rules might be circumvented—are simply incorrect. Contrary to the *Love* court's statement, the majority of cases, even in 1982, favored a strict construction of 28 U.S.C. § 1446(b).[73]

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70. *Love*, 542 F. Supp. at 67-68 (bracketed alterations in original).

71. *See id.*

72. *See infra* notes 103-120 and accompanying text.

73. *Compare* Maglio v. F.W. Woolworth Co., 542 F. Supp. 39, 41 (E.D. Pa. 1982) (holding that "[t]he language of § 1446(b) is very clean and unambiguous"); Tyler v. Prudential Ins. Co. of Am., 524 F. Supp. 1211 (W.D. Pa. 1981); Perimeter Lighting, Inc. v. Karlton, 456 F. Supp. 355, 359 (N.D. Ga. 1978); International Equity Corp. v. Pepper & Tanner, Inc., 323 F. Supp. 1107, 1111 (E.D. Pa. 1971); Kulbeth v. Woolnought, 324 F. Supp. 908, 910 (S.D. Tex. 1971); *In re* 73rd Precinct Station House, 329 F. Supp. 1175, 1177-78 (E.D.N.Y. 1971); Kurtz v. Harris, 245 F. Supp. 752, 754 (S.D. Tex. 1965); Benson v. Bradley, 223 F. Supp. 669, 671 (D. Minn. 1963); Barr v. Hunter, 209 F. Supp. 476, 477 (W.D. Mo. 1962); French v. Banco Nacional de Cuba, 192 F. Supp. 579, 580 (S.D.N.Y. 1961); McCargo v. Steele, 151 F. Supp. 435, 438 (W.D. Ark. 1957); Raymond's, Inc. v. New Amsterdam Casualty Co., 159 F. Supp. 212, 214-15 (D. Mass. 1956); Mahoney v. Witt Ice & Gas Co., 131 F. Supp. 564, 568 (W.D. Mo. 1955); Richlin Advertising Corp. v. Century Florida Broadcasting Co., 122 F. Supp. 507, 509 (S.D.N.Y. 1954); Potter v. Kahn, 108 F. Supp. 593, 594 (S.D.N.Y. 1952) *with* Quick Erectors, Inc. v. Seattle Bronze Corp., 524 F. Supp. 351, 353-54 (E.D. Mo. 1981) (finding, for § 1446(b) purposes, that "a copy of the pleading [received] before it was duly served is irrelevant"); Gibbs v. Paley, 354 F. Supp. 270, 271-72 (D. P.R. 1973); Moore v. Firedoor Corp. of Am., 250 F. Supp. 683, 685 (D. Md. 1966); Potter v. McCauley, 186 F. Supp.

Moreover, as several courts have pointed out, strict construction would not, as *Love* suggests, permit a plaintiff to "circumvent" formal service requirements, because any defect could be challenged in the federal court as easily as in the state forum.[74] Accordingly, the *Love* court's decision to require formal service stands or falls on the legislative history rationale. With the exception of *Marion Corp. v. Lloyds Bank*,[75] cases following the *Love* decision have not significantly added to its reasoning.[76]

### *B. Review by the Appellate Courts*

Only two federal circuit courts of appeals have addressed this issue. But these courts have not considered the problem carefully enough to resolve the question. In *Northern Illinois Gas Co. v. Airco Industrial Gases, Inc.*,[77] the plaintiff sued defendants Airco and the

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146, 149 (D. Md. 1960); Rodriguez v. Hearty, 121 F. Supp. 125, 126-28 (S.D. Tex. 1954); Merz v. Dixon, 95 F. Supp. 193, 197 (D. Kan. 1951); Alexander v. Peter Holding Co., 94 F. Supp. 299, 301 (E.D.N.Y. 1950). According to this extensive research, 15 reported cases favored strict construction while only 7 found a looser interpretation. Statements in subsequent cases that *Love* is in the majority derive directly from the *Love* court's mistaken research.

