

## LITIGATION

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MONDAY, DECEMBER 3, 2007

### Multiple Defendants, Multiple Service Dates, **Time** to **Remove?**

*Second Circuit courts apply the statute differently.*

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**T**HE ISSUE APPEARS simple: A case in which federal subject matter jurisdiction plainly exists is filed in state court, and the attorney representing the defendant seeks to remove it to federal court. The statute provides that the defendant has 30 days from service of the complaint to remove the action.

But where there are multiple defendants served at different times, does the 30 day period begin to run from the time the first or the last defendant is served? The New York federal district courts are split on the issue, and the Second Circuit has yet to resolve it.

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#### Removal Statute and ‘Murphy’

28 U.S.C. §1446(b) provides in relevant part that:

[t]he 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 ...

Removing parties must demonstrate that the federal courts have subject matter jurisdiction and that they have complied with the removal statute,<sup>1</sup> which the courts strictly construe.<sup>2</sup>

In *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999), the Supreme Court held that the 30 day time period for the defendant to remove did not begin running until the defendant was actually served with process. The Court therefore clarified that, despite the “or otherwise” language of the statute, the removal period would not begin to run (and the defendant would have

no obligation to take action) until the defendant was subject to the court’s jurisdiction through service of process. The Court’s decision was predicated on the rationale that a defendant’s right to remove should not slip away until that party is actually brought before the court through service of process.<sup>3</sup>

Although some courts have relied on the holding in *Murphy Bros.* in ruling that the 30 day removal period should not begin running until the last defendant is served, thus ensuring that the last-served defendant’s right to remove does not “slip away” before the party is actually served, the *Murphy Bros.* ruling did not address how the removal statute applies in the multiple defendant situation. See, e.g., *Barnhart v. Federated Dep’t Stores, Inc.*, 2005 WL 549712 (S.D.N.Y. Mar. 8, 2005) (Koeltl, J.) at \*6 (“*Murphy Brothers* did not deal with the time to remove when multiple defendants are involved”). Indeed, neither the Supreme Court nor the Second Circuit has ever addressed the issue. See

*Glatzer v. Hanley*, 2007 WL 1334971 at \*2 (S.D.N.Y., May 8, 2007) (Chin, J.).

This lack of binding authority has resulted in conflicting and seemingly irreconcilable results in the New York federal courts.

### Applying the Traditional View

The traditional view (and, at least according to certain decisions, the “majority” position), is that in multiple defendant cases the notice of removal must be filed within 30 days of the date of service on the first-served defendant.<sup>4</sup> These cases reflect a strict interpretation of the statutory 30 day rule, except in those instances in which issues of equity, such as the loss of the later-served defendant’s right to remove entirely, require a more lenient treatment.

*Yang v. ELRAC, Inc.*, 2004 WL 235208 (S.D.N.Y. Feb. 6, 2004) (Haight, J.), is illustrative of the traditional view. In *Yang*, plaintiff commenced an action in New York state court, served defendant ELRAC on Oct. 20, 2003, and served defendant Martinez on Oct. 21, 2003. Defendants filed a collective notice of removal on Nov. 20, 2003, within 30 days of service on Martinez but 31 days after service on ELRAC.

The court held that “[i]t is established that failure of the first defendant served in a state court action to file a notice of removal with the district court within thirty days of service will prevent all subsequently served defendants from removing the action.” *Id.* at \*1. The court further held that the “first-served” rule should apply “unless there are outstanding issues of equity which make the first served rule undesirable.” *Id.* Because the court found no issues of equity that precluded application of the “first-served” defendant rule, it granted plaintiff’s remand motion.

The court in *Phoenix Global Ventures, LLC v. Phoenix Hotel Assocs., Ltd.*, 2004 WL 2360033 (S.D.N.Y. Oct. 19, 2004) (Holwell, J.), also applied the traditional view and granted a remand motion where defendants failed to remove within 30 days of service on the first-served defendant.

In that case, plaintiff Phoenix Global commenced a CPLR §3213 proceeding in New

York State Supreme Court. Certain defendants were served on May 21, 2004, and the remaining defendants were served by June 1, 2004. A notice of removal was filed on June 25, 2004. The court stated that the May 21, 2004, service “triggered the thirty day period, which expired on June 21, 2004,” and found that the late filing was a basis to grant plaintiff’s remand motion. *Id.* at \*\*3-4.

