The Battle of Removal - Is Delay the Ultimate Weapon?: A Note on Martine v. National Tea Company

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[T]he Federal courts may, and should, take such action as will defeat attempts to wrongfully deprive parties entitled to sue in Federal courts of the protection of their rights in those tribunals.¹

I. INTRODUCTION

Almost a century ago, the Supreme Court of the United States recognized the importance of protecting a party's right to remove a suit to federal court. Indeed, this right would be illusory if a party could defeat removal through simple manipulation or inaction. Under authorization of the United States Constitution,² Congress conferred upon federal district courts original jurisdiction over controversies involving citizens of different states.³ Congress also conferred upon the defendant the right to remove an action from state to federal court if the district court has original jurisdiction based on diversity of citizenship.⁴ Congress' intent in creating diversity jurisdiction and the right of removal was to protect out-of-state parties from local prejudice.⁵

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3. 28 U.S.C. § 1332 (1988) provides in pertinent part:
   The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—
   (1) citizens of different States;
   (2) citizens of a State and citizens or subjects of a foreign state;
   (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
   (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.
   (a) 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. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.
   (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.
5. See Barrow S.S. Co. v. Kane, 170 U.S. 100, 111, 18 S. Ct. 526, 530 (1898) (holding that the purpose was to "secure a tribunal presumed to be more impartial than a court of the state in which one of the litigants resides").
Although Congress' intent is clear, plaintiffs often deprive defendants of their right to remove suits to federal court. Do federal courts have the power to protect the right of a party to remove a suit or are they powerless to curb abusive practices by plaintiffs that prevent removal? The recent case of Martine v. National Tea Co. illustrates how a court allowed, though reluctantly, a plaintiff to circumvent removal under 28 U.S.C. § 1446 by intentionally withholding service on the defendant for over a year. This note recommends that federal courts and Congress not tolerate or condone plaintiffs' abusive practices that deprive defendants of their right of removal.

This case note will analyze the federal court's interpretation of 28 U.S.C. § 1446 in Martine, focusing primarily on the one-year time limit provided in § 1446(b). This note will also discuss (1) whether the time limits under 28 U.S.C. § 1446 are procedural or jurisdictional; (2) the interrelation of Louisiana Code of Civil Procedure article 421 and 28 U.S.C. § 1446; (3) whether the court has the power to curb abusive tactics designed to defeat removal; and (4) proposed solutions to curb abusive practices that prevent a party from removing a suit to federal court.

II. FACTS OF MARTINE

On August 26, 1991, Alexis and Paula Martine filed suit in the 19th Judicial District Court in East Baton Rouge Parish, Louisiana. The plaintiffs named as defendants the National Tea Company (doing business as the Real Super Store), Kelley Company, Inc. (Kelley), and Gambit International, Inc., along with their respective liability insurers. The plaintiffs withheld service until one year had

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.
(b) 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 the defendant, whichever period is shorter.
If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be removed on the basis of jurisdiction conferred by section 1332 of this title more than 1 year after commencement of the action.
lapsed from the date the state court suit was filed. Thereafter, they served Kelley on September 11, 1992.8 Kelley timely filed a notice of removal9 on October 9, 1992,10 claiming diversity of citizenship as a basis for subject matter jurisdiction pursuant to 28 U.S.C. § 1332. On October 14, 1992, Kelley filed a supplemental notice of removal. The plaintiffs responded by filing a timely motion to remand.11 The issue before the federal court was whether the defendant was barred from removing the case to federal court by the one-year time limit for removal in diversity actions under 28 U.S.C. § 1446(b).12

The plaintiffs argued that remand was appropriate because the defendant had filed the notice of removal “more than one year after commencement of the action” in violation of 28 U.S.C. § 1446(b). They argued that according to Louisiana Code of Civil Procedure article 421,13 an action commences when it is filed, regardless of whether any attempt to perfect service is made. Hence, the plaintiffs contended that the action commenced on August 29, 1991, the date the suit was filed. Because the defendant filed a notice of removal on October 9, 1992, more than one year later, the plaintiffs maintained, under a plain reading of § 1446(b), that the removal was improper and the case must be remanded to state court.

The defendants argued that removal of the case did not violate the one-year time bar of § 1446(b). They contended that an action commences by the filing of the petition accompanied by a bona fide effort to serve the defendant. Hence, the action did not commence until September 11, 1992, when the plaintiffs actually served the defendant with a copy of the state court petition. Therefore, the notice of removal filed on October 9, 1992, was within the one-year time bar.

The United States district court granted the plaintiffs’ motion to remand the action. The court held that under Louisiana Code of Civil Procedure article 421 an action is commenced by the filing of a pleading, irrespective of whether the plaintiff served the defendant with process. “By delaying service on [the defendant] for over a year, plaintiffs ensured that this action could not be timely

10. Kelley filed within 30 days after receiving, through service, the copy of the initial pleading, as required under 28 U.S.C. § 1446(b). The time limits for removal are discussed infra in the text accompanying notes 44-50.
13. La. Code Civ. P. art. 421 provides: “A civil action is a demand for the enforcement of a legal right. It is commenced by the filing of a pleading presenting the demand to a court of competent jurisdiction. Amicable demand is not a condition precedent to a civil action, unless specifically required by law.”
removed by [the defendant] to a federal forum" because according to 28 U.S.C. § 1446(b), "the case cannot be removed to federal court more than one year after the commencement of the action in state court."

The Martine court recognized the abuses and inequities that could result from the one-year limitation. It also acknowledged that the courts have created exceptions to prevent similar abusive practices. Nevertheless, the court refused to create an exception to prevent the abusive practice. The Martine court concluded that Congress should rewrite the provisions of § 1446(b) to curb such abuses and inequities.

The Martine court also recognized that a contrary decision had been reached by a federal district court in Alabama because the Alabama Code of Civil Procedure has been interpreted to mandate a good faith effort to serve the defendant.

The defendant's right to remove and the plaintiff's right to choose the trial forum often collide, requiring the court and Congress to resolve the conflict. This note will focus on these conflicting rights and the intricacies of 28 U.S.C. § 1446. However, a general discussion of removal jurisdiction and the procedure for removal is beneficial for a full understanding of the issues involved.

