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NOTES

ON REMOVAL JURISDICTION'S UNANIMOUS CONSENT REQUIREMENT

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INTRODUCTION

Unanimity is often difficult to achieve, even on the most insignificant issues.[1] As a result, in American law and politics unanimous agreement is rarely required; instead, majority or super-majority consensus is the norm.[2] In federal civil procedure, however, unanimity is required for defendants attempting to remove their lawsuits from state court to federal court.[3] Although this unanimity requirement is not in doubt, as courts have enforced it without exception for over a century,[4] uncertainty regarding the removal procedure lingers. Specifically, U.S. federal courts continue to disagree about how defendants must express their consent to the removal.[5] Given the considerable impact a successful—or unsuccessful—removal procedure can have on the final outcome of a lawsuit,[6] this judicial vacillation places litigants in a procedural quandary, leaving both plaintiffs and defendants unsure of what exactly is required to remove a case.[7]

There are two competing approaches to the practical application of the unanimity rule in a removal proceeding, and whenever a

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1. *See* A. Georges L. Romme, *Unanimity Rule and Organizational Decision Making: A Simulation Model*, 15 ORG. SCI. 704, 705 (2004) ("[M]any authors assume the attainment of unanimity is infeasible or impossible, particularly in large groups."). However, this difficulty may subside as the number of decision makers decreases.

2. *E.g.*, U.S. CONST. amend. XII (noting that the President must receive a majority of electoral votes); N.Y. BUS. CORP. § 708(d) (Consol. 1983) (requiring a majority vote by quorum of directors for board action); Richardson v. United States, 526 U.S. 813, 817 (1999) (finding that the Sixth Amendment requires unanimous jury to convict in a federal criminal trial).

3. *See* Chi., Rock Island, & Pac. Ry. Co. v. Martin, 178 U.S. 245, 247-48 (1900) (stating that because the removal statute "is confined to the defendant or defendants, it was well settled that a removal could not be effected unless all the parties on the same side of the controversy united in the petition").

4. *See id.*; Gableman v. Peoria, Decatur & Evansville Ry. Co., 179 U.S. 335, 337 (1900); Charles Clark & James William Moore, *A New Federal Civil Procedure I: The Background*, 44 YALE L.J. 387, 411 n.113 (1935) (discussing the history of removal statutes).

5. *See infra* Part II.

6. One study found that plaintiffs won 71 percent of diversity cases initially filed in federal court, but plaintiffs won only 34 percent of removed diversity cases. Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 581 (1998).

7. More than 30,000 cases are removed annually. CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3721 n.119 (2009).

plaintiff challenges removal on this procedural ground, the court must decide which interpretation is appropriate. Numerous federal courts require all defendants to individually express their consent to removing the case,[8] whereas many other federal courts permit one defendant to pledge in the notice of removal that all the other defendants have consented to the action.[9] These different approaches to the unanimity requirement exist in large part because the rule is judicially created and, consequently, the courts lack any clear statutory guidance.[10] As such, the exact details of the rule have been left to individual federal courts to develop and apply.

This Note investigates the current judicial disagreement regarding the unanimous consent requirement and ultimately argues that, based on several considerations, the best approach for federal courts to apply is the individual consent rule: this standard prohibits an attorney from vouching for the consent of the other defendants and instead requires each defendant to submit his own, written consent to the court. In reaching this conclusion, Part I discusses the history and fundamentals of the removal procedure. Part II then explores and analyzes the most pertinent and illustrative cases regarding each interpretation of the unanimity rule. These cases demonstrate the current judicial split, the judicial considerations behind each interpretation of the unanimity rule, and how an improper removal can significantly affect the final outcome of a case. Next, Part III explores the policy rationales behind removal jurisdiction. This discussion is essential to resolving the current judicial split because any interpretation of the unanimity rule must be consistent with the general policy aspirations of removal jurisdiction.

Finally, Part IV offers several arguments for and against each interpretation of the unanimity rule, including the proper application of Federal Rule of Civil Procedure 11 within the removal statutes, the importance of having clear procedural rules, and the need for courts to strictly construe all aspects of the removal process. In the end, this Note concludes that the independent-and-unambiguous consent rule is much more than a vexatious require-

8. *See infra* Part II.B.
9. *See infra* Part II.A.
10. *See* Spillers v. Tillman, 959 F. Supp. 364, 368 (S.D. Miss. 1997).

ment that courts impose on defendants. Instead, the rule is superior because it reflects an accurate interpretation of the removal statutes, protects a defendant's right to due process, promotes certainty and reduces superfluous litigation, and furthers the numerous policy goals of the unanimity rule and of removal jurisdiction in general.

I. THE FUNDAMENTALS OF REMOVAL JURISDICTION

Removal is the process by which defendants in a civil case may move to federal court an action that a plaintiff originally filed in state court. Although removal jurisdiction is not grounded in the Constitution, it has existed in American jurisprudence for more than two centuries.[11] That removal is constitutional and within Congress's power to implement is a settled question in American law,[12] and today the procedure operates as one of three ways a party may invoke federal jurisdiction—along with filing directly in federal court or seeking the review of a state court decision in federal court.[13]

In many lawsuits, the state and federal courts share jurisdiction, giving plaintiffs the decision of whether to proceed initially in either judicial system.[14] In these situations of concurrent jurisdiction, the plaintiff and defendant each have an opportunity to avoid state court—the plaintiff by initially filing in federal court and the defendant by removing the action to federal court after the plaintiff files in state court. Thus, assuming federal jurisdiction exists, the state court will hear the case only when both parties agree that state court is the best forum for the dispute.[15] Within this jurisdictional tug of war, removal provides defendants with the rare

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11. *See* Tristin K. Green, Comment, *Complete Preemption—Removing the Mystery from Removal*, 86 CALIF. L. REV. 363, 364 (1998); *see also* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 56 (3d ed. 1999).

12. *See* Tennessee v. Davis, 100 U.S. 257, 265 (1879); Ry. Co. v. Whitton's Adm'r, 80 U.S. 270, 289-90 (1871); Edward Hartnett, *A New Trick from an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 FORDHAM L. REV. 1099, 1108 n.41 (1995).

13. JAMES WILLIAM MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.03 (3d ed. 2011).

14. *See* ROBERT CLINTON ET AL., FEDERAL COURTS: THEORY AND PRACTICE 585 (1996).

15. *Id.* at 588.

opportunity to alter the forum.[16] Nevertheless, the plaintiff, as master of the complaint, still retains significant control over the forum in which the lawsuit will be litigated[17] and has numerous tools at his disposal to foil a defendant's ability to remove the case.[18]

Although simple in theory, removal is a complicated legal procedure with many moving parts.[19] As one federal judge asserted nearly a century ago, "[t]hat there is no other phase of American jurisprudence with so many refinements and subtleties, as relate to removal proceedings, is known by all who have to deal with them."[20] Another commentator described the law regarding removal jurisdiction as "a snare and a delusion."[21] Regardless of the difficulties surrounding the removal process, it remains an important and dependable arrow in the American litigator's quiver, as evidenced by the fact that as many as 11 percent of the cases in federal court during a given year entered that forum through removal.[22]

A. A Brief History

The scope and application of removal jurisdiction has evolved over the past several centuries. At English common law, no removal procedure existed.[23] In the United States, the Judiciary Act of 1789 first enumerated the right to removal, but this law limited removal

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16. *See* James T. Fousekis & James F. Brelsford, *Removal*, LITIGATION, Summer 1985, at 39; *see also* FRIEDENTHAL ET AL., *supra* note 11, at 56.

17. FRIEDENTHAL ET AL., *supra* note 11, at 58.

18. *See* 28 U.S.C. § 1441(b) (2006) (stating the forum-defendant rule, which prohibits removal premised on diversity jurisdiction when any defendant is a citizen of the state in which the suit is filed); Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 AM. U. L. REV. 49, 53-64 (2009); Victor E. Schwartz et al., *Federal Courts Should Decide Interstate Class Actions: A Call for Federal Class Action Diversity Jurisdiction Reform*, 37 HARV. J. ON LEGIS. 483, 485-86 (2000).

19. *See* Hartnett, *supra* note 12, at 1107.

20. Hagerla v. Miss. River Power Co., 202 F. 771, 773 (S.D. Iowa 1912); *see also* Harper v. Sonnabend, 182 F. Supp. 594, 595 (S.D.N.Y. 1960) ("[Removal] luxuriates in a riotous uncertainty.").

21. JAMES HAMILTON LEWIS, REMOVAL OF CAUSES FROM STATE TO FEDERAL COURTS 8 (1923).

22. *See* MOORE ET AL., *supra* note 13, § 107.03; Yosef Rothstein, *Ask Not for Whom the Bell Tolls: How Federal Courts Have Ignored the Knock on the Forum Selection Door Since Congress Amended Section 1446(b)*, 33 COLUM. J.L. & SOC. PROBS. 181, 185 (2000).