74. *See* IMCO USA, Inc. v. Title Ins. Co., 729 F. Supp. 1322, 1323 (M.D. Fla. 1990) ("The Defendant could have attacked Plaintiff's attempt to perfect service in *this* Court from the onset."); Pic-Mount Corp. v. Stoffel Seals Corp., 708 F. Supp. 1113, 1117 (D. Nev. 1989) ("The fact that removal requirements are not identical to state service requirements in no way allows a plaintiff to engage in 'chicanery' by subverting service requirements or the right to remove."); Conticommodity Servs. v. Perl, 663 F. Supp. 27, 29 (N.D. Ill. 1987) ("Whether a defendant removes to federal court or not, perfect service is necessary if the plaintiff is to maintain his action."); *see also* 1A MOORE'S FEDERAL PRACTICE, ¶ 0.168[3.-5-3], at 581 n.4 (1986) ("[V]alidity of service of process may be challenged after removal."). The *Conticommodity* court added:

> should a defendant wish to stand upon his right to . . . stricter state process rules, he may remain in the state forum and present a motion to quash there. It is difficult to see how this choice between state and federal service rules—which mirror the procedural choices at stake in any decision to remove—tends to undercut the removal right.

*Conticommodity*, 663 F. Supp. at 29.

75. 738 F. Supp. 1377 (S.D. Ala. 1990); *see* discussion *supra* notes 48-59 and accompanying text.

76. In Estate of Baratt v. Phoenix Mutual Life Insurance Co., 787 F. Supp. 333 (W.D.N.Y. 1992), Judge Telesca did say: "Finally, and perhaps most importantly, [the *Tyler* line] would not provide the clearest rule. Collateral litigation would surely result from arguments over whether the defendant 'actually or constructively []' received papers which were improperly served." *Id.* at 337. This contention is easily dealt with. The *Love* line of cases, far from creating "the clearest rule," muddies the water in two ways. First, it judicially rewrites the relatively clear language of the statute. Second, it embroils the district court in a usually unnecessary dispute over state service requirements. Any objective observer must conclude that it is easier to determine simple receipt than sufficiency of service under the diverse laws of the fifty states.

77. 676 F.2d 270 (7th Cir. 1982).

American Arbitration Association (AAA) in state court after Airco filed a demand for arbitration of a contract dispute.[78] Airco received a copy of the state court complaint on January 19, 1981, the day the action was commenced. Airco was served with a copy of the state court summons on January 23.[79]

Airco filed a verified removal petition in federal district court on January 26, well within the thirty-day time limit imposed by 28 U.S.C. § 1446(b) under either the Receipt Rule or the Proper Service Rule. However, on February 3, Northern Illinois Gas moved to remand the cause to state court, arguing, *inter alia*, that the removal petition was defective because Airco had failed to join the AAA in the petition, or explain its absence.[80] Airco filed an amended petition for removal on February 20, stating that AAA need not have been joined since it was a nominal party.[81] The plaintiff argued that the amended petition was untimely.

The court allowed the late amendment to cure the defective petition because "the state court record, attached to the removal petition, contained the necessary factual information regarding the AAA's nominal party status."[82] However, the court stated as a preliminary matter that "[r]emoval must be effected within thirty days after a defendant receives a copy of the state court complaint, or is served, whichever occurs first."[83] And while the court engaged in no analysis of the *Tyler-Love* dichotomy, it did reject defendant Airco's *Love* argument, stating in a footnote that "Airco's counsel's receipt of the complaint on January 19, 1981 constituted effective receipt . . . for purposes of the time limitation of 28 U.S.C. § 1446(b) . . . ."[84]

Perhaps because of the absence of serious direct analysis of the issue by the Seventh Circuit, district courts in that circuit have not treated its pronouncement on the timeliness issue as dispositive.[85] Rather, at least one court has cited *Northern Illinois Gas* to point out the scarcity of appellate decisions on the issue.[86]

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78. *Id.* at 271.
79. *Id.* at 272.
80. *Id.*
81. *Id.*
82. *Id.* at 274.
83. *Id.*
84. *Id.* at 273 n.1.
85. *See, e.g.*, Conticommodity Servs. v. Perl, 663 F. Supp. 27, 30 (N.D. Ill. 1987); General Beverage Sales Co. v. Zonin, S.P.A., 589 F. Supp. 846, 848 (W.D. Wis. 1984).
86. *See* Kerr v. Holland America-Line Westours, Inc., 794 F. Supp. 207, 210 n.3 (E.D. Mich. 1992). For an explanation of the limited opportunity for appellate review in this context, see *infra* text accompanying notes 122-123.