Similarly, the court in *Quinones v. Minority Bus Line Corp.*, 1999 WL 225540 (S.D.N.Y. Apr. 19, 1999) (Pauley, J.), followed the “first-served” rule and held that “[w]here there are multiple defendants, the receipt of the initial pleading by the first defendant who

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28 U.S.C. §1446(b) provides that the defendant has 30 days from service of the complaint to remove the action to federal court. But where there are multiple defendants served at different times, does the 30 day period begin to run from the time the first or the last defendant is served?

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may remove the action triggers the start of the thirty day period.” *Id.* at \*2.<sup>5</sup>

Another rationale on which some New York federal courts rely in applying the first-served defendant rule is the “unanimity” principle, which requires that all defendants consent to removal. These courts remand actions where all defendants failed to consent to remand within the 30 day period after the first defendant was served. See *Payne v. Overhead Door Corp.*, 172 F.Supp.2d 475, 477-78 (S.D.N.Y. 2001) (remand motion granted where all defendants did not consent within 30 day period); *Smith v. Kinhead*, 2004 WL 728542 at \*2 (S.D.N.Y. Apr. 5, 2004) (Sweet, J.) (noting that removal jurisdiction must be strictly construed and granting remand motion because “the removal statute has consistently been interpreted to require that all defendants consent to removal within the thirty day period”).

### The Modern Rule

In contrast to the cases that interpret the 30 day rule strictly, other New York decisions have followed the last-served defendant rule in determining when the time to remove begins to run. Those courts applying the last-served defendant rule are typically animated by a desire to preserve the later-served defendant’s removal rights and to prevent a plaintiff from staggering service on multiple defendants to gain a procedural advantage.

*Varela v. Flintlock Constr., Inc.*, 148 F. Supp. 2d 297 (S.D.N.Y. 2001), provides a good example of the application of the last-served defendant rule where any other outcome would cause the later-served defendant’s rights to be waived.

There, plaintiff commenced an action in state court against defendants Flintlock and Steck, and served Flintlock on June 14, 1994, and Steck on June 29, 1994. Plaintiff filed an amended complaint on March 7, 2001—seven years later—and added Weiss as a new defendant.

Weiss filed a notice of removal on March 30, 2001. Under these circumstances, the court determined that Weiss had 30 days from service upon him to remove the case and that he was not bound by the time that the initial defendants were served. The court found that allowing Weiss 30 days to remove the case preserved his ability to seek removal, and, if the “first-served” defendant rule were applied, Weiss’ procedural rights would have been lost years before he was even made a party to the litigation.

The court in *Varela* further noted that a concern of courts applying the “last-served” defendant rule, which it characterized as the minority rule, is that the “first-served” rule could allow plaintiffs to manipulate the litigation and defeat removal by serving defendants at different times. *Id.* at 299-300.<sup>6</sup>

The *Varela* court further held that application of the last-served defendant rule was consistent with the Supreme Court’s *Murphy Bros.* decision, because allowing the time period to run from service on the later-

served defendant ensured that his procedural rights would not “slip away...before one is subject to any court’s authority.” *Varela*, 148 F. Supp. 2d. at 300, quoting *Murphy Bros.*, 526 U.S. at 356.

Similarly, in *Barnhart v. Federated Dep’t Stores, Inc.*, 2005 WL 549712 (S.D.N.Y. March 8, 2005) (Koeltl, J.), defendant Federated was served on April 15, 2004, defendant Wonderling was served on May 25, 2004, and defendant Sheehan was served on May 26, 2004. A notice of removal was filed on May 27, 2004.

Plaintiff claimed the removal was untimely because it was filed more than 30 days after service on the first defendant. The court denied the remand motion and found that “the application of the first-served defendant rule as advocated by the plaintiff would allow the right of removal of defendant Sheehan to have expired on May 15, 2004, eleven days before Sheehan was even served with the summons and complaint.” *Id.* at \*6.

The court in *Fernandez v. Hale Trailer Brake & Wheel*, 332 F. Supp. 2d 621 (S.D.N.Y. 2004), also applied the “last-served” rule to preserve a defendant’s removal right which otherwise would have been lost.