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15. Id.
16. As discussed infra at notes 64-74 and accompanying text, the one-year time limit was placed in § 1446(b) to stop removal of cases where substantial action had been taken in state court prior to removal. In Martine, while ruling on the defendant's motion to reconsider, the court correctly recognized that the removal did not interfere with any state court proceeding because of the plaintiffs' decision to withhold service. Martine v. National Tea Co., 837 F. Supp. 749, 750 (M.D. La. 1993), interlocutory appeal denied, No. 93-0193 (5th Cir., February 25, 1994).
17. The Martine court stated:

Decisions have been rendered by the United States Supreme Court and various appellate courts, including the Fifth Circuit Court of Appeals, involving instances where a plaintiff has intentionally sought to prevent a defendant from removing a case to federal court. For example, where a plaintiff intentionally adds as a defendant a resident of the plaintiff's state to prevent the defendant from removing the case to federal court because of the lack of complete diversity [of] citizenship between the parties, the courts have applied the rule of fraudulent joinder which allows the court to disregard the resident defendants.

Id. (footnotes omitted).
18. The court explained:

This court recognizes that the one year limitation upon removal lends itself to abuses and inequities, particularly where, as here, the [plaintiffs] did not attempt service on the defendant until more than one year after the suit was filed in state court. However, it is for the Congress and not this Court to rewrite the provisions of section 1446(b) to curb such abuses.

Martine, 841 F. Supp. at 1422.
19. "The Court recognizes [Greer v. Stilcraft, 704 F. Supp. 1570 (N.D. Ala. 1989)] rendered by Judge Sam C. Pointer, Jr., Chairman of the Judicial Conference Advisory Committee on Civil Rules reaches a contrary result from this Court's ruling. This difference may be due in part to the difference in the laws of the states of Louisiana and Alabama." Martine, 837 F. Supp. at 750.
III. REMOVAL JURISDICTION

The United States Congress has conferred upon defendants the right to remove a case from state to federal court. The Constitution does not grant the right of removal; the right is purely statutory. Nevertheless, the Supreme Court has recognized the importance of the defendant's right of removal, stating that "[t]he Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right." In general, 28 U.S.C. § 1441 authorizes defendants to remove cases over which the district courts have the requisite subject matter jurisdiction.

Parties attempting removal primarily rely on 28 U.S.C. § 1331, federal question jurisdiction, and 28 U.S.C. § 1332, diversity jurisdiction, as bases for removal under § 1441. Accordingly, "the principles governing federal question jurisdiction, [and] diversity of citizenship jurisdiction ... are applicable to removal." For example, for purposes of original federal question subject matter jurisdiction, a case arises "under the Constitution, treaties or laws of the United States" if the adjudication depends on the application of any of these sources of federal law. This general principle of federal question jurisdiction also applies to removal jurisdiction under § 1441(b). Similarly, the basic principles of diversity jurisdiction, such as the requirement of complete diversity between plaintiffs and defendants and the amount in controversy requirement, are fully applicable to § 1441(b).

Although federal question and diversity cases are the actions most commonly removed, there exist several other grounds for removal. These include actions involving separate and independent claims or causes of action; actions against a foreign state; actions against federal officers, members of the armed forces, or

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20. See supra note 4.
21. 14A Charles Alan Wright et al., Federal Practice and Procedure § 3721, at 185-86 (1985) ("The right to remove a case from a state to a federal court is purely statutory and therefore is entirely dependent on the will of Congress") (footnotes omitted).
22. Wecker v. National Enameling and Stamping Co., 204 U.S. 176, 186, 27 S. Ct. 184, 188 (1907) (cited with approval by the United States Fifth Circuit Court of Appeals in Grassi v. Ceba-Geigy, Ltd., 894 F.2d 181, 183 (1990)). See also Heniford v. American Motors Sales Corp., 471 F. Supp. 328, 335 (D.S.C. 1979) ("Although the right of removal is a statutory right, it is a substantial right of the nonresident defendant.").
The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.
24. See supra note 3.
25. See supra note 4.
26. Wright et al., supra note 21, at 192 (footnotes omitted).
27. Id. § 3722, at 231-32.
28. For a more detailed discussion of removal based on federal question and diversity of citizenship, see Wright et al., supra note 21, § 3722 and § 3723, respectively.
federal employees;\textsuperscript{31} or actions involving civil rights that are guaranteed by the Constitution of the United States.\textsuperscript{32}

IV. PROCEDURE FOR REMOVAL

Determining that a federal district court has jurisdiction over the action fulfills only part of the requirement for removal under § 1441(a). This section also requires that the action “be removed by the defendant or the defendants.” Thus, only a defendant possesses the right to remove.\textsuperscript{33} “A plaintiff may not remove a case to federal court, even when they are in a position of a defendant with regard to counterclaims asserted against him.”\textsuperscript{34}

Federal law determines who is a plaintiff and who is a defendant for purposes of applying the removal statute.\textsuperscript{35} The federal court may realign the parties according to their real interest before it decides whether the case was properly removed by a defendant.\textsuperscript{36} Additionally, “[c]ourts have consistently construed 28 U.S.C. § 1446(a) to require that all defendants either join the petition for removal or to consent to such removal.”\textsuperscript{37} However, this rule does not apply when: (1) the non-joining defendant has not been served with process at the time the removal petition is filed;\textsuperscript{38} (2) the non-joining defendant is merely a nominal or formal party;\textsuperscript{39} (3) the removal claim is a separate and independent claim as defined by

\textsuperscript{34} Carlton, 609 F. Supp. at 149. See also Oregon Egg Producers v. Andrew, 458 F.2d 382, 383 (9th Cir. 1972) (“A plaintiff who commences his action in a state court cannot effectuate removal to a federal court even if he could have originated the action in a federal court and even if a counterclaim is thereafter filed that states a claim cognizable in a federal court.”) (citation omitted).
\textsuperscript{35} “For the purpose of removal, the federal law determines who is plaintiff and who is defendant. It is a question of the construction of the federal statute on removal, and not the state statute.” Chicago, R. I. and P. R.R. Co., 346 U.S. at 580, 74 S. Ct. at 294. See also Shamrock Oil and Gas Corp. v. Sheets, 313 U.S. 100, 104, 61 S. Ct. 868, 870 (1941) (“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 to be applied.”).
\textsuperscript{36} See Carlton, 609 F. Supp. at 149-50 (the district court denied an intervenor the right to remove a counterclaim filed against him, holding that the intervenor would be aligned as a plaintiff for purposes of removal).
\textsuperscript{39} See, e.g., Norman v. Cuomo, 796 F. Supp. 654 (N.D.N.Y. 1992) (per curiam) (non-consenting
28 U.S.C. § 1441(c), or (4) the court determines that the non-joining defendant was improperly joined. If a defendant does not join or consent to the notice of removal, the notice must set forth the reason why the defendant has not joined in the removal, or the notice will be considered defective.