The other circuit court of appeal treating the issue also did so obliquely. In *Pochiro v. Prudential Insurance Co. of America*,[87] the plaintiffs sued in Arizona state court, delivering a copy of the complaint to outside counsel for the defendant on November 30, 1984.[88] Prudential was formally served on December 6, 1984.[89] Thereafter, on January 3, 1985, thirty-four days after the claimed receipt by outside counsel, but twenty-nine days after formal service, Prudential filed its petition for removal. The district court denied the Pochiros' motion to remand.[90] On appeal, the Pochiros argued that Prudential's removal petition was untimely because it was filed more than thirty days after a copy of the complaint was delivered to Prudential's outside counsel.[91] The Ninth Circuit rejected this assertion, holding as follows:

> This argument . . . fails, however, because the Pochiros make no claim that the law firm representing Prudential in a prior action between the same parties was authorized to accept service of process for Prudential in the Pochiro action. *Moreover, the Pochiros do not claim that Prudential otherwise received a copy of their complaint before December 2, 1984,*[92] *which was the thirtieth day prior to the filing of the petition for removal.* Thus, the removal petition was timely.[93]

Although the *Pochiro* court did not confront the 28 U.S.C. § 1446(b) issue directly, it may be argued that its reliance on the "or otherwise received" language rejected the reasoning set forth in *Love*.[94]

This implicit rejection of *Love* reveals itself in two ways. First, as noted, the *Love* court held that the "or otherwise" language of 28 U.S.C. § 1446(b) is applicable *only* in those states that have adopted the New York procedure permitting service of the summons without the complaint, and that formal service is required in all other

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87. 827 F.2d 1246 (9th Cir. 1987).

88. *See* Responsive Memorandum In Opposition To Plaintiffs' Motion To Remand at 1, *Pochiro*, No. Civ. 85-11 PHX EHC (D. Ariz. filed Feb. 4, 1985) [hereinafter "Prudential Responsive Memorandum"]. The Ninth Circuit *Pochiro* decision does not specify certain dates, making it awkward to cite as precedent.

89. *Id.*

90. *See Pochiro*, 827 F.2d at 1248.

91. *Id.*

92. Actually, December 4 was the thirtieth day prior to removal. Although this error does not affect analysis of the case, it further weakens *Pochiro* as persuasive precedent.

93. *Pochiro*, 827 F.2d at 1248-49 (citations omitted) (emphasis added).

94. *See* Love v. State Farm Mut. Auto. Ins. Co., 542 F. Supp. 65, 67-68 (N.D. Ga. 1982).

states.[95] Arizona is *not*, however, one of those states that adopted the New York procedure.[96]

Second, *Pochiro* held that receipt prior to December 2, 1984, would have rendered removal untimely. This holding rejects the *Love* position that only formal service can trigger the thirty-day period, because December 2 was also *prior to formal service of process on the defendant*.[97] Therefore, by citing the "or otherwise" language of 28 U.S.C. § 1446(b) with respect to an Arizona state court action and by identifying dates prior to formal service as appropriate triggers of the thirty-day period, *Pochiro* necessarily rejected *Love*. This argument assumes, however, that the court actually considered the matter.

The complexity and confusion of the *Pochiro* decision render it vulnerable to the charge that its departure from the *Love* view was an inadvertent dictum. Nevertheless, when analyzed closely, the decision provides credible appellate support for the *Tyler* approach.