23. *See* WRIGHT ET AL., *supra* note 7, § 3721.

to diversity jurisdiction actions only.[24] The 1789 Act, moreover, permitted removal by "aliens, nonresident defendants, and parties to suits concerning land titles in which one party relied on a [title granted in a nonforum state] and an adverse party relied on a grant from the state in which the suit was brought."[25] Nearly a century later, the Judiciary Act of 1875 significantly expanded the ability of litigators to remove an action by allowing the removal of nearly every lawsuit over which there was federal jurisdiction and, for the first time, by granting "either party" to the suit—that is, either the plaintiff or the defendant—the opportunity to remove.[26] At all other times since the adoption of the 1789 Judiciary Act, the right of removal had been limited to only defendants.[27]

Twelve years after the 1875 Judiciary Act, Congress enacted the Judiciary and Removal Act of 1887. The 1887 Act provided the modern foundation for removal jurisdiction by restricting the removal power to only defendants and by prohibiting removal when the defendant's pleadings were the exclusive basis for federal jurisdiction.[28] It stated:

> [A]ny suit of a civil nature ... of which the circuit courts of the United States are given original jurisdiction ... which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district.[29]

Today, 28 U.S.C. § 1441, one of several modern removal statutes, is based on the 1887 Act[30] and similarly specifies that only defendants have the statutory right to remove "any civil action brought in a State court of which the district courts of the United States have

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24. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80; *see also* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 105-06 (1941); Hartnett, *supra* note 12, at 1114.

25. WRIGHT ET AL., *supra* note 7, § 3721.

26. Judiciary Act of 1875, ch. 137, § 2, 18 Stat. 470, 470-71 (1875); *see also Shamrock Oil & Gas Corp.*, 313 U.S. at 104-05; WRIGHT ET AL., *supra* note 7, § 3721.

27. *Shamrock Oil & Gas Corp.*, 313 U.S. at 105; *see also* H.R. REP. NO. 1078-49, at 1 (1886).

28. WRIGHT ET AL., *supra* note 7, § 3721.

29. Judiciary Act of 1887, ch. 373, § 2, 24 Stat. 552, 553 (1887).

30. *See* Green, *supra* note 11, at 365.

original jurisdiction."[31] Specifically, removal may be based on diversity jurisdiction,[32] federal question jurisdiction,[33] or on one of several statutory grounds.[34]

B. The Removal Procedure

1. Basic Principles of Removal

Although commentators have described removal as a "peculiar procedure" and a "judicial curiosity," there are several consistent features within the process.[35] First, § 1441 allows a case to be removed only from a state court to a federal court.[36] There is no procedure for moving a case from federal court to state court or from one state court to another state court.[37] Second, § 1441 applies to only civil actions, not criminal proceedings in state courts.[38] Third, as § 1441(a) notes, only "the defendant or the defendants" may remove a case.[39] A plaintiff may not remove a case,[40] even when the plaintiff becomes a defendant due to a counterclaim.[41] Third-party defendants are also not entitled to remove a case in the absence of specific statutory authority.[42] It may be obvious, then,

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31. 28 U.S.C. § 1441(a) (2006).

32. U.S. CONST. art. III, § 2; 28 U.S.C. § 1332(a).

33. U.S. CONST. art. III, § 2; 28 U.S.C. § 1331.

34. *See, e.g.*, 28 U.S.C. §§ 1442-44, 1452(a).

35. MOORE ET AL., *supra* note 13, § 107.03.

36. *See* FRIEDENTHAL ET AL., *supra* note 11, at 57 (quoting Tinney v. McClain, 76 F. Supp. 694, 698 (N.D. Tex. 1948)).

37. *See id.*

38. *See id.* at 57 & n.6.

39. 28 U.S.C. § 1441(a) (2006); *see also* FRIEDENTHAL ET AL., *supra* note 11, at 57.

40. *See* Am. Int'l Underwriters (Phil.), Inc. v. Cont'l Ins. Co., 843 F.2d 1253, 1260 (9th Cir. 1988).

41. *See* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 104-07 (1941); CLINTON ET AL., *supra* note 14, at 593-99. *See generally* Haden P. Gerrish, Note, *Third-Party Removal Under Section 1441(c)*, 52 FORDHAM L. REV. 133 (1983).

42. Federal courts have consistently ruled that third-party defendants are not "defendants" within the meaning of § 1441(a). *See* First Nat'l Bank of Pulaski v. Curry, 301 F.3d 456, 461-62 (6th Cir. 2002); Fed. Ins. Co. v. Tyco Int'l Ltd., 422 F. Supp. 2d 357, 373-74 (S.D.N.Y. 2006). This restriction also applies to parties joined as counterclaim defendants. *See* Capitalsource Fin., L.L.C. v. THI of Columbus, Inc., 411 F. Supp. 2d 897, 899 (S.D. Ohio 2005). However, courts have upheld removal by third-party defendants when there is explicit statutory authorization to do so. *See* Ciolino v. Ryan, No. C03-1396, 2003 WL 21556959, at *3 n.4 (N.D. Cal. July 9, 2003); FRIEDENTHAL ET AL., *supra* note 11, at 61 n.36.

that nonparties to a lawsuit are also not entitled to remove a case because, in § 1441(a), "defendant" refers exclusively to a party brought into a suit through adequate service of process.[43] Finally, a case may be removed only to the federal district court that "embrac[es]" the state court from which the action is being removed.[44] In addition to these basic principles, there are numerous other procedural rules that a defendant must follow in order to successfully remove a case.[45]

2. Subject Matter Jurisdiction, Timing Rules, and the Filing Process

As noted above, a defendant may remove a lawsuit only when he could have originally filed it in a federal district court.[46] To make that determination, the jurisdiction issue is analyzed just as it would have been had the case originally been filed in federal court.[47] If the action is being removed based on diversity jurisdiction, a court determines diversity of citizenship at the commencement of the action and at the time of removal,[48] and the constitutional requirements of Article III, Section 2, and the statutory requirements of 28 U.S.C. § 1332, including the amount-in-controversy requirement, are in full effect.[49] If, on the other hand, federal question jurisdiction is the foundation for removal, the well-pleaded complaint rule still applies, along with the other requirements of Article III, Section 2, and 28 U.S.C. § 1331.[50]

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43. FRIEDENTHAL ET AL., *supra* note 11, at 57; *see also* Hous. Auth. of Atlanta v. Millwood, 472 F.2d 268, 272 (5th Cir. 1973).

44. 28 U.S.C. § 1441(a) (2006). After a case is properly removed, it may be transferred to another federal district court. *Id.* §§ 1404, 1406(a).

45. *E.g.*, *id.* § 1446(b) (timing requirements); *id.* § 1446(d) (filing requirements).

46. *Id.* § 1441(a).

47. FRIEDENTHAL ET AL., *supra* note 11, at 58.

48. *See* Stevens v. Nichols, 130 U.S. 230, 231 (1889); Lombardi v. Paige, No. 00 CV 2605 RCC, 2001 WL 303831, at *2 (S.D.N.Y. Mar. 28, 2001); FRIEDENTHAL ET AL., *supra* note 11, at 60.

49. *See* FRIEDENTHAL ET AL., *supra* note 11, at 58. If a case is removed pursuant to § 1332, the forum-defendant rule also applies. *See* 28 U.S.C. § 1441(b) (2006).

50. *See* FRIEDENTHAL ET AL., *supra* note 11, at 58; *see also* Merrell Dow Pharm., Inc. v. Thompson, 478 U.S. 804, 808 (1986); Arthur R. Miller, *Artful Pleading: A Doctrine in Search of Definition*, 76 TEX. L. REV. 1781, 1783 (1998).

28 U.S.C. § 1446 sets out the timing requirements for removal. A defendant seeking removal must file a notice of removal within thirty days of receiving service of process.[51] If the case is not removable at the time of service, the defendant must file for removal within thirty days of when "it may first be ascertained that the case is one which is or has become removable."[52] But, if the case later becomes removable because of diversity jurisdiction, it cannot be removed more than one year from the commencement of the action.[53]

The federal courts currently disagree, however, about the application of these timing rules when multiple defendants are served at different times.[54] This discord has led to three divergent approaches, each of which receives approval from numerous federal jurisdictions: (1) the thirty-day time frame to remove begins as soon as the first defendant is served, and if no defendant removes the case during that window, later-served defendants cannot remove the case;[55] (2) the thirty-day time frame to remove does not begin until the last defendant is served;[56] and (3) the *McKinney* rule, which gives the first-served defendant thirty days to file for removal

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51. *See* Murphy Bros. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 346 (1999); Jay P. Lechner, *Recent Trends in the Eleventh Circuit: Removal Jurisdiction and Procedures in Employment Law Litigation*, 28 NOVA L. REV. 351, 373 (2004).

52. 28 U.S.C. § 1446(b).

53. *Id.*

54. *See* Lechner, *supra* note 51, at 374; *see also* Rothstein, *supra* note 22, at 210-13; Lindsay E. Hale, Comment, *Triggering Removal Under 28 U.S.C. § 1446: The Eleventh Circuit's Adoption of the Last-Served Defendant Rule in* Bailey v. Janssen Pharmaceutica, Inc., 32 AM. J. TRIAL ADVOC. 363, 369-81 (2008); Briant S. Platt, Note, *Section 1446(b) Federal Removal Jurisdiction and the Thirty-Day Clock: Should a Motion to Amend Trigger the Time Bomb?*, 4 NEV. L.J. 120, 126-35 (2003).

55. *See* Betts v. Larsen Intermodal Servs., Inc., No. 05-0600-CG-C, 2006 WL 1748600, at *4 (S.D. Ala. June 21, 2006); Smith v. Health Ctr. of Lake City, Inc., 252 F. Supp. 2d 1336, 1345-46 (M.D. Fla. 2003).