A. Time for Removal

The time within which a defendant must file a notice of removal is set forth in 28 U.S.C. § 1446(b). The first paragraph of § 1446(b) covers those cases that are initially removable from state court. The defendant has thirty days to file a notice of removal after receiving a copy of the initial pleading, through service or otherwise.

In states that do not require the plaintiff to furnish the defendant with defendants were nominal parties whose consent to removal was not required); Tri-Cities Newspapers, Inc., 427 F.2d at 327 ("[N]ominal or formal parties . . . are not required to join in the petition for removal.").


42. See, e.g., Lewis v. Rego Co., 757 F.2d 66 (3d Cir. 1985).

43. See id.; Romashko v. Avco Corp., 553 F. Supp. 391, 392 (N.D. Ill. 1983) ("It is defendant's burden under the removal statute . . . to explain affirmatively the absence of codefendants in the petition for removal, and failure to set out such an explanation renders the removal petition defective.").

44. See supra note 7.

45. The courts are split as to the meaning of the phrase "service or otherwise." The issue revolves around whether the 30-day removal period commences when the defendant receives a copy of the initial pleading or when proper service is effected upon the defendant.


According to another approach, it is not necessary for a plaintiff to properly serve the defendant in accordance with state law to trigger the 30-day period. Instead, the 30-day period begins to run from the date the defendant received the initial pleading setting forth a removable claim. This rule has generally been characterized the "receipt rule." Tyler v. Prudential Ins. Co. of America, 524 F. Supp. 1211 (W.D. Pa. 1981), represents this view. For cases that have adopted the Tyler interpretation, see Trepel v. Kohn, Milstein, Cohen & Hausfeld, 789 F. Supp. 881 (E.D. Mich. 1992) (receipt of summons and complaint by registered mail); Wortham v. Executive Info. Sys., Inc., 788 F. Supp. 324 (S.D. Tex. 1992) (receipt of petition though not formally served with process); Arnold v. Federal Land Bank, 747 F. Supp. 342 (M.D. La. 1990) (defective service was sufficient to trigger 30-day time limit); Dawson v. Orkin Exterminating Co., 736 F. Supp. 1049 (D. Colo. 1990) (receipt of complaint date-stamped by the state court by certified mail); Uhles v. F.W. Woolworth Co., 715 F. Supp. 297 (C.D. Cal. 1989) (courtesy copy of complaint given during settlement negotiations before properly served under state
a copy of the initial pleading, the defendant must file the notice of removal within thirty days after the defendant receives service of summons.  

The second paragraph of § 1446(b) provides for cases that were not initially removable when filed in state court, but subsequently became removable. In those cases, the non-resident defendant must file the notice of removal after receiving a copy of "an amended pleading, motion, order or other paper" from which the defendant can first ascertain that the case is removable.

Congress amended the second paragraph of § 1446(b) in 1988 to prevent the defendant from removing a case based on diversity jurisdiction more than one year after commencement of the action. This one-year limitation does not apply to cases in which subject matter jurisdiction is based on federal question jurisdiction as Congress explicitly limited its application to cases "removed on the basis of jurisdiction conferred by section 1332."

B. One-Year Time Limit: Procedural or Jurisdictional?

Two important issues regarding the one-year limitation on removal of diversity suits exist: (1) whether the one-year time limit is procedural or jurisdictional; and (2) when is an action commenced in state court, thereby starting the running of the one-year limitation. To resolve these issues, it is necessary to review the jurisprudence, the removal statutes involved, and the legislative history of these removal statutes.

The Fifth Circuit Court of Appeals in Barnes v. Westinghouse Electric Corp. held that the one-year limitation of § 1446(b) is procedural, not jurisdic-
tional, and may be waived. Further, in Hopkins v. Dolphin Titan International, Inc., the Fifth Circuit affirmed its previous holding that the word “procedural" in § 1447(c) refers to any defect that does not involve the subject matter jurisdiction of the federal district court. Therefore, if the defendant’s notice of removal is filed after the one-year limit has lapsed, the notice is only procedurally defective.

Under 28 U.S.C. § 1447(c), “a motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a).” Therefore, a plaintiff who fails to file a timely motion to remand based on a violation of the one-year time limitation waives his right to have the case remanded to state court. The thirty-day limitation to file a motion to remand does not apply to motions to remand based on the lack of subject matter jurisdiction. Such a motion may be filed any time, and if “at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded” to state court. The court may also remand a suit to state court on its own motion if the federal court lacks subject matter jurisdiction.

The procedural nature of the one-year time limit does not actually curb plaintiffs’ practices designed to prevent removal. However, it allows a defendant to counteract the plaintiff’s attempt to prevent removal if the plaintiff fails to file a timely motion to remand.

V. ANALYSIS OF 28 U.S.C. § 1446

A. Statutory Language

Congress amended the second paragraph of § 1446(b) to include a one-year time limit for removal of cases based on diversity jurisdiction. Although Congress failed to state explicitly the effective date of the amendments, the Fifth Circuit Court of Appeals has held that the effective date of the amendments to § 1446(b) and § 1447(c) is November 19, 1988, the date of enactment. Several courts have

52. 976 F.2d 924, 926 (5th Cir. 1992).
53. 28 U.S.C. 1447(c) (1988) states in part: A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.
54. Id.
55. Id.
57. Barnes v. Westinghouse Elec. Corp., 962 F.2d 513, 515 n.7 (5th Cir. 1992) (“[T]he effective date of . . . sections (1446(b) and 1447(c)) is the date the Act was enacted, which is November 19, 1988.”). See also In re Shell Oil Co., 932 F.2d 1523, 1526 (5th Cir. 1991), cert. denied, 112 S. Ct. 914 (1992); Royer v. Harris Well Serv., Inc., 741 F. Supp. 1247, 1248 (M.D. La. 1990); Horn v. Service
also applied the amendments retroactively to cases pending in state court on the statute's effective date.\textsuperscript{58}

The parties in \textit{Martine} disagreed as to whether federal law or state law determines when a case commences for purposes of § 1446. In their brief to the court, the defendants argued that "[t]he removal statute which is nationwide in its operation, [is] intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied."\textsuperscript{59} Therefore, according to the defendants in \textit{Martine}, federal law should define commencement for purposes of § 1446. The \textit{Martine} court ruled, however, that state law determines the commencement of the action for purposes of the one-year limit on removal.\textsuperscript{60} The congressional statute does not have a nationwide definition for commencement, therefore, state law is essentially the only alternative.\textsuperscript{61}

The differences in state law have led to conflicting decisions in the federal courts regarding the interpretation and application of the one-year limit of §

\textsuperscript{58}Barnes, 962 F.2d at 515 n.7; \textit{In re Shell Oil Co.}, 932 F.2d at 1526; \textit{Royer}, 741 F. Supp. at 1248; \textit{Hom}, 727 F. Supp. at 1344; \textit{Greer}, 704 F. Supp. at 1580.