The only case citing *Pochiro* in the context of the courtesy copy issue is a magistrate's decision in *Thompson v. Telephone & Data Systems*.[98] In that case, the plaintiff filed a declaratory judgment action on May 21, 1990.[99] On May 29, the plaintiff's counsel sent one defendant's counsel a courtesy copy of the complaint, which was immediately forwarded to the client.[100] Formal service occurred on July 13, and one defendant removed on August 3.[101] In holding that receipt, not formal service, triggered the removal period, the magistrate relied in part on *Pochiro*, but distinguished the facts in the *Thompson* dispute:

> In [*Pochiro*], plaintiffs delivered a copy of their complaint to defendant's counsel of record more than thirty days before defendant petitioned for removal. Plaintiffs did not claim, however, that defendant's counsel of record was authorized to accept service of process for defendant. "Moreover,

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95. *Id.*; *see also* Thomason v. Republic Ins. Co., 630 F. Supp. 331, 333-34 (E.D. Cal. 1986) ("The 'or otherwise' language pertains only to those states where plaintiff can commence a suit without filing or serving initial pleadings until sometime later.").

96. Arizona's Rules of Civil Procedure provide that the "summons and complaint shall be served together." *See* ARIZ. R. CIV. P. 4(d) (1987).

97. *See* Prudential Responsive Memorandum, *supra* note 87, at 1.

98. No. 90-783-JU (D. Or. Jan. 7, 1991) (per Juba, Mag.), *aff'd without opinion*, (D. Or. May 15, 1991) (per Panner, J.). As noted *supra* note *, the author successfully argued that removal in that case was untimely.

99. *Id.* at 3.

100. *Id.*

101. *Id.* at 4. The removing defendant argued that the remaining defendant was improperly aligned, thus obviating the requirement that all defendants join in the removal.

> [plaintiffs] do not claim that [defendant itself] otherwise received a copy of their complaint before . . . the thirtieth day prior to the filing of the petition for removal."
>
> * * *
>
> Contrary to *Pochiro*, the petitioning defendants here have stipulated that their outside counsel forwarded copies of plaintiff's complaint to defendants and that these were seen by an officer, director, or managing agent of theirs about sixty days before the petition for removal.[102]

As set forth above, the magistrate's opinion is a legitimate reading of *Pochiro*, though, for purposes of interpreting 28 U.S.C. § 1446(b), it would have been preferable if the Ninth Circuit had spoken more clearly.

### C. *The Legislative Intent*

When all is said and done, the *Tyler* cases rely blindly on rules of construction while the *Love* cases rely blindly on the suspect reasoning in *Love* and vague policy-based rationales. To determine the "correct" reading of the statute, then, we must look closely at the legislative history of 28 U.S.C. § 1446(b) and at the *Love* argument derived from it.

Courts have found at least four legislative purposes underlying the 1949 amendments to the statute. Based on considerations of fairness, the amendment was intended to ensure that, in New York-type jurisdictions, the defendant had the full twenty,[103] and later thirty, days from receipt of a copy of the initial pleading.[104] Although this is clearly one of the purposes of 28 U.S.C. § 1446(b),[105] it should be agreed that, "if Congress had intended to require service, in all circumstances, or limit the 'or otherwise' lan-

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102. *Id.* at 7 (citations omitted) (bracketed insertions within quotation marks in original).

103. *See supra* note 69.

104. *See* Love v. State Farm Mut. Auto. Ins. Co., 542 F. Supp. 65, 68 (N.D. Ga. 1982).

105. In some States suits are begun by the service of a 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 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.

S. REP. No. 303, 81st Cong., 1st Sess., *reprinted in* 1949 U.S.C.C.A.N. 1248, 1254; *see also* H.R. REP. No. 352, 81st Cong., 1st Sess., *reprinted in* 1949 U.S.C.C.A.N. 1248, 1268 ("Subsection (b) of section 1446 of title 28, U.S.C., as revised, has been found to create difficulty in those States, such as New York, where suit is commenced by the service of a

guage to application in certain states, it surely could have written the statute explicitly to achieve that result."[106] To limit the congressional purpose solely to the New York problem is inconsistent with the broad language Congress employed.

Surprisingly, the *Love* court noted another purpose: to ensure that, in states allowing substituted service on a state officer—for example, in connection with nonresident motorist statutes—the time period commenced only upon the defendant's actual receipt of a copy of the initial pleading, not upon receipt by the state officer.[107] Although I agree with this interpretation as well, it is important to note that this congressional "purpose" does not appear in the legislative reports. It is a *judicial* construction. Inexplicably, the *Love* court did not reconcile its purported narrow reliance on express legislative statements with its speculation on the possibility of other intentions of the drafters.