56. *See* Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 533 (6th Cir. 1999); Piacente v. State Univ. of N.Y. at Buffalo, 362 F. Supp. 2d 383, 387 (W.D.N.Y. 2004). In 2009, H.R. 4113 was introduced in the House of Representatives to codify the later-served defendant rule within § 1446(b); the bill is currently before the House Subcommittee on Courts and Competition Policy and the Senate Judiciary Committee. H.R. 4113, 111th Cong. § 103 (2010); Library of Congress, *Bill Summary & Status, 111th Congress (2009-2010), H.R. 4113, Committees*, http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR04113:@@@c (last visited Sept. 25, 2011).

and also gives each later-served defendant thirty days from when he is served to join the removal notice.[57]

If the removing defendant meets the previously mentioned requirements for removal, § 1446(d) enumerates exactly how he must proceed.[58] After the defendant files the notice of removal, he must promptly give written notice to all adverse parties and file a copy of the notice of removal with the clerk of the state court from which the defendant is removing the case.[59] After receiving a copy of the notice, the state court must immediately stop all proceedings on the case because, regardless of the removal's propriety, the state court's subsequent actions would be invalid.[60] A defendant may waive the opportunity to remove the case, however, by defending against the lawsuit in state court before filing for removal.[61]

3. Remand

A plaintiff may challenge the propriety of the removal by filing a motion to remand pursuant to § 1447(c).[62] The defendant then bears the burden of proving that the removal was proper.[63] Motions to remand that are premised on procedural defects in the removal must be filed within thirty days after the defendant filed the notice of removal;[64] a motion to remand based on a lack of subject matter jurisdiction may be filed at any time.[65] The federal district court must also remand the case sua sponte if it discovers a jurisdictional

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57. *See* McKinney v. Bd. of Trs. of Marland Cmty. Coll., 955 F.2d 924, 928 (4th Cir. 1992); Jonathan K. Youngblood, *An Overview of Removing and Remanding Cases Originally Filed in State Court*s, *in* MANAGING COMPLEX LITIGATION 2007: LEGAL STRATEGIES AND BEST PRACTICES IN "HIGH-STAKES" CASES 31, 47-49 (2007) (citing cases).

58. 28 U.S.C. § 1446(d) (2006).

59. *Id.*

60. FRIEDENTHAL ET AL., *supra* note 11, at 64; *see also* 28 U.S.C. § 1446(d). If the case is remanded, the state court may restart the proceedings. *See* FRIEDENTHAL ET AL., *supra* note 11, at 64.

61. FRIEDENTHAL ET AL., *supra* note 11, at 64 & n.53.

62. 28 U.S.C. § 1447(c).

63. R. G. Barry Corp. v. Mushroom Makers, Inc., 612 F.2d 651, 655 (2d Cir. 1979); FRIEDENTHAL ET AL., *supra* note 11, at 64.

64. 28 U.S.C. § 1447(c).

65. *Id.* For more on the classification of procedural and jurisdiction defects, see Scott Dodson, *In Search of Removal Jurisdiction*, 102 N.W. U. L. REV. 55, 55-79 (2008); *see also* Alex Lees, Note, *The Jurisdictional Label: Use and Misuse*, 58 STAN. L. REV. 1457, 1470-80 (2006).

defect in the removal.[66] A plaintiff waives the opportunity to remand the case if, once the removed case begins proceeding on its merits, he fails to timely object to the removal.[67]

II. THE UNANIMITY RULE: A CIRCUIT SPLIT

The final procedural hurdle for defendants attempting to remove a case to federal court is that every served defendant must consent to the removal.[68] Consequently, each defendant must both agree to the removal and express that agreement.[69] This "unanimity rule" is a procedural requirement, the violation of which may result in the case being remanded to state court if the plaintiff brings the error to the attention of the court within thirty days of the removal.[70] Although the unanimity requirement is judicially created and not specifically enumerated by any statute or procedural rule,[71] federal courts have consistently and steadfastly applied it.[72]

The unanimity rule protects plaintiffs from litigating cases in separate forums, which would occur if one defendant was able to remove the claim against himself while other defendants allowed their suits to remain in state court. As one federal district court has described it, "[o]ne of the purposes of this 'rule of unanimity' is to prevent the defendants from gaining an unfair tactical advantage by splitting the litigation and requiring the plaintiff to pursue the case in two fora simultaneously, thereby creating needless duplication of effort and additional expense."[73] The rule also promotes

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66. 28 U.S.C. § 1447(c).

67. FRIEDENTHAL ET AL., *supra* note 11, at 64. Jurisdictional defects in the removal are never waivable. *Id.*

68. Balazik v. Dauphin, 44 F.3d 209, 213 (3d Cir. 1995).

69. *See id.*

70. *See id.*; *see also* Johnson v. Helmerich & Payne, Inc., 892 F.2d 422, 423 (5th Cir. 1990).

71. *See* Spillers v. Tillman, 959 F. Supp. 364, 368 (S.D. Miss. 1997). The pending bill that would codify the later-served defendant rule within § 1446(b) would also institute the unanimity rule. *See* H.R. 4113, 111th Cong. § 103 (2010). But, if passed as currently drafted, the amendment would not resolve how defendants must actually show consent. H.R. 4113, 111th Cong. § 103 (2010).

72. *See* Chi., Rock Island, & Pac. Ry. Co. v. Martin, 178 U.S. 245, 247-48 (1900); *see also* Wis. Dep't of Corr. v. Schacht, 524 U.S. 381, 393 (1998) (Kennedy, J., concurring) ("Removal requires the consent of all of the defendants.").

73. Sansone v. Morton Mach. Works, Inc., 188 F. Supp. 2d 182, 184 (D.R.I. 2002).

consistent state and federal court rulings and protects defendants desiring to stay in state court by not allowing one defendant to force other unwilling defendants into the federal forum.[74]

Although there is no reason to doubt the future of the unanimity rule itself, federal courts are divided regarding the functional application of the rule in multi-defendant lawsuits. Some federal courts require each defendant to submit his own consent form,[75] whereas other federal courts allow one defendant to pledge in the notice of removal that all the other defendants have consented.[76] This Part discusses the most prominent federal cases that illustrate this judicial discord and the rationales that courts on each side of the divide have applied.

A. The Vouching Rule

Several federal courts have adopted a rule that allows one defendant, in the notice of removal, to vouch for the consent of the other defendants. For example, in *Proctor v. Vishay Intertechnology, Inc.*, the Ninth Circuit Court of Appeals held that a timely notice of removal filed by one defendant containing an averment of the other, nonmoving defendant's consent was sufficient to satisfy the unanimity rule's consent requirement.[77] Similarly, in *Harper v. AutoAlliance International, Inc.*, the Sixth Circuit Court of Appeals ruled that only one attorney of record must sign the notice of removal so long as that attorney certifies that the remaining defendants have consented.[78] Some courts have gone so far as to declare that it is sufficient for one defendant to orally express consent to the moving defendant as long as that moving defendant files the notice of removal on time.[79]

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74. *Id.*

75. *See infra* Part II.B.

76. *See infra* Part II.A.

77. 584 F.3d 1208, 1224-25 (9th Cir. 2009).

78. 392 F.3d 195, 201-02 (6th Cir. 2004).

79. *See, e.g.*, Clyde v. Nat'l Data Corp., 609 F. Supp. 216, 218 (N.D. Ga. 1985) ("[The unanimity] rule does not require that every defendant actually sign the same petition.... However, the cases indicate that such unanimity must be expressed to the court within the thirty day period, whether by petition, written consent or oral consent."); Colin K. v. Schmidt, 528 F. Supp. 355, 358 (D.R.I. 1981) (concluding that defendant's oral consent to removal is sufficient).

1. Proctor v. Vishay Intertechnology, Inc.

In *Proctor*, minority shareholders brought an action against the defendant corporation, its shareholders, and Ernst & Young, LLP, for breach of fiduciary duty and waste of corporate assets.[80] After the defendants removed the action to federal court, the plaintiffs filed a motion to remand, which the federal district court denied.[81] The court then granted the defendants summary judgment, and the minority shareholders appealed.[82] Of particular importance was the plaintiffs' motion to remand, which was premised on procedural defects in the removal notice.[83]

The plaintiffs argued that the notice of removal was improper because a defendant did not provide a timely, written expression of his consent to the removal petition that Ernst & Young filed.[84] Ernst & Young's notice of removal stated that all defendants had consented to the removal of the action, but one defendant did not file his own written notice of removal until well after the thirty-day removal time frame expired.[85] As an issue of first impression for the Ninth Circuit, the court chose to adopt the Sixth Circuit's rule that consent is properly expressed when an attorney of record signs the notice and states that the remaining defendants consent to the removal, rather than requiring each defendant to individually submit written notice of his consent.[86]

To determine which rule to apply, the *Proctor* court considered the relevant modern removal statute[87] and the seminal Supreme Court case on the unanimity rule, *Chicago, Rock Island, & Pacific Railway Co. v. Martin*.[88] Noting that *Martin* described the unanimity rule but did not define how defendants must express their consent to removal, and without any federal statute to provide

80. *Proctor*, 584 F.3d at 1213.
81. *Id.* at 1213, 1218.
82. *Id.* at 1218.
83. *Id.* at 1219.
84. *Id.* at 1224.
85. *Id.*
86. *Id.*
87. *Id.* at 1225.
88. 178 U.S. 245, 248 (1900) ("It was well settled [under the Judiciary Act of 1875] that a removal could not be effected unless all the parties on the same side of the controversy united in the petition.").

guidance, the Ninth Circuit court looked to the principles of the removal process and the rules for attorney representations to the court for direction.[89] In particular, the court cited § 1446(a), which requires defendants to sign the notice of removal "pursuant to Rule 11 of the Federal Rules of Civil Procedure."[90] Rule 11, the court noted, requires that "[e]very pleading, written motion, and other paper must be signed by at least one attorney of record."[91] The court continued, stating that Rule 11 also prescribes that "[b]y presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney ... certifies that ... the factual contentions [therein] have evidentiary support."[92]