\textsuperscript{61}Several courts have used this rationale in determining whether prescription has run in a case brought under a federal statute. Thus, federal courts will apply state law to determine whether a suit filed under 42 U.S.C. § 1983 was timely filed. To bring some uniformity to the prescription issue, Congress has recently enacted 28 U.S.C. § 1658 (1990), which sets forth a four-year statute of limitations for all cases filed pursuant to federal statutes enacted on or after December 1, 1990. For cases filed pursuant to acts passed before December 1, 1990, the various state law prescriptive periods continue to apply. Because Congress defined when a suit is prescribed, it can also define when a suit is "commenced" for the purposes of removal. But Congress has not defined "commenced" in the removal statute; therefore, courts must look to state law to determine when a suit is commenced for purposes of removal.
Congress could remedy these conflicting results by creating a uniform definition of "commencement" for § 1446.

B. Legislative History

One of Congress' objectives in amending § 1446(b) to include a one-year limitation on removal was to address problems that arise from a change of parties as an action progresses toward trial in state court. Congress wanted to reduce the opportunity for removal after substantial progress has been made in state court to avoid delay and disruption in the state court.

In effect the amendment would also help preserve comity between the state and federal courts.

Although Congress' intent was to reduce removal where substantial progress has been made in state court, the statutory language does not define the amount of progress that must occur in the state court action before removal becomes impermissible. The statute merely prohibits removal more than one year after commencement of the action in state court. This rule allows for uniform application and relieves the court of the problem of determining whether substantial progress has been made in state court. However, the statute as currently phrased also prevents removal of cases that have not progressed at all in the state court. The Martine case had not progressed in the least because the plaintiff had withheld service; nevertheless, the court held that § 1446(b) required remand. The Martine court was obviously concerned with this problem: "It is very difficult to see how a removal under the facts of this case can interfere with the state court proceedings..."

The application of § 1446 in Martine conflicts with the result in Greer v. Skilcraft, 704 F. Supp. 1570 (N.D. Ala. 1989), because Louisiana's definition of "commencement" differs from Alabama's. See infra text accompanying notes 92-94.

The legislative history reveals in pertinent part:

All of the proposed amendments in this section relate to removal jurisdiction. The amendments would, among other things... establish a one-year limit on removal based on diversity jurisdiction. ...

Subsection (b)(2) amends 28 U.S.C. § 1446(b) to establish a one-year limit on removal based on diversity jurisdiction as a means of reducing the opportunity for removal after substantial progress has been made in state court. The result is a modest curtailment in access to diversity jurisdiction. The amendment addresses problems that arise from a change of parties as an action progresses toward trial in state court. The elimination of parties may create for the first time a party alignment that supports diversity jurisdiction. Under section 1446(b), removal is possible whenever this event occurs, so long as the change of parties was voluntary as to the plaintiff. Settlement with a diversity-destroying defendant on the eve of trial, for example, may permit the remaining defendants to remove. Removal late in the proceedings may result in substantial delay and disruption.


when none have occurred because of plaintiffs' decision to withhold service until the one year time limitation has expired.\(^6\)

The legislative history reflects Congress' concern with "[r]emoval late in the proceedings ... result[ing] in substantial delay and disruption."\(^6\) In many cases in which the amendment bans removal, however, the removal would not cause any delay or disruption to the pending case. On the other hand, the amendment encourages wily plaintiffs to delay the judicial process. The case of \textit{Martine} illustrates this point. The plaintiffs in \textit{Martine} intentionally withheld service from the defendant for more than one year after the commencement of the state court action to prevent the defendant from removing the case to federal court. This inaction delayed the judicial process in both state and federal court. By permitting the plaintiffs to engage in such practice, the \textit{Martine} court may encourage other plaintiffs to delay the judicial process in the same manner. Although some courts acknowledge Congress' intent to prevent removal when there has been substantial progress in state court, they contend that § 1446 gives them no choice but to remand the case, even if it has not progressed at all in state court.\(^6\) On the other hand, other courts refuse to accept that Congress intended to provide "the plaintiff the power to prevent removal by manipulation and inaction."\(^7\) These courts refused to remand the case to state court because they believed the language of § 1446 lead to absurd results. These courts invoked the congressional intent of the amendment to justify their holding—"[t]he one-year ban [is] intended to reduce, not encourage, delays in case adjudication."\(^7\) Further, these courts note that the power given to the plaintiff not only results in delay of case adjudication, but also gives the plaintiff the power to eliminate diversity jurisdiction altogether.\(^7\)

The court in \textit{Martine} questioned whether removing an action that had not progressed in state court was consistent with the congressional intent of § 1446(b).\(^7\) Nevertheless, the court applied the letter of the law, rejecting the

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\item \textit{Greer}, 704 F. Supp. at 1583.
\item The court in \textit{Saunders} summarized this view:
  Congress did not intend plaintiffs, through gimmicks and artful maneuvering used in connection with the one year bar to removal, to straightjacket or deprive non-resident defendants of their legitimate entitlements to removal.
\item Clearly, Congress intended to exclude certain diversity cases from being held in federal court, but it is equally clear Congress did not intend to establish a rule which would allow plaintiffs to circumvent diversity jurisdiction altogether .... \textit{Saunders}, 777 F. Supp. at 1284-85 (citing Kite v. Richard Wolf Medical Instruments, 761 F. Supp. 597 (S.D. Ind. 1989)).
\item The \textit{Martine} court stated:
\end{enumerate}
opportunity to invoke a congressional intent argument. Although judges must not act as legislators, where there is some ambiguity in the law or where the application of the law is contrary to congressional intent, a jurisprudential exception to curb abuse of the law as written is appropriate.74

C. Does the One-Year Time Limit Apply to Both Paragraphs of § 1446?

The Martine court stated that "regardless of when a diversity case becomes removable, the case cannot be removed to federal court more than one year after the commencement of the action in state court."75 The Martine court broadly interpreted the one-year limitation as applying to cases that are initially removable and to cases that are not initially removable as defined in both paragraphs of § 1446(b).