In *Fernandez*, the first-served defendant was served four months prior to later served defendants. The later served defendants removed within 30 days after they were served. The court followed the “last-served” rule, finding that it:

is the wiser course, especially in a case such as this where subsequent defendants were added to the complaint almost four months after the initial defendants were served. The application of a “first-served” defendant rule in this case would deprive these later-added defendants of their ability to exercise procedural rights to remove the case before they are subject to the jurisdiction of the state court and before they are even on notice that they will be parties to the case.

*Id.* at 623.

Other decisions following the “last-served” defendant rule also noted the policy reason of protecting a defendant’s right to remove. See *Buechner v. Avery*, 2005 WL 3789110 at \*\*3-4 (S.D.N.Y. Feb. 14, 2005) (noting that first-

served rule “would give the party seeking to avoid removal the strategic opportunity to sequence service of process so as to minimize the possibility of removal,” by, for instance, waiting 30 days before serving the second party); *Berisic v. Winckelman*, 2003 WL 21714930 at \*4 (S.D.N.Y., July 23, 2003) (Buchwald, J.) (although not reaching the issue, noting that the last-served rule ensures that the later-served defendants’ rights do not “slip away”).

### Conclusion: Consensus Approach

The divergent New York opinions reflect a tension between a strict construction of the removal statute, which is consistent with the traditional narrow interpretation of federal courts’ subject matter jurisdiction, and a more lenient reading of the statute in order to preserve defendants’ rights.

*Tate v. Mercedes-Benz USA, Inc.*, 151 F. Supp. 2d 222 (N.D.N.Y. 2001), provides a third approach that synthesizes the two conflicting rules. Adopting the Fourth Circuit rule, the court in *Tate* held that the first-served defendant was required to file a removal petition within 30 days of service, and that later-served defendants had 30 days from service on them to join in the first-served defendant’s “otherwise valid removal petition.” *Id.* at 224.

Under this approach, each party is obligated to file a removal petition within 30 days, thus adhering to the statute’s plain language and avoiding the anomalous result that a later-served defendant’s removal petition could revive the removal right of a first-served defendant long after 30 days from service on the first-served defendant had expired. In addition, by allowing each defendant 30 days to remove, the *Tate* approach ensures that no defendant’s right to remove will “slip away,” and, moreover, thwarts a plaintiff’s efforts to preclude removal by serving multiple defendants more than 30 days apart.

In sum, practitioners should be wary of the potential pitfalls associated with the timing of removal in the multiple-defendant situation. Until the Second Circuit provides guidance on the issue, it appears that the

best approach is to file a removal petition within 30 days of the first-served defendant to avoid any possible waiver.



1. *Tate v. Mercedes-Benz USA, Inc.*, 151 F. Supp. 2d 222, 223 (N.D.N.Y. 2001) (citing *Maybruck v. Haim*, 290 F. Supp. 721, 724 (S.D.N.Y. 1968)).

2. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 109, 61 S.Ct. 868, 872 (1941) (quoting *Healy v. Ratta*, 292 U.S. 263, 270, 54 S. Ct. 700, 703(1934)).

3. *Murphy Bros.*, 526 U.S. at 356.

4. See *Varela v. Flintlock Const., Inc.*, 148 F. Supp. 2d 297, 299 (S.D.N.Y. 2001) (stating that “the majority of courts, including the Fifth Circuit and district courts in this District, have followed the ‘first served defendant’ rule,” and noted that the rationale underlying the majority rule is that “an earlier-served defendant who does not seek removal within thirty days of being served has waived his or her right to do so and is therefore precluded from consenting to a later-served defendant’s notice of removal”); *In re Tamoxifen Citrate Antitrust Litig.*, 222 F. Supp. 2d 326, 334 (E.D.N.Y. 2002) (majority of courts apply “first served rule”); Moore’s Federal Practice, 3d Ed., § 107.30[3][a] (“[w]hen a case involves multiple defendants, traditionally most courts have held that the 30-day removal period begins to run when the first defendant is served.... Thus, the failure of the first-served defendant to file a removal notice within 30 days of service prevents all subsequently served defendants from later removing the action unless there is evidence that the plaintiff intentionally delayed naming another defendant in a bad faith attempt to prevent removal”).

5. Because there was insufficient evidence to ascertain when one of the defendants received the pleading, the court in *Quinones* ordered the submission of further evidence before the remand motion could be decided.

6. The court in *Yang* referred to *Varela* as an example of when application of the “first-served” defendant rule would be inequitable. *Yang*, 2004 WL 235208 at \*1.