The court acknowledged two concerns that arise when one defendant is permitted to vouch for another defendant's consent: the fear of a defendant erroneously stating the other defendant's consent, and the concern that a nonmoving defendant might tacitly allow the removal only to later object to it by claiming nonconsent after determining that the new federal forum is unfavorable.[93] Ultimately, however, the court held that Ernst & Young's notice of removal, although unsigned by another defendant, was sufficient because of two mitigating factors that alleviated the above concerns: the moving party was bound by the threat of sanctions pursuant to Federal Rule of Civil Procedure 11, and the nonmoving codefendant knew of the removal petition and thus had an adequate opportunity to object to it.[94]

2. Harper v. AutoAlliance International, Inc.

The Sixth Circuit's decision in *Harper*, which, as noted, was persuasive in the *Proctor* holding, reached the same result by applying a comparable analysis.[95] In *Harper*, the plaintiff filed a retaliatory discharge claim against several defendants.[96] The

89. *Id.*
90. *Id.* (quoting 28 U.S.C. § 1446(a) (2006)) (internal quotation marks omitted).
91. *Id.* (quoting FED. R. CIV. P. 11(a)) (internal quotation marks omitted).
92. *Id.* (quoting FED. R. CIV. P. 11(b)).
93. *Id.*
94. *Id.*
95. 392 F.3d 195, 201-02 (6th Cir. 2004).
96. *Id.* at 198-99.

defendants removed the case to the United States District Court for the Eastern District of Michigan, which denied the plaintiff's motion to remand.[97] The court subsequently granted summary judgment for the defendants.[98] The plaintiff appealed the district court's rejection of his motion to remand, claiming that not every defendant consented to the notice of removal.[99]

The attorneys for three of the four defendants had signed the notice of removal.[100] The notice stated that the three signing attorneys had "obtained concurrence from counsel" for the fourth defendant, Jeffrey Kelly.[101] The plaintiff contended that pursuant to § 1446(a), each defendant must sign the notice of removal because Rule 11 does not allow one defendant to make representations or file pleadings on behalf of his codefendants.[102] The *Harper* court, however, rejected this interpretation of Rule 11 and instead held that nothing in the rule prohibited an attorney from making a representation regarding a nonmoving codefendant's consent.[103] If the three signers had fraudulently vouched for Kelly's consent, the court noted, it could have remanded the case due to the procedural defect and issued sanctions.[104]

3. Roybal v. City of Albuquerque

An interesting disagreement has also developed within the Tenth Circuit regarding the consent requirement. In 2008, the United States District Court for the District of New Mexico ruled that each party to a lawsuit must individually express consent.[105] But, that same year, the court chose not to apply that ruling in a subsequent case and instead allowed one defendant to express consent for

97. *Id.* at 199-200.
98. *Id.* at 197-98.
99. *Id.* at 199-200.
100. *Id.* at 201.
101. *Id.*
102. *Id.*
103. *Id.* at 201-02.
104. *Id.* at 202; *see also* GREGORY P. JOSEPH, SANCTIONS: THE FEDERAL LAW OF LITIGATION ABUSE § 5(A)(2)(b) (4th ed. 2008) (discussing Rule 11 sanctions for filing a removal petition in bad faith).
105. Vasquez v. Americano U.S.A., L.L.C., 536 F. Supp. 2d 1253, 1257 (D.N.M. 2008).

another defendant.[106] In *Roybal v. City of Albuquerque*, the New Mexico district court enumerated four reasons for not requiring each defendant to individually express consent.[107] First, § 1446(a) does not explicitly state that separate consent is required.[108] Second, federal courts regularly rely on the representations of an attorney about another party.[109] Third, although courts should strictly construe the removal statutes, and despite the presumption against removal, courts should not make rules that are unnecessary for enforcing the removal statutes and that are contrary to ordinary federal procedural practices.[110] Finally, the court stated that without case law illustrating a problem with defendants misrepresenting each other's consent, the individual written consent requirement is an unnecessary and "drastic measure."[111]

Overall, when adopting the vouching rule, courts rely heavily on their statutory interpretation of § 1446(a) and the regulatory power of Rule 11. Moreover, courts criticize the alternative individual written consent requirement as being overly burdensome and formalistic.[112] The less stringent vouching rule presumably boasts efficiency and temporal benefits in the litigation process when compared to the perceived burden that requiring individual written consent imposes.[113] By relaxing requirements for removal, courts grant defendants greater access to the federal courts, whereas a more restrictive and persnickety procedural requirement might be perceived as heightening the barrier of access to the federal judicial system—and greater access to the federal courts is an important

106. *Compare id.* at 1257-58, *with* Tresco, Inc. v. Cont'l Cas. Co., No. 10-0390, 2010 WL 2977606, at *10-11 (D.N.M. July 10, 2010), *and* Roybal v. City of Albuquerque, No. 08-181, 2008 WL 5991063, at *1 (D.N.M. Sept. 24, 2008).

107. 2008 WL 5991063, at *21-24.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *See, e.g.*, Esposito v. Home Depot USA, Inc., 590 F.3d 72, 76-77 (1st Cir. 2009) ("Although mindful of the principle that removal statutes are to be narrowly construed, we nevertheless are not inclined to establish a wooden rule, regardless of whether such a rule would have the benefit of promoting clarity."); Colin K. v. Schmidt, 528 F. Supp. 355, 358 (D.R.I. 1981) ("[T]his Court does not believe that it is necessary for all defendants actually to *sign* the petition. Requiring all defendants to sign would be a senseless formalism.").

113. Courts applying the independent-and-unambiguous rule refute this claim. *See infra* Part II.B.

policy goal.[114] Numerous other federal courts have reached a different conclusion on this issue, however, by holding that one defendant vouching for another's consent is insufficient under the removal statutes and the unanimity rule.

B. The Independent-and-Unambiguous Consent Rule

In contrast to the vouching approach, numerous federal appellate and district courts have imposed a more stringent consent requirement on defendants. This interpretation of the unanimity rule—described by some courts as the "independent-and-unambiguous consent requirement"—requires all defendants to individually express their own consent to the court.[115] The Fifth,[116] Seventh,[117] and Eighth[118] Circuits, as well as numerous federal district courts,[119] have adopted this approach. For example, in *Getty Oil Corp. v. Insurance Co. of North America*, the Fifth Circuit Court of Appeals ruled that pursuant to § 1446(a), one defendant could not adequately claim in his notice of removal that another defendant "do[es] not oppose and consent[s] to [the] ... Petition for Removal."[120] Instead, the court held that each defendant must

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114. *See* Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1906 (1989).

115. *See* Henderson v. Holmes, 920 F. Supp. 1184, 1187 n.2 (D. Kan. 1996); *see also* Miller v. Fed. Int'l, Inc., No. 9-CV-105-JPG, 2009 WL 535945, at *1 (S.D. Ill. Mar. 4, 2009) ("[I]t is not enough for the removing defendants to say in their notice simply that all the other defendants do not object to removal. All defendants must join in the motion by supporting it in writing.").

116. *See* Getty Oil Corp. v. Ins. Co. of N. Am., 841 F.2d 1254, 1262 n.11 (5th Cir. 1988).

117. *See* Roe v. O'Donohue, 38 F.3d 298, 301 (7th Cir. 1994) ("To 'join' a motion is to support it in writing."), *abrogated on other grounds by* Murphy Bros. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 346 (1999).

118. *See* Pritchett v. Cottrell, Inc., 512 F.3d 1057, 1062 (8th Cir. 2008).

119. *E.g.*, Boruff v. Transervice, Inc., No. 2:10-CV-00322, 2011 WL 1296675, at *2 (N.D. Ind. Mar. 3, 2011); Nat'l Waste Assocs. v. TD Bank, N.A., No. 3:10-CV-289, 2010 WL 1931031, at *7 (D. Conn. May 12, 2010); Dichiara v. RDM Techs., No. 08-11411-NMG, 2009 WL 1351640, at *1 (D. Mass. Jan. 13, 2009); Creed v. Virginia, 596 F. Supp. 2d 930, 934 (E.D. Va. 2009); Vasquez v. Americano U.S.A., L.L.C., 536 F. Supp. 2d 1253, 1257-58 (D.N.M. 2008); Ricciardi v. Kone, Inc., 215 F.R.D. 455, 458 (E.D.N.Y. 2003); Sansone v. Morton Mach. Works, Inc., 188 F. Supp. 2d 182, 185 (D.R.I. 2002); Tate v. Mercedes-Benz U.S.A., Inc., 151 F. Supp. 2d 222, 223-24 (N.D.N.Y. 2001); Berrios v. Our Lady of Mercy Med. Ctr., No. 99 Civ. 21, 1999 WL 92269, at *2 (S.D.N.Y. Feb. 19, 1999); Martin Oil Co. v. Phila. Life Ins. Co., 827 F. Supp. 1236, 1237-38 (N.D. W. Va. 1993).