However, it is not clear that the one-year time limit applies to both paragraphs.76 Courts applying the time limit to both paragraphs find that removal statutes are to be strictly construed against removal.77

The plain language of § 1446(b) may be reasonably construed as stating that all cases removed on the basis of diversity are subject to the one-year limit. . . . [T]he fact that Congress chose to place the one-year limit after only one paragraph instead of both should not detract from the purpose of § 1446(b). . . to require prompt removal once diversity of citizenship is known.78

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74. Grassi v. Ciba-Geigy, Ltd., 894 F.2d 181, 183 (5th Cir. 1990) ("Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.") (citing Wecker v. National Enameling & Stamping Co., 204 U.S. 176, 185-86, 27 S. Ct. 184, 188 (1907)).


76. The defendants in Martine did not make the argument that the one-year limitation applies only to the second paragraph of § 1446(b). Therefore, the court did not address whether the Middle District would adopt this view.

77. See, e.g., Rezendes v. Dow Corning Corp., 717 F. Supp. 1435, 1437 (E.D. Cal. 1989) ("Removal statutes have historically been strictly construed.").

However, this conclusion is flawed for two reasons. First, strict construction of removal statutes does not mean manipulative construction. If the statute is clear and unambiguous, the court should not manipulate it to prevent removal. Second, to find that the limitation could be reasonably construed to apply to both paragraphs ignores the rules of English grammar. The plain language of § 1446(b) mandates application of the one-year limit to the second paragraph only. Congress did not simply place the amendment after the second paragraph as an independent statement that applies to both paragraphs, as the court in Perez erroneously portrays. Rather, the time limit is a qualifying phrase connected to the body of the second paragraph. It is well-established in English grammar that a qualifying phrase modifies only what immediately precedes it. Therefore, this qualifying phrase should not modify the first paragraph, but only the second.

Courts supporting the application of the one-year limit to both paragraphs also argue that "[o]ne of Congress' major concerns addressed by the Judicial Improvements Act was the rising caseload in the federal courts." Therefore, there is support in the legislative history for applying the one-year limit to both paragraphs.

In Rezendes v. Dow Corning Corp., the court acknowledges that Congress explicitly stated in the legislative history that "the amendment 'addresses problems that arise from a change of parties as an action progresses toward trial in state court.'" These actions are covered by the second paragraph of § 1446. But, the court stated that Congress did not indicate that application of the one-year rule was intended to only apply in such situations.

However, several factors support the argument that Congress did indicate that the one-year limit applied to the second paragraph only. Congress created the amendment as a dependent clause, connected to the second paragraph. Congress explicitly stated that it was concerned with reducing the opportunity for remand after substantial progress has been made in state court—progress that does not occur in cases covered by the first paragraph of § 1446(b). Congress also explicitly stated that the amendment addresses problems that arise from a change of parties as an action progresses toward trial in state court, not with cases that are initially removable. Congress cannot provide every possible application of the amendment in the legislative history. Nevertheless, if Congress was so concerned with the rising caseload and wanted to indicate that the one-year limit applied to both paragraphs, it could have done so.

The third reason given by the courts for applying the one-year limit to both paragraphs is that such an interpretation will preserve comity between the state and federal courts. However, comity between the state and federal courts is not

79. Id.
81. The legislative history is cited supra at note 64.
82. Rezendes, 717 F. Supp. at 1438.
83. See supra note 64.
endangered when the federal courts retain jurisdiction over a case that the defendant has a right to remove. A case governed by the first paragraph of § 1446(b) could hardly progress in state court because the defendant has only thirty days to remove after receiving the initial pleading. Therefore, by retaining jurisdiction over a case governed by the first paragraph, a federal court will neither disrupt nor disturb the state court proceeding—nor threaten comity. Martine was such a case.

The court in Rezendes made one final argument for applying the one-year limitation to the first paragraph of § 1446(b). It stated:

[E]ven assuming that the final clause in § 1446(b) only applies to cases not initially removable, plaintiffs are still able to prevent removal of diversity actions simply by joining a non-diverse defendant at the outset, (thereby making "the case stated by the initial pleading" one which is not removable) and refusing to serve and/or refusing to dismiss the non-diverse defendant until after the one-year time limit has passed.85

However, the Rezendes court failed to consider the fraudulent joinder doctrine.86 If the federal court finds that the plaintiff joined the resident defendant solely for the purposes of defeating diversity jurisdiction, the court may disregard the resident defendant for purposes of removal.87 Therefore, the court could treat the case as one that is initially removable and not subject to the one-year limitation.88

VI. LOUISIANA CODE OF CIVIL PROCEDURE ARTICLE 421 AND THE FEDERAL REMOVAL STATUTES

Under § 1446, the one-year time limit runs from the "commencement of the action." The Martine court and other courts use state law to determine when a suit commences for purposes of the one-year time limit for removal.89 Therefore, it is necessary to evaluate Louisiana’s definition of “commencement.” Article 421 of the Louisiana Code of Civil Procedure provides that a civil action "is commenced by the filing of a pleading presenting demand to a court of competent jurisdiction."90 The defendants in Martine, however, argued that an action does not commence with mere filing of the suit. Rather, the defendants, citing Greer v.

85. Rezendes, 717 F. Supp. at 1439 n.3.
86. The fraudulent joinder doctrine is discussed infra at note 99.
88. Plaintiffs may, however, defeat removal by legitimately joining a resident defendant and refusing to serve the defendant until after one year. Therefore, other legislative action is needed to completely eliminate the effect of withholding service from the defendant.
89. Some courts do not believe state law should be used to determine when a suit is commenced under the removal statutes. See supra note 59.
90. See supra note 13.
Skilcraft,91 argued that an action is commenced when a party files a pleading presenting demand, and makes a bona fide attempt to serve process on the defendant.92

However, Louisiana courts have held that Article 421 does not require a bona fide effort to serve.93 These courts have interpreted Article 421 according to its clear and unambiguous language—an action "is commenced by the filing of a pleading." Service of citation is not a condition precedent to the civil action's commencement.94 Therefore, applying Louisiana law, a suit is commenced by its filing for purposes of § 1446(b). The court in Martine could not use Greer as precedent because it applied Alabama, not Louisiana, law. Without a uniform definition of "commencement," federal courts will have conflicting decisions regarding the removal statutes, which are intended to be uniform in their application. This note recommends that Congress eliminate this problem by amending § 1446(b) to provide a uniform definition for commencement of an action.95