*Love* and its progeny derive from these two limited goals a larger third purpose, to "expand the removal period."[108] Therefore, they conclude, adherence to the express language of the statute—which quite literally limits the defendant to thirty days following receipt of the initial pleading, regardless of service—must not be what Congress intended.[109] This reasoning is illogical and, arguably, a usurpation of the legislative function.[110] There is no doubt that Congress intended to expand slightly the removal period in New York-type states, but there is no evidence of a generalized intent to expand the removal period in other states as well.[111]

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summons and the plaintiff's initial pleading is not required to be served or filed until later.").

106. Pic-Mount Corp. v. Stoffel Seals Corp., 708 F. Supp. 1113, 1116 (D. Nev. 1989).

107. *See Love*, 542 F. Supp. at 68 n.3 (citing Kulbeth v. Woolnought, 324 F. Supp. 908, 910 (S.D. Tex. 1971); Benson v. Bradley, 223 F. Supp. 669, 672 (D. Minn. 1963); Mahoney v. Witt Ice & Gas Co., 131 F. Supp. 564, 568 (W.D. Mo. 1955)).

108. *See id.* at 68.

109. *Id.*

110. *See* Rodriguez v. United States, 480 U.S. 522, 526 (1987) ("It frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary purpose must be the law.").

111. "The thirty-day period is mandatory and cannot be extended by consent of the parties or by order of court." Tyler v. Prudential Ins. Co. of Am., 524 F. Supp. 1211, 1213 (W.D. Pa. 1981) (citing Crompton v. Park Ward Motors, Inc., 477 F. Supp. 699, 701 (E.D. Pa. 1979); Typh, Inc. v. Typhoon Fence, Inc., 461 F. Supp. 994, 996 (E.D. Pa. 1978)). As one court noted:

> the notion that Congress' intent was to expand the removal period in any state [] is directly refuted by its clear language at the end of the amended section wherein [Congress] stated "whichever is shorter." If Congress had anticipated an expansion of time through this amendment, [it] would have more appropriately stated "whichever is greater," thereby clearly expressing such intent.

This leads to the fourth and most interesting "purpose" of the statute: uniformity. This, of course, had been the overarching purpose of the *1948* amendments making the removal petition a federal, rather than a state court pleading,[112] but was noted by the *Love* court only in passing.[113] By later enacting the "or otherwise" language in 1949 to correct the New York and nonresident-motorist problems, Congress also maintained a uniform trigger for the removal period, that is, receipt of a copy of the initial pleading. As several courts have noted: "The 1949 amendment sought to eliminate [the] unfairness [of the prior rule as applied under diverse state procedures] by providing a time limit which would operate with a greater degree of uniformity throughout the federal system."[114]

At least two courts following the *Tyler* approach have, however, shied away from the uniformity rationale, citing the absence of specific statements in the legislative history to support such a purpose.[115]

> The problem with this assertion of congressional intent, as with *Love* and its progeny, is that it claims too much. While the language of the statute does suggest a single national standard based upon notice, the congressional reports accompanying the 1949 amendments do not say that state service rules are irrelevant in determining commencement of the removal period. Rather, they simply express congressional desire to correct the problems that arose under the 1948 removal statute and repeat, more or less, the provision of the statute.[116]

This warning notwithstanding, I agree with those cases finding a goal of uniformity in 28 U.S.C. § 1446(b), as amended.

First, it is universally conceded that the single most important intent and effect of the *1948* amendment was to create a more uniform trigger for the removal period.[117] Logically, if the 1949

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> However, not only did [Congress] not affirmatively express such intent, but [it] contrarily expressed the opposing view.

Lindley v. DePriest, 755 F. Supp. 1020, 1024 (S.D. Fla. 1991).

112. *See supra* text accompanying notes 68-69; *infra* note 116 and accompanying text.

113. *See Love*, 542 F. Supp. at 67.