120. 841 F.2d at 1262 n.11.

individually provide timely, written consent to the removal.[121] An analysis of several cases from these jurisdictions illustrates the courts' reasoning for strictly enforcing the unanimity rule's consent requirement and why these courts reject the vouching rule as insufficient.[122]

1. Henderson v. Holmes

The court in *Henderson v. Holmes* reached a conclusion similar to that in *Getty Oil Corp*.[123] In *Henderson*, a torts case decided by the United States District Court for the District of Kansas, the court granted the plaintiff's motion to remand when one of the two defendants failed to express his consent to the removal in writing before the removal deadline, even though the second defendant had filed a timely notice of removal.[124] In addition, the court refused to infer the defendant's consent from his decision to file his answer in federal court.[125]

The *Henderson* court favored this interpretation of the unanimity rule based on several considerations. First, without a written representation on record stating a defendant's consent, nothing binds that defendant as consenting to the notice of removal.[126] Second, and perhaps most importantly, the independent-and-unambiguous consent requirement ensures that the necessary unanimity exists.[127] Third, the requirement is consistent with the need to strictly construe removal rules in favor of remand and state jurisdiction.[128] Fourth, the rule does not place an unfair burden on defendants and prevents manipulation by plaintiffs.[129] And finally, numerous other federal district and circuit courts have successfully applied this specific rule.[130]

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121. *Id.* The court left open the possibility for one defendant to formally grant the other defendant the authority to act on his behalf during the removal, but that did not occur. *Id.*

122. *Martin Oil Co.*, 827 F. Supp. at 1237-38.

123. 920 F. Supp. 1184, 1187 (D. Kan. 1996).

124. *Id.* at 1185, 1187.

125. *Id.* at 1187. *Contra* Harper v. AutoAlliance Int'l, Inc., 392 F.3d 195, 202 (6th Cir. 2004) (inferring consent from defendant's answer).

126. *Henderson*, 920 F. Supp. at 1187 n.2.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

2. Sansone v. Morton Machine Works, Inc.

In *Sansone v. Morton Machine Works, Inc.*, a products liability case decided in the United States District Court for the District of Rhode Island, one of two defendant corporations did not file its motion to join the removal petition of the other corporation until forty-nine days after both defendants were served with the complaint.[131] The nonmoving defendant argued that it had verbally consented to the removal with the other defendant and that such consent should be sufficient.[132] In rejecting this argument and granting the plaintiff's motion to remand, the *Sansone* court concluded that even had the moving defendant's complaint attested to the nonmoving defendant's consent, that attestation would have been insufficient pursuant to the court's standard, which required each defendant to individually express timely, written consent to the removal.[133]

In addition to what the court described as "the overwhelming weight of authority requiring that each defendant independently notify the court of its consent," the court cited several significant policy reasons to support its decision.[134] Most importantly, a bright-line rule that requires all defendants to express consent eliminates uncertainty regarding what is required for a proper removal, thus "avoiding needless duplication of effort in two different fora."[135] The independent consent requirement, moreover, prevents defendants from later claiming a procedural defect in the removal after discovering the federal forum to be unfavorable, because each defendant's consent is in writing.[136] The inherent certainty of the independent-and-unambiguous consent rule also conserves scarce judicial resources by reducing litigation regarding motions to remand: evidentiary hearings to determine whether a defendant actually expressed consent to his codefendant are rendered unnecessary.[137] Finally, the *Sansone* court concluded that applying

131. 188 F. Supp. 2d 182, 185 (D.R.I. 2002).
132. *Id.*
133. *Id.*
134. *Id.* at 185-86.
135. *Id.* at 185.
136. *Id.* at 185-86.
137. *Id.* at 186.

this rule was consistent with the Supreme Court's mandate that in order to protect state judicial power, courts must strictly construe the removal statutes in favor of state court jurisdiction.[138]

III. THE POLICY OF REMOVAL JURISDICTION: WHY IT WAS CREATED AND WHY IT IS USED

The policy rationales behind removal jurisdiction and the unanimity rule are essential to resolving the current judicial disagreement. Courts on each side of the divide support their choice of which rule to adopt by citing the fundamental policy justifications for removal jurisdiction and the unanimity rule. Consequently, a discussion of these rationales is the logical place to begin any effort to resolve the current debate.

Removal is, at its core, an exercise in forum shopping.[139] The defendant attempts either to avoid a specific state court that is suspected to be plaintiff-friendly or to end litigation that has begun unfavorably in a state tribunal.[140] Removal is unique, however, in that it is the only procedure that allows an action to be automatically moved from one proper judicial system to another,[141] and it is one of the rare procedural actions in which the defendant, by filing a notice of removal rather than a motion to remove, may act without seeking the court's permission.[142] The general rationale for permitting removal is to protect a defendant's right to litigate in a federal forum when a plaintiff files a claim in state court that could otherwise have been brought in the federal judicial system.[143] Although Congress could have expanded the defendant's right by allowing every claim that could have been originally brought in a federal district court to be removed, the removal statutes are not so far-reaching. Instead, Congress has enacted numerous limitations

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138. *Id.*

139. *See generally* Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507 (1995) (discussing the pretrial forum battle).

140. AM. LAW INST., STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 358 (1969).

141. *See* MOORE ET AL., *supra* note 13, § 107.03.

142. *See* Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1245 (2008).

143. *See* Ehrlich v. Oxford Ins. Co., 700 F. Supp. 495, 497 (N.D. Cal. 1988).

that prevent the removal of specific types of cases that otherwise would be removable, such as the forum-defendant rule of § 1441(b).[144]

The opportunity to have a dispute heard before a court is deeply engrained in the American psyche, as "the public has been taught that courts exist to provide a solution ... for life's ills," and citizens use "the judicial system [to] resolve[ ] complex political and cultural issues in our modern times."[145] Removal jurisdiction operates as one means of accessing the federal court system in particular, and there are numerous important policy reasons for allowing this procedural opportunity, such as providing an impartial forum to out-of-state defendants who are haled into a plaintiff's home state court.[146] In addition, defendants may seek to have the case heard in the federal rather than state court system because they believe that litigation in federal court is more burdensome to plaintiffs than similar litigation in a state forum.[147]

Through the removal statutes, Congress also intended to ensure that a removed lawsuit stays together as a single action by allowing a defendant to remove a "separate and independent claim" when appropriate.[148] Consequently, removal is consistent with the efficiency goal of the Federal Rules of Civil Procedure, as outlined in Rule 1.[149] The pursuit of efficiency—which may be succinctly defined as "achieving an objective for the lowest cost"[150]—is essential to resolving the current judicial dissonance regarding the application of the unanimity rule in multi-defendant lawsuits. This Part discusses the numerous other historical, practical, and institutional rationales for removal jurisdiction.

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144. 28 U.S.C. § 1441(b) (2006); *see also id.* § 1445 (listing civil actions that are nonremovable).

145. Dana E. Prescott, *Consent Decrees, the Enlightenment, and the "Modern" Social Contract: A Case Study from* Bates, Olmstead, *and Maine's Separation of Powers Doctrine*, 59 ME. L. REV. 75, 109 (2007).

146. Ellen Bloomer Mitchell, *Improper Use of Removal and Its Disruptive Effect on State Court Proceedings: A Call To Reform 28 U.S.C. § 1446*, 21 ST. MARY'S L.J. 59, 60 (1989).

147. EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958, at 127 (1992).

148. 28 U.S.C. § 1441(c); David D. Siegel, Annotation, *Commentary on 1988 and 1990 Revisions of Section 1441*, 28 U.S.C.A. § 1441 (West 2006).

149. FED. R. CIV. P. 1.

150. DEBORAH STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING 61 (rev. ed. 2002).

A. Removal Based on Diversity Jurisdiction

Defendants expect to receive a more favorable outcome in federal court for several reasons, all of which are directly correlated with the rationale for removal jurisdiction in general. Historically, many litigants believed that state courts favored local plaintiffs in diversity suits.[151] This local prejudice prevented nonresident parties in state courts from receiving a "fair and impartial forum in which to try their claims or defenses."[152] The fear of local prejudice was not limited to cases involving private citizen defendants: "Most scholars would surely agree that at various times there was prejudice, and sometimes open hostility, toward foreign [out-of-state] corporations in many states."[153]

Despite the prominent historical role of local prejudice in the rationale for allowing the removal of diversity cases, one American Law Institute study proposed that removal based solely on diversity jurisdiction be limited exclusively to cases between diverse citizens in which there is an actual likelihood of prejudice to the out-of-state defendant as a stranger in the state court.[154] Nevertheless, due to the pervasive trepidation regarding the mere possibility of unfair treatment, removal premised on diversity jurisdiction continues to protect nonresident defendants by providing them a mighty

151. *See* Ry. Co. v. Whitton's Adm'r, 80 U.S. 270, 289 (1871) ("[Diversity jurisdiction] had its existence in the impression, that State attachments and State prejudices might affect injuriously the regular administration of justice in the State courts."); PURCELL, *supra* note 147, at 127-28.

152. PURCELL, *supra* note 147, at 128; *see also* Burford v. Sun Oil Co., 319 U.S. 315, 336 (1943) (Frankfurter, J., dissenting) (discussing local bias); Hanrick v. Hanrick, 153 U.S. 192, 198 (1894) ("The whole object of allowing a defendant to remove a suit or controversy into the Circuit Court of the United States is to prevent the plaintiff from obtaining any advantage against him by reason of prejudice or local influence."); Neal Miller, *An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 372 (1992) ("Diversity jurisdiction is generally thought to reflect a concern for out-of-state commercial litigants' fears of local-court bias.").

153. PURCELL, *supra* note 147, at 128; *see also* Pease v. Peck, 59 U.S. 595, 599 (1856) (discussing the constitutional right to an unbiased forum). Not all of the Founding Fathers believed that diversity jurisdiction was necessary. *See* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 487-92 (1928) (discussing the Founders' concerns about diversity jurisdiction).