VII. THE COURT'S POWER TO CURB ABUSES

A. An Intentional Withholding of Service Exception?

The plain language of § 1446(b) seems to give to the plaintiff the power to eliminate removal based on diversity jurisdiction by intentionally withholding service of process. Such action causes delay and undermines the congressional purpose of amending § 1446(b). What power does the court have to stop these

92. Several Alabama cases have stated that under the Alabama Code of Civil Procedure "an action is commenced when the complaint . . . is filed with the court, although the event does not constitute 'commencement' for all purposes." These cases held that an "action [is] not 'commenced' when . . . filed with the circuit clerk . . . with[out] the bona fide intention of having it immediately served." Greer, 704 F. Supp. at 1583 (citing Ward v. Saben Appliance Co., 391 So. 2d 1030, 1035 (Ala. 1980)).
93. Martinez v. Reed, 490 So. 2d 303, 306 (La. App. 4th Cir. 1986); de la Vergne v. de la Vergne, 479 So. 2d 549, 550 (La. App. 1st Cir. 1985); Haynie v. Haynie, 452 So. 2d 426, 427 (La. App. 3d Cir. 1984); Sims v. Sims, 247 So. 2d 602, 603-04 (La. App. 3d Cir. 1971).
94. A review of several older Louisiana cases reveals that under prior law an action did not commence until service of citation on the defendant. D'Asaro v. Sawyer, 87 So. 2d 346 (La. Ct. App., Orl. 1956); Commercial Nat'l Bank v. Henderson, 173 So. 790, 791 (2d Cir. 1937). See also Federal Ins. Co. v. T. L. James & Co., 69 So. 2d, 636, 638 (La. App. Orl. 1954) (The court found that, for purposes of prescription, "[a] plaintiff cannot hand a petition to the clerk, with instructions to make an entry of filing on it, and then withhold it from service until further instructions, and afterwards contend that the petition was actually filed when the entry of filing was made."); Canada v. Frost Lumber Indus., Inc., 9 So. 2d 338, 340 (La. App. 2d Cir. 1942).
This jurisprudence was based on 1870 Code of Practice article 359 that provided:
The joining of issue is in fact the foundation of the suit, as citation is that of the action; it is only after this is done that the suit begins; the parties are then in a situation to discover what evidence is necessary in support of their respective claims. (emphasis added). The present Louisiana Code of Civil Procedure replaced the 1870 Code of Practice in 1960.
95. Discussed infra in Part VIII.
abuses? In *Wecker v. National Enameling and Stamping Co.*, the United States Supreme Court stated:

> [T]he Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal court as to permit the state courts, in proper cases, to retain their own jurisdiction.

When a party intentionally tries to defeat removal, the Supreme Court firmly stated that "the Federal courts may, and should, take such action as will defeat attempts to wrongfully deprive parties entitled to sue in Federal courts of the protection of their rights in those tribunals." The courts have created several jurisprudential exceptions in an attempt to curb attempts to wrongfully defeat the right of removal. These exceptions include the fraudulent joinder doctrine and the improper assignment of interest rule.

The fraudulent joinder rule covers those instances in which a plaintiff in a civil action has "fraudulently joined" a defendant for the sole purpose of defeating the federal court's diversity jurisdiction. Without complete diversity, a defendant cannot remove a case to federal court. The removing defendant has the heavy burden of proving fraudulent joinder.

To prove fraudulent joinder, the defendant "must show either that there is no possibility that the plaintiff would be able to establish a cause of action against the [resident] defendant in state court; or that there has been outright fraud in the plaintiff's pleading of jurisprudential facts." The federal district court "must then evaluate all of the factual allegations in the light most favorable to the plaintiff, resolving all contested issues of substantive fact in favor of the plaintiff." Further, "the district court must resolve any uncertainties as to the current state of controlling substantive law in favor of the plaintiff." If the federal court finds that there is even a possibility that a state court would find a cause of action stated against the resident defendant, it must find that the resident defendant has been properly joined and remand the case to state court for lack of diversity jurisdiction. On the other hand, if the federal court finds that the plaintiff joined the non-resident defendant solely for the purpose of defeating diversity, and there is no possibility of a valid claim against the resident defendant, then the court may

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96. 204 U.S. 176, 27 S. Ct. 184 (1907).
97. Id. at 186, 27 S. Ct. at 188, quoted with approval by the Fifth Circuit Court of Appeals in *Grassi v. Ciba-Geigy, Ltd.*, 894 F.2d 181, 183 (5th Cir. 1990).
98. Id. at 182-83, 27 S. Ct. at 187.
100. *B., Inc.*, 663 F.2d at 549 (footnote omitted).
101. *Id.*
102. *Id.*
103. *Id.* at 550.
disregard the resident defendant for purposes of diversity jurisdiction and removal.\textsuperscript{104}

The improper assignment of interest rule functions in a similar manner. It authorizes and imposes a duty on federal district courts to "examine the motives underlying a partial assignment which destroys diversity and to disregard the assignment in determining jurisdiction if it be found to have been made principally to defeat removal."\textsuperscript{105} Federal courts have created these exceptions to support their policy of protecting a party's right to remove a case to federal court.

A judicially created exception to the one-year time period of § 1446 designed to defeat attempts by plaintiffs to deprive defendants of the right to remove by intentionally withholding service of process would be consistent with the Supreme Court's mandate. As the court in \textit{Martine} stated, "It appears that a similar rule is required [to protect the defendant's right to removal] where a plaintiff intentionally withholds service on a defendant for one year to prevent a defendant from removing a case to federal court."\textsuperscript{106} Therefore, if a federal district court finds that a party intentionally withholds service to defeat removal under the one-year time limit set forth in § 1446(b), a rule similar to that devised for improper assignments would allow the court to disregard the elapsed time in determining the timeliness of the removal. If such a rule is created, the court must also determine the burden of proof that must be satisfied by the defendant.