114. French v. Banco Nacional de Cuba, 192 F. Supp. 579, 580 (S.D.N.Y. 1961), *quoted in* Conticommodity Servs. v. Perl, 663 F. Supp. 27, 30 (N.D. Ill. 1987) *and* Dawson v. Orkin Exterminating Co., 736 F. Supp. 1049, 1053 (D. Colo. 1990).

115. *See* Pic-Mount Corp. v. Stoffel Seals Corp., 708 F. Supp. 1113, 1117 (D. Nev. 1989); *Conticommodity*, 663 F. Supp. at 30.

116. *Conticommodity*, 663 F. Supp. at 30 (citations omitted).

117. Subsection (b) makes uniform the time for filing petitions to remove all civil actions within twenty days after commencement of the action or service of

amendment was intended to "repeat[] more or less" the statute as it existed in 1948,[118] then Congress must have retained the goal of uniformity. Certainly nothing in the language of the 1949 amendment or in the legislative history suggests that Congress intended to discard the more uniform rule created by the amendment adopted only one year earlier.[119]

Second, a case can be made that the goal of uniformity does appear, albeit obliquely, in the legislative reports accompanying the 1949 amendment. In this regard, the "Purpose" portion of the Senate report says that the bill "amends the section prescribing procedure for the removal of cases from State courts so as *to make it fit the diverse procedural laws of the various States* . . . ."[120] The italicized passage makes no sense except as a statement of intent to make the statute uniform for all states by tailoring its language to accommodate New York-type jurisdictions. Of a similar nature is the following statement: "[i]t is believed that [the 1949 amendment] will meet the *varying conditions* of practice in *all* states."[121] Again, this passage strongly suggests a congressional intent to create a uniform trigger that could circumvent the procedural idiosyncracies of any given state.

The *Love* holding is in direct conflict with this legislative policy. *Love*'s reading of the statute, by tying the commencement of the removal period to the vagaries of state law and the (eventually determined) sufficiency of process, destroys whatever uniformity Con-

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process[,] whichever is later, instead of "at any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead" as required by section 72 of title 28, U.S.C., 1940 ed. As thus revised, the section will give adequate time and operate uniformly throughout the Federal jurisdiction.

28 U.S.C.A. § 1446(b), Reviser's Note to 1948 Act (West 1973).

118. *See Conticommodity*, 663 F. Supp. at 30.

119. The conclusion that Congress intended to foster uniformity by its 1949 amendment finds further support in the following 1941 description of the then-existing removal provisions:

> [t]he removal statute, which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definitions or characterization of the subject matter to which it is to be 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.

Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 104 (1941). Indeed, it may be said that the entire history of the removal statutes has been to achieve national uniformity. It is highly unlikely that Congress abandoned this concern in 1949.

120. S. REP. No. 303, 81st Cong., 1st Sess., *reprinted in* 1949 U.S.C.C.A.N. 1248, 1248 (emphasis added).

121. *Id.* (emphasis added).

gress hoped to achieve. In order to adopt the *Love* position, therefore, one must conclude that Congress had a policy of uniformity in 1948 that it completely abandoned in 1949, despite several statements in the legislative reports to the contrary.

The *Tyler* position, however, fully accords with the four "purposes" outlined above. Following the express words of the statute in this case does not interfere with congressional goals of solving the New York and nonresident-motorist-statute problems. Moreover, so long as it is understood that the congressional intent to "expand the removal period" only applied to states where the removal period could have begun before a defendant ever saw the complaint, the *Tyler* position does no harm to that purpose. Finally, the *Tyler* approach is the only one to create a uniform thirty-day period for defendants in all states. Thus, the most compelling justification for rejecting *Love* in favor of *Tyler* rests not on rules of construction, but on the intent of Congress as derived from a careful reading of the language of the statute and the legislative history.