154. AM. LAW INST., *supra* note 140, at 2.

procedural privilege.[155] Altogether, removal gives a defendant the exceptional opportunity to eliminate the anticipated "home-court advantage" of the plaintiff in diversity actions.[156]

B. Removal Based on Federal Question Jurisdiction

Apprehension regarding state courts also surfaces in federal question cases, although for different reasons. Many of America's Founders doubted the ability—and desire—of state court judges to faithfully and competently enforce federal laws.[157] Consequently, an "original purpose of removal jurisdiction in federal question cases was to ensure that the tribunal better informed on questions of federal law would adjudicate the matter."[158] Any mistrust was not restricted to the Founding Era, however, as the Civil War exacerbated suspicion towards state courts by creating "widespread concern, particularly in Congress, that state courts in the South could not be trusted to protect the rights of the newly freed slaves."[159] With the expansion of substantive due process in the mid-twentieth century, state judicial systems shouldered an increased burden with respect to protecting individual rights,

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155. PURCELL, *supra* note 147, at 147. Commentators have argued that local bias is no longer a significant threat to out-of-state litigants in state courts. FED. COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 40 (1990). To the contrary, however, Congress recently enacted the 2005 Class Action Fairness Act, which dramatically lowered the standard for removal in class action lawsuits, to protect nonresident defendants from local prejudice. *See* MOORE ET AL., *supra* note 13, § 107.03.

156. Rothstein, *supra* note 22, at 184-85.

157. Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 239 (1988). Several of America's most influential early statesmen expressed the fear that state courts held a distinct agenda from the federal judiciary. James Madison once stated, "Confidence cannot be put in the State Tribunals as guardians of the national authority and interests." *Id.* (quoting MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 124 (1966)). Similarly, Daniel Webster once argued before the Supreme Court that the "[C]onstitution itself supposes that [state judicial systems] may not always be worthy of confidence, where the rights and interests of the national government are drawn into question." *Id.* at 240 (quoting Osborn v. Bank of the U.S., 22 U.S. 738, 81 (1824)).

158. MOORE ET AL., *supra* note 13, § 107.03.

159. Chemerinsky, *supra* note 157, at 240-43; *see also* PURCELL, *supra* note 147, at 128-37; Miller, *supra* note 152, at 373 ("Fears that courts in the Southern States would refuse to enforce federally created rights after the Civil War prompted the empowerment of the federal courts.").

leading to further concern regarding state courts.[160] Some even argue, moreover, that generally speaking, a conservative-leaning Supreme Court's preference toward state courts is tacitly grounded in the assumption that federal courts are more likely to act as a countermajoritarian body than state courts. Thus, it is hypothesized, leaving constitutional questions to state courts rather than to federal courts might result in fewer countermajoritarian judicial decisions.[161]

In addition to the fear that state courts might pursue their own agendas and disregard the national interest, removal of federal question cases exists because federal judges are expected to be more skilled than state judges at deciding federal legal issues: "The entire basis for federal 'arising under' jurisdiction ... is the idea that forum matters. Federal courts are seen as experts in federal law and thus better than state courts in interpreting federal law with accuracy, uniformity, and appropriate sensitivity to federal interests."[162] Consequently, a plaintiff who initially chooses the federal forum must believe that the federal court will be more receptive to his federal claim, and a defendant seeking to remove a case when the plaintiff chooses the state forum employs the same reasoning.[163]

C. Practical Reasons To Remove a Case

Removal is a strategic litigation decision. Shifting the dispute to federal court provides defendants with a different environment in which to litigate their cases. For example, according to one commentator, there are several practical and institutional reasons why a defendant may attempt to remove a case, including closer judicial supervision and management of the case, differences in jury demographics, size, and unanimity requirements, different evidentiary rules and rules regarding awarding attorneys' fees, and the opportunity to force the plaintiff into a forum he attempted to avoid.[164]

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160. Chemerinsky, *supra* note 157, at 240; Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1118-20 (1977).

161. Neuborne, *supra* note 160, at 1131.

162. Scott Dodson, *The Complexity of Jurisdictional Clarity*, 97 VA. L. REV. 1, 50-51 (2011) (citations omitted).

163. *See* Hartnett, *supra* note 12, at 1173-74.

164. Fousekis & Brelsford, *supra* note 16, at 39; *see also* Mitchell, *supra* note 146, at 60; Rothstein, *supra* note 22, at 184 ("Removal may counterbalance the inherent advantages that

Moreover, the defendant may be more familiar with the Federal Rules of Civil Procedure than state procedural rules, or the federal forum may offer a speedier adjudicative time frame.[165] The savvy—or ruthless, depending on one's perspective—defendant might also remove the claim simply because federal court litigation is often appreciably more expensive than state court litigation.[166]

Some attorneys also express a preference for federal judges over state judges.[167] Justice Sandra Day O'Connor, who served as both a state and federal judge, has expressed what she believes are the reasons defendants prefer having their cases heard before federal judges: federal judges are often better compensated, and their positions are more prestigious; the life tenure of federal judges insulates them from the majoritarian pressure that democratically elected officials encounter; and federal judges are more amenable to the defendant's position in constitutional rights lawsuits.[168] Justice O'Connor concludes, however, that the "allegations concerning relative competency and judicial mindset are essentially subjective impressions not subject to confirmation in fact."[169] To reach this conclusion, she notes that higher pay does not equal higher quality, especially when many federal judges are appointed from the state bench.[170] In addition, many states embrace systems that insulate their judges from populace pressures, such as appointing the judges or giving them long tenures.[171] Lastly, although certain federal judges may favor some constitutional claims more than their state counterparts, no evidence indicates that federal judges, when considered collectively, have more sensitivity to every constitutional principle.[172]

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a plaintiff ... may gain in choosing to file in a particular state court.").

165. MOORE ET AL., *supra* note 13, § 107.03.

166. *See* Hartnett, *supra* note 12, at 1174.

167. Fousekis & Brelsford, *supra* note 16, at 39; *see also* Miller, *supra* note 152, at 374.

168. Sandra D. O'Connor, *Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge*, 22 WM. & MARY L. REV. 801, 812-13 (1981).

169. *Id.* at 813.

170. *Id.* at 812.

171. *Id.* at 812-13.

172. *Id.* at 813.

D. Empirical Evidence in Support of Removing a Case

Notwithstanding Justice O'Connor's concessions, significant empirical evidence supports the decision to remove a case, and in the world of zero-sum, high-stakes litigation, any increased probability of victory makes removal an invaluable procedural weapon for the modern practitioner. Thus, a rational defendant might remove a case based on his expectation that "[t]he nature of the forum help[s] determine both the likelihood that plaintiffs might win and, if they did, the amounts they would receive."[173] To that point, one study that a pair of law professors conducted revealed that the "win rate [for plaintiffs] in ... diversity cases [originally filed in federal court] is 71%, but in removed diversity cases it is only 34%."[174] Similarly, another study by the same professors found that the plaintiffs' win rate was only 36.77 percent in the 38,306 cases studied that arrived in federal court via removal from state court.[175] The authors concluded that "[p]erhaps the 'removal effect' of a lowered win rate results in part from a loss of forum advantage. Unlike change of venue, ... removal has a fairly express purpose of changing outcome."[176] In total, "removal seem[s] to work a seriously negative effect on plaintiffs' win rate[s]."[177] Although the exact causes of this negative effect are debatable, the empirical evidence clearly supports a defendant's desire to remove a case.[178]

Concerns about removal remain, however, because by providing a federal forum for lawsuits initiated in a state court, the procedure deprives a state tribunal of the opportunity to hear a case over which it had proper jurisdiction.[179] This deprivation raises legiti-

173. PURCELL, *supra* note 147, at 127 (1992); *see also* STONE, *supra* note 150, at 233-34 (discussing the rational decision maker).

174. Clermont & Eisenberg, *supra* note 6, at 581.

175. Clermont & Eisenberg, *supra* note 139, at 1514 n.18.

176. *Id.*

177. Clermont & Eisenberg, *supra* note 6, at 606.

178. *Id.* at 606-07. For further explanation as to why attorneys often prefer the federal forum, see generally James Duke Cameron, *Federal Review, Finality of State Court Decisions, and a Proposal for a National Court of Appeals—A State Judge's Solution to a Continuing Problem*, 3 BYU L. REV. 545, 550-53 (1981); Thomas B. Marvell, *The Rationales for Federal Question Jurisdiction: An Empirical Examination of Student Rights Litigation*, 5 WIS. L. REV. 1315 (1984).

179. MOORE ET AL., *supra* note 13, § 107.03.

mate federalism concerns, but nevertheless, a state is not allowed to restrict a defendant's right to removal,[180] as the Supreme Court made clear when it declared, "[Removal jurisdiction] is a question of the construction of the federal statute on removal, and not the state statute. The [state]'s procedural provisions cannot control the privilege of removal granted by the federal statute."[181] The only exception to this rule is that pursuant to the Eleventh Amendment, if a state consents to be sued in its own state forum, the case may not be removed unless the state waives its protection by removing the case on its own.[182] Similarly, removal also respects state judicial authority by not allowing removal after the state court has issued a final judgment on the matter.[183] The federalism concern is one reason that courts strictly construe removal statutes. This interpretive approach is influential in resolving the current circuit split regarding the unanimity rule.[184]

IV. Discussion: Selecting the Better Consent Rule

The current judicial disagreement regarding how to apply the unanimity rule creates uncertainty for litigants, adds superfluous time and expense into the already burdensome litigation process, and promotes forum shopping. As the Supreme Court has noted, "[a] single, uniform federal rule ... provide[s] desirable certainty to both plaintiffs and defendants."[185] This Part endeavors to resolve the issue by analyzing the two competing consent rules, and ultimately concludes that courts should apply the independent-and-unambiguous consent requirement in multi-defendant removal situations.