\section*{B. Requisite Burden of Proof}

For the court to find a "fraudulent joinder," the removing party must prove by clear and convincing evidence that there is no possibility that the plaintiff has a cause of action against a resident defendant.\textsuperscript{107} On the other hand, improper or collusive assignment is resolved as a simple question of fact.\textsuperscript{108} A rule governing intentional withholding of service should be subject to the same standard as improper assignment. To better understand the reason behind this conclusion, one must understand why fraudulent joinder and improper assignment are subject to different standards of proof. The court in \textit{Grassi v. Ciba-Geigy, Ltd.} explained that "in a fraudulent joinder case, . . . the only way to attack the joinder is by proving

\begin{itemize}
  \item 105. Grassi \textit{v.} Ciba-Geigy, Ltd., 894 F.2d 181, 185 (5th Cir. 1990). For a more detailed discussion of improper assignment, see 8 A.L.R. Fed. 845 (1971) (validity in effect of plaintiffs assignment of claim or part thereof to prevent removal of action from state court to federal district court on grounds of diversity of citizenship).
  \item 107. Grassi, 894 F.2d at 186 (acknowledging that "claims of fraudulent joinder must be plead with particularity and proved by clear and convincing evidence") (citing Parks \textit{v.} New York Times Co., 308 F.2d 474, 478 (5th Cir. 1962), \textit{cert. denied}, 376 U.S. 949, 84 S. Ct. 964 (1964)).
  \item 108. \textit{Id.} (citing Bass \textit{v.} Texas Power \& Light Co., 432 F.2d 763, 766-67 (5th Cir. 1970), \textit{cert. denied}, 401 U.S. 975, 91 S. Ct. 1194 (1971)).
\end{itemize}
fraud in the [opponent's] pleading of jurisdictional facts. As with any allegation of fraud, it must be proved by clear and convincing evidence. On the other hand, in a collusive assignment case, the parties do not allege fraud in the pleadings. Rather, the court evaluates an assignment that does not concern the merits of the case. Therefore, the issue of whether there has been a collusive assignment is to be resolved as a simple question of fact. Because fraudulent joinder cases concern the merits of the case, all disputed issues of fact concerning the defendant's liability must be resolved in the light most favorable to the plaintiff to prevent the district court from having to try the entire case to determine whether there has been a fraudulent joinder of a particular defendant. The district court thereby avoids "trespass upon the judicial 'turf' of the state courts." Because partial assignment cases do not concern the merits of the case, "no question arises of encroachment upon state court jurisdiction.

Just as the motive behind the assignment of interest does not concern the merits of the case, the motive behind intentional withholding of service does not concern the merits. The party complaining of the withholding of service would not allege fraud regarding the facts of the case. Therefore, the claim should not be subject to the higher legal standard applied in fraudulent joinder cases. In investigating motive, the court need not delve into the merits of the case, and will not "trespass upon the judicial turf of the state court. Similar to collusive assignment cases, the issue of whether service was withheld to prevent removal under the one-year limit of § 1446(b) should be resolved as a simple question of fact.

Federal courts have adopted the view that removal statutes are to be strictly construed against removal and in favor of remand. The Supreme Court of the United States explained this rule in Shamrock Oil & Gas Corp. v. Sheets:

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 jurisdic-

109. Grassi, 894 F.2d at 186.
110. Id.
111. Id.
112. The court in Grassi explained the difference between fraudulent joinder and collusive assignment as follows:

[D]espite having similar effects on jurisdiction, fraudulent joinder cases are fundamentally different from collusive assignment cases. The first issue involved in resolving an allegation of fraudulent joinder is whether the plaintiff has stated a claim against the nondiverse defendant. In doing so, all disputed issues of fact concerning that defendant's liability must be resolved in the light most favorable to the plaintiff. This is done to prevent the trial court from having to try the entire case in order to determine whether a claim has been stated against a particular defendant. In this manner the district court avoids "trespass upon the judicial 'turf' of the state courts." In the case of a partial assignment, however, a determination of the motive behind the assignment does not concern the merits of the case, so that no question arises of encroachment upon state court jurisdiction.

Id. (citations omitted).
113. 313 U.S. 100, 61 S. Ct. 868 (1941).
tion 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." 114

The policy behind the strict construction of removal statutes is to prevent encroachment on the state courts' jurisdiction and to preserve comity, as well as to protect the right of the plaintiff to choose the forum. 115 If there is a doubt as between allowing removal or remanding the case to state court, remand will usually prevail.

The court in Martine contended that creating a new jurisprudential rule regarding intentional withholding of service should be the work of the Supreme Court or an appellate court. However, the defendant may not be allowed access to the appellate court if his case is remanded. Under 28 U.S.C. § 1447(d) an "order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." The Supreme Court in Thermitron Products, Inc. v. Hermansdorfer116 held that § 1447(d) prohibited review only of remand orders based on § 1447(c). 117 Thermitron allows appeal or review by writ when remand was based on purely administrative concerns. Congress has since amended 28 U.S.C. § 1447(c), 118 and appellate courts are having difficulty applying Thermitron under the new language of § 1447(c). 119

The Fifth Circuit stated in In re Shell Oil Company:

When Congress amended § 1447(c), it deleted the reference to "improvident removal" while simultaneously adding a requirement that motions to remand based on "any defect in removal procedure" be made within 30 days. These changes reflect a congressional intent to delete improvident removal as an unreviewable basis for remand. . . . This

114. Id. at 108-09, 61 S. Ct. at 872 (citation omitted).
117. At the time of Thermitron, 28 U.S.C. § 1447(c) read in part: "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case . . . ."
118. Pub. L. No. 100-702, § 1016(c)(1) amended 28 U.S.C. § 1447(c) to read in part: "A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."
119. See In re Allstate Ins. Co., 8 F.3d 219, 221 (5th Cir. 1993) (holding that the court "may review a remand order on petition for writ of mandamus . . . provided that it was entered on grounds not authorized by § 1447(c)"). Cf. In re Medscope Marine Ltd., 972 F.2d 107, 110 (5th Cir. 1992) (holding that timely remand motions premised on a defect in removal procedure are unreviewable under § 1447(d)). See also In re Digicon Marine, Inc., 966 F.2d 158 (5th Cir. 1992); McDermott Int'l, Inc. v. Lloyds Underwriters, 944 F.2d 1199 (5th Cir. 1991); In re Shell Oil Co., 932 F.2d 1523 (5th Cir. 1991) (allowing appeal of remand); In re Shell Oil Co., 932 F.2d 1518 (5th Cir. 1991) (allowing review on petition of mandamus); Soley v. First Nat'l Bank of Commerce, 923 F.2d 406 (5th Cir. 1991) (not allowing appeal).
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leaves remand orders for lack of subject matter jurisdiction as the only clearly unreviewable remand orders.120

Therefore, if the Court in Martine based its remand on something other than lack of subject matter jurisdiction, under In re Shell Oil Company, the Fifth Circuit will have jurisdiction to review the case on appeal. The court in Martine held that its remand order is based on 28 U.S.C. § 1446(b) and is not based on § 1447(c).121 However, the Fifth Circuit did not follow In re Shell Oil Company122 and refused to consider an appeal of the defendant.123

The Martine court contended, this is “a classic case for appellate review under 28 U.S.C. § 1292(b) if review by ordinary appeal is not available.”124 Nevertheless, the Fifth Circuit determined, based on In re Medscope Marine Ltd., that it had no jurisdiction to consider the appeal. The Martine court was correct when it concluded that “[i]t is possible that only the Congress can correct the concerns the Court has about a plaintiff intentionally withholding service for a year to prevent a defendant from removing a case to federal court.”125 The Fifth Circuit’s decision makes it clear that until Congress acts to remedy these abuses, the federal district courts should create a jurisprudential rule to prevent plaintiffs from defeating removal by intentionally withholding service of process. The Supreme Court in Wecker gave the federal courts its approval to do so.126 Accordingly, it would be appropriate to create such a rule.