## III. CONCLUSIONS AND PROPOSALS FOR LEGISLATIVE CHANGE

The conclusion that the removal period begins upon the receipt of a courtesy copy of a filed complaint should not be taken as an endorsement of that result. Countless attorneys have been unnecessarily surprised by 28 U.S.C. § 1446(b). Countless hours of court time and client funds have been wasted in litigating an issue that should never arise under a rational system of federal jurisprudence.[122] And countless litigants have inadvertently waived, through a trivial and understandable mistake, the right of removal that has been recognized by successive congresses for more than two hundred years.

Finally, it is unlikely that the circuit courts or the Supreme Court will have the opportunity to settle the issue on appeal. Another portion of the statute prohibits appeal from a remand order except in rare circumstances,[123] and thus effectively prevents any

122. As footnotes 6 and 8, *supra*, indicate, at least 61 cases involving this procedural anomaly have been decided since the 1949 amendments, and 26 decisions have been published since 1987. There is no telling how many unpublished district court and magistrate opinions have been decided in that period as well.

123. *See* 28 U.S.C. § 1447(d) (1988) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.").

appellate resolution of the matter.[124] The statute has the practical effect of foreclosing review of an order under 28 U.S.C. § 1446(b) unless (1) a motion to remand was denied, (2) the plaintiff subsequently lost on the merits, (3) the plaintiff decided to appeal, and (4) the plaintiff contested the removal issue on appeal. With respect to the fourth factor, financial and strategic considerations may well lead a plaintiff not to contest removal because a "favorable" ruling on that issue would prevent the appellate court from ruling on substantive issues and throw the case back to "square one" in the state court.

Having concluded that the federal courts may not escape the harsh mandate of 28 U.S.C. § 1446(b), and given the unresolvable split in the case law, I suggest legislative revision. This can be done in a number of ways. Should Congress feel that uniformity remains essential, then it should amend the section to say "receipt by the defendant, at any time and in any manner . . . ."[125] Conversely, if fairness to defendants is the paramount concern, the language could be changed to "receipt by the defendant, through or after formal service of process. . . ."[126] Although neither of these options is perfect, both possess the virtue of simplicity and would, at the least, resolve the split in the case law on this issue.

There is a more complex middle ground that would remove the courtesy copy trap while retaining most of the goal of uniformity. Toward this end, the following language is suggested as a substitute for the current 28 U.S.C. § 1446(b), with revisions in litalics:

> The notice of removal of a civil action or proceeding shall be filed within thirty days of receipt by the defendant of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based *under any of the following circumstances: (1) receipt of said copy through or following service of process; (2) receipt, prior to service of process, where said copy is accompanied by written notice that said receipt commences the removal period under this subsection; or (3)* service of

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124. *See* Jerome I. Braun, *Reviewability of Remand Orders: Striking the Balance in Favor of Equality Rather than Judicial Expediency*, 30 SANTA CLARA L. REV. 79, 82-84 (1990) ("[B]y enacting section 1447(d), Congress expressly granted federal district courts virtually non-reviewable power, presumably in the interests of judicial economy and efficiency, to deprive defendants of their statutory right to have federal district courts adjudicate federal questions.").

125. As the discussion above makes clear, the author does not prefer this version because it leads to unnecessary surprise.

126. This approach would essentially codify the *Love* position. Its drawback, of course, is its complete destruction of uniformity.

> summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant. *For the purpose of subsection (b)(1), questions as to the sufficiency of process shall not affect the commencement of the removal period.*

As revised, subsection (b)(1) of the proposed amendment would essentially restate the *Love* reading of the current section. It is, however, qualified by the final sentence of the revised section, which would ensure that commencement of the removal period is not contingent upon satisfying the service of process laws of the individual states or, for that matter, the Federal Rules of Civil Procedure.[127] Subsection (b)(2) permits commencement based on receipt of a courtesy copy, but ensures that the defendant will have written notice that the period is running. Subsection (b)(3) repeats the current trigger for New York-type jurisdictions, which do not require that an initial pleading ever be served on a defendant in a civil suit.[128]

Such an amendment would have the following salutary effects. First, it would resolve the conflict in the federal courts over the meaning of this section by striking a compromise between *Love* and *Tyler*. In this regard, the amendment requires a heightened degree of formality—that is, service, attempted service, written notice, or summons—to trigger the removal period. This is consistent with *Love*. At the same time, the amendment ensures that *sufficiency* of process under the various state laws remains irrelevant, as is currently the case under the *Tyler* approach. Hopefully, this change will reduce the litigation generated by this section.