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180. *Id.*

181. Chi., Rock Island & Pac. Ry. Co. v. Stude, 346 U.S. 574, 580 (1954).

182. *Id.*; *see also* Lapides v. Bd. of Regents of Univ. Sys. of Ga., 535 U.S. 613, 618-24 (2002).

183. *See* Rosenthal v. Coates, 148 U.S. 142, 147 (1893).

184. *See* Moore et al., *supra* note 13, § 107.05.

185. Chardon v. Fumero Soto, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting). *Contra* Amanda Frost, *Overvaluing Uniformity*, 94 Va. L. Rev. 1567, 1637-39 (2008) (arguing that the Supreme Court over-prioritizes uniformity when granting certiorari).

A. Unanimity, Personal Jurisdiction, and the Formal Service of Process Requirement

Formal service of process has a vital place in the American legal system, as the requirement dates back to the English common law writ of *capias ad respondendum*.[186] Without adequate service of process—and absent any waiver of service by the defendant—a court generally may not exercise jurisdiction over the named defendant.[187] Consequently, a defendant is not an official party to a suit until service of process is properly executed, and thus "the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action or forgo procedural or substantive rights."[188]

The significance of formal service is infused into the removal process. In order to trigger a defendant's thirty-day time frame to file a notice of removal pursuant to § 1446(b), the plaintiff must, "through service or otherwise," give the defendant a "copy of the initial pleading."[189] Plaintiffs, however, abused the "or otherwise" language of § 1446(b) by utilizing less formal methods of process to manipulate the removal timing rules, prejudicing the removal rights of defendants.[190] To quash this abuse and informality, the Supreme Court ruled in *Murphy Bros. v. Michetti Pipe Stringing, Inc.* that a defendant's thirty days to remove a case do not begin accruing until formal service of process is made.[191] Rejecting the plaintiff's fax of a "courtesy copy of the file-stamped complaint" to the defendant as insufficient to trigger the removal clock, the Court held that "[s]ervice of process ... is fundamental to any procedural imposition on a named defendant."[192] As a result, by adding "or otherwise" to § 1446(b), Congress only intended to make the statute flexible enough to meet the diverse state formal process rules while

186. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).
187. *See* Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 104 (1987).
188. Murphy Bros. v. Michetti Pipe Stringing, Inc., 526 U.S. 344, 351 (1999).
189. 28 U.S.C. § 1446(b) (2006).
190. *See* Matthew J. Mussalli, *Tick, Tock: Rules on the Removal Clock*, 19 REV. LITIG. 47, 48 (2000).
191. 526 U.S. at 356.
192. *Id.* at 348, 350.

still providing a defendant notice of a suit's substance before he is forced to make a removal decision.[193]

The holding in *Murphy Bros.* and the necessity of formal, written notice before a defendant is either haled into court or forced to choose whether to remove a case supports the independent consent requirement. In a multi-defendant lawsuit, the vouching rule enables a defendant who files for removal to submit his codefendant to the federal district court's power without any formal acknowledgment of that codefendant's consent. Thus, the federal court can exercise jurisdiction pursuant to an implied authority: the court assumes that given the moving defendant's vouching of consent and the nonmoving defendant's lack of resistance, the nonmoving defendant is aware that he is an official party to a lawsuit in federal court. The nonmoving defendant, however, is not guaranteed such notice. In effect, the notice requirement that was so fundamental in *Murphy Bros.*—and in American constitutional law[194] and civil procedure[195] in general—is missing. In any other situation, no court would base its jurisdictional power on a defendant's claim that he verbally informed his codefendant of the suit; such an action is not an adequate substitute for formal service of process and notice.

A federal court, therefore, should not exercise jurisdiction over a defendant in a removed action without first explicitly determining that each defendant to the suit has received notice that the court is doing so. Notice becomes intertwined with judicial power and, as such, is an issue of constitutional importance. Without acknowledgment through either the codefendant's signature on the notice of removal or an individual written record of consent, the federal court relies on an implied jurisdictional power over a defendant, which contravenes the Fourteenth Amendment's Due Process requirement.[196] The independent-and-unambiguous consent interpretation of the unanimity rule alleviates this concern because there is no

193. *Id.* at 352-53.

194. *See* Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (stating that notice is a "fundamental requisite" of the Fourteenth Amendment).

195. *See* FED. R. CIV. P. 4.

196. This situation is problematic because a court might exercise personal jurisdiction over a defendant based on implied consent even when the defendant lacks the relationship with the forum state that the Fourteenth Amendment traditionally requires. *See* Wendy Collins Perdue, *Personal Jurisdiction and the Beetle in the Box*, 32 B.C. L. REV. 529, 536-39, 542-44 (1991) (discussing consent and personal jurisdiction).

need for implied consent to jurisdiction when the defendant has explicitly both expressed his consent and acknowledged the removal.

B. Consistency with Removal Policy

One goal of the unanimity rule is to prevent a willing defendant from dragging an unwilling defendant into federal court.[197] This goal is closely related to a second purpose of the rule: preventing the splitting of a plaintiff's lawsuit.[198] Indeed, without the unanimity rule, if one defendant attempts to remove a case but the other is unwilling, one of two outcomes will result: either the unwilling defendant will be forced into the federal court, or the unwilling defendant will be allowed to remain in state court, thereby inefficiently forcing the plaintiff to litigate in separate forums.

The vouching approach, by not requiring individual consent, inflames the risk of an unwilling defendant being forced into the federal forum. It allows a defendant to file the notice of removal while mistakenly or fraudulently vouching for the consent of his codefendants when the codefendants do not, in fact, consent. If the court accepts the vouching interpretation of the unanimity rule, the codefendants are now stuck in federal court unless and until they move to have the case remanded—assuming there is no jurisdictional flaw that prompts the court to remand the case sua sponte. The codefendants may decide to forsake such a challenge and instead proceed in federal court, or they may choose to litigate the facts and procedural defect on a motion to remand.

Either of these choices is fundamentally unfair to the nonmoving defendants and counter to the principles of the unanimity rule; although the defendants may recover costs from the removal litigation, including attorneys' fees,[199] there is a significant delay until the case returns to state court.[200] Such activity is also harmful to the state court from which the case was removed.[201] To the contrary, the independent-and-unambiguous consent requirement

197. *See supra* text accompanying note 74.
198. *See supra* text accompanying note 73.
199. 28 U.S.C. § 1447(c) (2006).
200. *See* Mitchell, *supra* note 146, at 106.
201. *Id.* at 60.

reduces these risks by discouraging abuse of the removal procedure—or, at least making abuse more difficult—and by allowing a defendant to quickly and easily prove that he did not consent by pointing out the lack of any written consent form. This requirement thus prevents any prolonged litigation on the matter and ensures that the improperly removed case is quickly returned to the state tribunal.

C. The Value of a Clear Rule

There is a compelling "federal interest in uniformity and ... in having 'firmly defined, easily applied rules.'"[202] True to its name, the independent-and-unambiguous consent standard emphasizes clarity and simplicity when applying the unanimity rule's consent requirement. But the vouching rule also promotes simplicity: the court presumes that there is consent, unless a nonmoving defendant states to the contrary. Although straightforward to apply in theory, in practice the vouching rule fails to promote the fundamental values that a bright-line rule is expected to encompass; instead, it operates as the removal equivalent of a Rube Goldberg device.

1. A Lesson from Hertz Corp. v. Friend

A recent Supreme Court case illustrates the importance of adopting an easily applied, clear rule.[203] In *Hertz Corp. v. Friend*, a 2010 case involving a class action lawsuit against Hertz Corporation alleging violations of California's wage and hours laws, the Court installed a uniform test for determining a corporation's principal place of business pursuant to 28 U.S.C. § 1332(c)(1), ending a longstanding judicial debate.[204] Emphasizing the importance of certainty in a procedural rule, the Court noted that although there is value in applying a broad and adaptable test,[205] "administrative simplicity is a major virtue in a jurisdictional

202. Wilson v. Garcia, 471 U.S. 261, 270, 275 (1985) (Rehnquist, J., dissenting) (quoting Chardon v. Fumero Suto, 462 U.S. 650, 667 (1983)); *see also* Hertz Corp. v. Friend, 130 S. Ct. 1181, 1192-93 (2010). A uniform rule also eliminates one incentive for forum shopping.

203. *Hertz*, 130 S. Ct. at 1192-93; *see also* Dodson, *supra* note 162, at 3.

204. *Hertz*, 130 S. Ct. at 1185-86, 1191-92.

205. *Id.* at 1192.

statute."[206] As a result, courts should endeavor to avoid tests that "complicate a case, eating up time and money as the parties litigate" issues other than the merits of the dispute.[207] Procedural rules that "produce appeals and reversals [and] encourage gamesmanship" unnecessarily exhaust precious judicial resources.[208]

Several federal courts adopting the individual consent standard have also acknowledged the value associated with applying a bright-line rule, including the United States District Court for the Southern District of New York in *Berrios v. Our Lady of Mercy Medical Center*.[209] In addition, in *National Waste Associates v. TD Bank, N.A.*, the United States District Court for the District of Connecticut noted that "[a]bandoning the bright-line rule ... would ... encourage litigation about matters peripheral to the merits of lawsuits."[210] Altogether, these cases represent a strong repudiation of the vouching rule because that standard allows for too much confusion and ambiguity during the removal process.