VIII. PROPOSED LEGISLATIVE SOLUTIONS

Congress has several options to correct these inequities arising under § 1446(b). First, Congress could amend § 1446(b) to clarify that the one-year

120. In re Shell Oil Co., 932 F.2d at 1520 (footnote omitted).
122. In re Shell Oil Co. was based partially on Air-Shields, Inc. v. Fullam, 891 F.2d 63 (3d Cir. 1989), in which the Third Circuit found that the district court’s remand for untimely removal was based on § 1446(b) and not on § 1447(c). Therefore, the panel held that it could review the writ of mandamus applied for by the defendant.
123. Martine v. National Tea Co., No. 93-0193 (February 25, 1994). The Fifth Circuit stated: The district court’s basis for the remanding the instant case was the defendants removal of the action from state court after it has been pending there for more than one year. 28 U.S.C. § 1446(b) proscribes removal of cases on the basis of jurisdiction more than one year after commencement of the action. Timely remand motions premised on a defect in removal procedure are unreviewable by this Court.
124. The court stated that “[a]ll of the requirements of § 1292(b) are met in this case. The order involves a controlling question of law to which there is a difference of opinion and a decision from the appellate court will materially advance the ultimate termination of the litigation.” Martine, 837 F. Supp. at 751.
125. Id. at 750.
126. Recall that the Fifth Circuit cited Wecker with approval in Grassi v. Ciba-Geigy. See supra note 1.
limitation applies only to the second paragraph. By applying the limitation only to cases that have progressed toward trial (paragraph two cases), Congress' intent will be achieved.\textsuperscript{127} Second, Congress could amend § 1446(b) to include a uniform definition of commencement. To eliminate the particular abuse discussed in this note, the uniform definition should state that an action is commenced by the filing of the suit in state court coupled with a bona fide effort of the plaintiff to serve process on the defendant. Third, Congress could impose a time limit for service under § 1446 similar to that of Rule 4 of the Federal Rules of Civil Procedure.\textsuperscript{128} For example, if the party who filed suit in state court does not serve the defendant within 120 days after the filing of the action, or cannot show good cause why such service was not made within that period, the action shall not be considered "commenced" for purposes of computing the one-year limit of § 1446(b).

Both of these amendments are consistent with the policy that the removal statute, which is nationwide in its operation, is intended to be uniform in its application and unaffected by local law definitions or characterizations of the subject matter to which it is to be applied.

The Louisiana legislature could also eliminate the abuse of intentionally withholding service to defeat removal by amending Louisiana Code of Civil Procedure article 421. Article 421 could be amended to require the filing of a pleading presenting the demand to a court of competent jurisdiction and a bona fide effort to serve the defendant to commence an action. The plaintiff would no longer be able to simply withhold service on the defendant to defeat removal. The plaintiff would have to prove that he at least made an effort to serve the defendant at the time suit was filed.

Second, the legislature could amend the Louisiana Code of Civil Procedure to impose time limits on service of process similar to those of Rule 4(j) of the Federal Rules of Civil Procedure. Presently, a party can file a lawsuit in state court and withhold service of process for up to five years.\textsuperscript{129} The amendment would eliminate this practice by mandating that service be made within the time limit, unless the plaintiff can show good cause why service was not made.

The lack of a time limit for service creates a gap in the law that undermines some of the policies behind the laws of prescription. It discourages prompt

\textsuperscript{127} Martine illustrates that paragraph one cases, those that are initially removable, do not progress in state court when the plaintiff withholds service of process for over one year. Therefore, removal of the case will not disrupt the state proceeding.

\textsuperscript{128} Rule 4(j) of the Federal Rules of Civil Procedure provides in pertinent part:

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

\textsuperscript{129} La. Code Civ. P. art. 561 provides in part:

An action is abandoned when the parties fail to take any step in its prosecution or defense in the trial for a period of five years.
adjudication of claims and consequently allows relevant evidence to become stale. Also, this gap allows parties to delay the lawsuit to increase the amount of prejudgment interest that the other party must pay on a judgment. The amendment would fill this gap and remove many of the opportunities for abuse.

IX. CONCLUSION

Congress has created a statutory right for a defendant to remove a case to federal court. The Supreme Court has stated that defendants should not be wrongfully deprived of this right. The recent amendment to 28 U.S.C. § 1446(b) slightly curtails the defendant’s right by providing a one-year limitation on removal in diversity cases. Although Congress intended to reduce interference with a pending state court suit and eliminate unnecessary delays and disruptions of the judicial process, the amendment may actually cause judicial delay by inviting plaintiffs to intentionally withhold service of process from defendants to prevent removal of the suit to federal court. Congress’ intent will not be implemented under the current language of the amendment.

The intentional deprivation of a defendant’s right to remove a suit to federal court should not be endorsed by the courts or Congress. Congress should amend 28 U.S.C. § 1446(b) to clarify that the one-year limitation applies only to the second paragraph. Congress should also amend 28 U.S.C. § 1446(b) to provide a uniform definition of “commencement” of a suit for purposes of removal. This amendment should require a plaintiff to make a bona fide effort to serve the defendant within the time set forth in Rule 4 of the Federal Rules of Civil Procedure. Similar action should be taken by the Louisiana legislature to amend Louisiana Code of Civil Procedure article 421 to require service of process within 120 days from the filing of the suit in state court. Until Congress or the Louisiana legislature takes appropriate action to curb the abuse of the one-year limitation on removal in diversity cases, or if they fail to take action, federal courts should create an intentional withholding of service exception to § 1446, similar to the fraudulent joinder and improper assignment of interest exceptions. Legislative or judicial action is clearly required to protect the defendant’s right to remove a suit to federal court.

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