Second, the proposed amendment will be fairer to the litigants and their counsel. The increased level of formality required to commence the thirty-day period will prevent the kind of surprise experienced by *B*'s attorney in the opening scenario. In this way, the statute will ensure that an important right is not lost through the understandable inadvertence of the defendant's counsel. At the same time, if *A* wished to force *B* into a quick removal decision, he

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127. Although it is conceivable that attempted service would be so deficient as to create unfairness, such cases would be rare. At the very least, the defendant will have received a copy of a filed complaint that, as set forth in the text above, is sufficient under current law to commence the removal period.

128. In New York, a plaintiff may commence a suit by merely serving the defendant a summons without a complaint. *See, e.g.*, Sauerzopf v. North America Cement Corp., 93 N.E.2d 617, 618 (N.Y. 1950); Viscosi v. Merritt, 510 N.Y.S.2d 30 (N.Y. App. Div. 1986); Henry Sash & Door Co. v. Medi-Complex Ltd., 69 Misc. 2d 269 (N.Y. Dist. Ct. 1972); All-O-Matic Mfg. Corp. v. Shields, 59 Misc. 2d 199 (N.Y. Dist. Ct. 1969).

could either attempt service or give *B* a courtesy copy accompanied by a subsection (b)(2) notice.

Third, the proposed amendment remains substantially consistent with the goal of uniformity. Under subsections (b)(1) and (2), commencement of the removal period is not contingent upon the formal commencement of the action under state law. As long as the defendant receives a copy of the initial pleading either through or after *attempted* service, the removal period commences under subsection (b)(1), whether or not such service is later found to be defective. This ensures that the trigger remains a *federal* one.

Of course, the removal period under the proposed revision would not be *as* uniform as that under the Receipt Rule, and it is possible that a considerable amount of time could elapse between receipt of a copy and the filing of the removal notice. For instance, at least theoretically, the proposed amendment would permit *B* to receive a courtesy copy of a filed complaint without forcing her to remove the action until some kind of formal service is attempted. Depending on state laws requiring service within a specified time after filing, *B* could have a substantial period of time in which she need not file a removal petition, even though she knows that she will remove when the time comes.[129]

I do not see any way to avoid this largely hypothetical difficulty without re-creating the courtesy copy trap. In any event, I do not view this marginal breach of the uniformity principle as sufficient to outweigh the fairness concerns outlined above. Cases of substantial delay, first of all, will be rare given that, in the vast majority of instances, formal service of process will closely follow the courtesy copy or other informal receipt. That delay, moreover, is clearly controlled by the plaintiff, who may at any time force the defendant's hand by utilizing the provisions of the amended subsections (b)(1) and (2). Accordingly, the plaintiff will not be prejudiced. Moreover, until the defendant has been served, there is no danger that the case would proceed in the state court to the prejudice of any party or of the justice system itself. Finally, I suggest that, where a plaintiff has filed a complaint but refuses to attempt service, the courtesy copy

129. It should be remembered, however, that, under the current statute, a substantial amount of time could also elapse. For instance, assume that *A* simply held up a copy of the filed complaint and showed it to *B*. At that point, *B* would know of the suit and would probably know whether federal subject matter jurisdiction existed, but she could wait for months or years to remove (depending on the state) so long as she never "received" a copy. This somewhat bizarre scenario simply underscores the difficulty of insisting on an absolutely uniform trigger.

takes on the character of a threat made for strategic purposes in the settlement negotiations. A rule that relaxes slightly the defendant's obligation to remove under these circumstances could save the courts valuable time and resources in the event that (1) the case is settled, or (2) the plaintiff allows the filed complaint to lapse in state court by failing to prosecute.

The current substantial conflict in the cases interpreting 28 U.S.C. § 1446(b) is intolerable. *Any* amendment that serves to resolve that conflict while increasing the fairness to litigants is preferable to the existing confusion. There are more important questions to litigate.