2. Lowering Transaction Costs

For all the doubt that the vouching rule adds to the litigation process, it saves very little time and money. Even the most novice litigation associate can quickly draft the short and simple notice of removal. It is unclear why a court allowing one attorney to vouch for another's consent feels compelled to excuse counsels from such a basic procedural task. Certainly the cost-conscious client would prefer his counsel to draft the removal notice rather than take the risk of paying that counsel to litigate the consent issue on appeal; that same client would also prefer not to waste the expensive notice of removal filing fee on a failed removal effort.[211] Admittedly, some

206. *Id.* at 1193.

207. *Id.*

208. *Id.*

209. No. 99 Civ. 21 (DLC), 1999 WL 92269, at *3 (S.D.N.Y. Feb. 19, 1999).

210. No. 3:10-CV-289, 2010 WL 1931031, at *6 n.17 (D. Conn. May 12, 2010) (citation omitted) (internal quotation marks omitted).

211. The filing fee may be as high as $350. *See* Eastern District of Pennsylvania, *Frequently Asked Questions*, http://www.paed.uscourts.gov/us11000.asp (last visited Sept. 25, 2011). Upon remand, defendants might also have to pay attorneys' fees, 28 U.S.C. § 1447(c) (2006), but the Supreme Court has abated this possibility by reading an "objectively reasonable" defense into the statute. Martin v. Franklin Capital Corp., 546 U.S. 132, 136 (2005).

cases involve time restraints that prevent counsels from submitting a notice of removal,[212] but it is plausible that even if a defendant has only twenty-four hours to remove a case due to a late joinder, an experienced attorney could still draft a proper and timely notice of removal. Or, even more simply in such a situation, under the independent-and-unambiguous rule an attorney may just sign a codefendant's already prepared notice of removal.[213]

The balancing between the marginal cost of requiring individual consent—which, as posited, is relatively low—and the purported efficiency benefits of the vouching rule is a compelling factor in resolving this debate.[214] On the one hand, the heightened independent consent requirement adds negligible costs and time to the litigation process while at the same time actually reducing the risk of later costs and delays arising when the consent issue is litigated on the motion to remand and perhaps again on appeal. On the other hand, the vouching rule creates uncertainty and an increased likelihood of future litigation while providing minimal efficiency benefits. Both perspectives combine to make the independent-and-unambiguous consent rule the obvious choice.

Furthermore, the inherent flexibility of the vouching rule, which is a result of allowing parties to consent to removal via a broader array of methods than the independent consent requirement might allow, contravenes the general nature of the removal statutes. These statutes establish precise standards for removing a case, including specific jurisdictional and timing requirements. Removal is, in effect, more akin to a well-regulated procedural process than a jurisdictional analysis, such as determining in personam jurisdiction. Thus, by requiring specificity and promoting lucidity, the independent consent requirement fits comfortably within the highly regulated removal procedure. There is also no benefit to keeping the consent requirement broad or vague for the sake of future adaptability or to stay in line with the policy reasons for removal, as the

212. Such a problem arises particularly when courts apply the first-served defendant rule. *See supra* Part I.B.2.

213. *See* Spillers v. Tillman, 959 F. Supp. 364, 368 (S.D. Miss. 1997). In federal courts, which frequently rely on electronic submissions, an electronic signature should be adequate.

214. *See* STONE, *supra* note 150, at 235-36 (defining cost-benefit balancing).

removal process should be quick, simple, and certain.[215] The vouching rule only adds superfluous doubt to the litigation process.

If all courts adopt the individual consent requirement, however, the heightened standard might make it more difficult for defendants to gain access to the federal judicial system. Because one of the central purposes of removal jurisdiction is to grant defendants the opportunity to litigate in federal court, this is a legitimate policy concern.[216] Presumably, however, defendants who currently litigate in a jurisdiction that applies the vouching rule will quickly adjust their behavior to conform to the independent-and-unambiguous removal standard, and in the long run, all defendants will reap the efficiency benefits that the rule promotes.

D. Strict Constructionist Interpretation of Removal Rules

Courts should strictly construe removal statutes in favor of limiting the right to removal jurisdiction.[217] In regard to the consent requirement during the removal of multi-defendant lawsuits, a strict interpretation of the unanimity rule favors the independent-and-unambiguous approach.[218] This approach heightens the standard for removal, making removal both less likely and more difficult. It also better protects the plaintiff's forum choice: when there is doubt in the removal procedure, which occurs when one defendant vouches for the other's consent rather than each defendant individually expressing consent, an approach that creates exceptions for defendants and lowers the requirements for removal

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215. The removal *procedure* is distinct from removal *jurisdiction*. Although there is value in keeping removal jurisdiction rules vague and adaptable, that is less true for the step-by-step process by which one accesses that jurisdiction. *Cf.* Dodson, *supra* note 162, at 53 ("[Uncertainty] can provide opportunities for courts to better implement and accommodate the underlying policies in given circumstances. These benefits are particularly true for the area of jurisdiction, in which the courts have a strong claim to expertise.").

216. *See supra* Part III.A-B.

217. *See* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108-09 (1941); *In re* Hot-Hed Inc., 477 F.3d 320, 323 (5th Cir. 2007) ("As the effect of removal is to deprive the state court of an action properly before it, removal raises significant federalism concerns. The removal statute is therefore to be strictly construed and any doubt as to the propriety of removal should be resolved in favor of remand." (internal quotation marks omitted)).

218. Dichiara v. RDM Techs., No. 08-11411-NMG, 2009 WL 1351640, at *5 (D. Mass. Jan. 13, 2009) (holding that strict constructionism requires application of the independent consent rule).

facilitates a defendant's ability to disrupt the plaintiff's original decision to litigate in state court. The individual consent requirement is therefore more consistent with the proper interpretation of removal statutes in general.

E. The Proper Interpretation of Rule 11

Just as Rule 11 plays a prominent role in decisions by federal courts applying the vouching rule, it serves an equally important function in the independent-and-unambiguous consent jurisdictions. Given the central presence of Rule 11 in the text of § 1446(a), it is not surprising that an interpretation of the Federal Rules of Civil Procedure's sanctions provision is influential in the ultimate decisions of these courts. For example, in *Creekmore v. Food Lion, Inc.*, a torts case in which the United States District Court for the Eastern District of Virginia adopted the independent consent requirement, the court firmly stated, "Rule 11 does not authorize one party to make representations or file pleadings on behalf of another."[219] Whereas other courts specifically held that Rule 11 not only allows but also buttresses the ability of one defendant to vouch for another defendant's consent, the court in *Creekmore* unequivocally held that Rule 11 requires each defendant to "file their own signed pleadings."[220] In addition, the court noted, "One of the primary reasons that parties may have separate counsel is to present independently their position to the court."[221] Similarly, a court also adopted this interpretation of Rule 11 in *National Waste Associates v. TD Bank, N.A.*, a case in which the Connecticut federal district court declared, "Nowhere does [Rule 11] ... authorize one defendant to sign solely on behalf of all other defendants, based on a representation of their consent."[222]

219. 797 F. Supp. 505, 508 (E.D. Va. 1992).

220. *Id. Creekmore* was decided before the 1993 amendments to Rule 11. However, according to the advisory committee's note on the 1993 amendments, the intent of Rule 11(a), the relevant section in *Creekmore*, was unchanged by the amendments. FED. R. CIV. P. 11 advisory committee's note.

221. *Creekmore*, 797 F. Supp. at 509 n.9.

222. Nat'l Waste Assocs. v. TD Bank, N.A., No. 3:10-CV-289, 2010 WL 1931031, at *6 (D. Conn. May 12, 2010).

1. The Need for Individually Signed Representations to the Court

Section 1446(a) requires a defendant to "file" a notice of removal, and Rule 11 regulates written representations to the courts.[223] Nothing in Rule 11 or its accompanying advisory committee notes suggests an exception to the signed pleadings requirement.[224] Moreover, the advisory note to the 1993 amendments to Rule 11 explicitly cautions against submitting a representation to the court without the signatures of the attorneys of record: "Unsigned papers ... are to be stricken if the omission of the signature is not corrected promptly after being called to the attention of the attorney."[225] Additionally, the official commentary to Rule 11 states that "[t]he obligations imposed under [Rule 11] ... obviously require that a pleading, written motion, or other paper be read before it is filed or submitted to the court."[226] If a court allows one defendant to vouch for another defendant's consent, the attorneys who did not sign the notice of removal are submitting a written representation to the court without reviewing the document with the requisite level of attention and care. To the contrary, the individual written consent requirement does not encounter this problem; the attorney for each defendant, by being required to sign the notice of removal, has the opportunity—and thus the duty—to diligently review the notice before filing it.

Furthermore, the 1993 advisory committee note to Rule 11 adds, "[Rule 11] retains the principle that attorneys ... have an obligation to the court to refrain from conduct that frustrates the aims of Rule 1."[227] However, those aims, which include promoting the efficient and just adjudication of cases,[228] are disrupted when a court accepts an interpretation of Rule 11 that allows an attorney to vouch for the consent of another defendant. That interpretation only leads to confusion, more litigation, and the heightened possi-

223. *See* 28 U.S.C. § 1446(a) (2006); FED. R. CIV. P. 11(a)-(b).
224. *See* FED. R. CIV. P. 11 advisory committee's note.
225. *Id.*
226. *Id.*
227. *Id.*
228. *See* FED. R. CIV. P. 1.

bility of injustice.[229] But, if courts correctly apply Rule 11 as requiring each attorney's individually signed, written consent, they will promote the goals of Rule 1, reduce litigation time and costs, and better thwart the possibility of injustice.

2. How Vouching May Circumvent Rule 11

One example clearly illustrates how the vouching rule's interpretation of Rule 11 can lead to undesirable results. Plaintiff, a resident of Virginia, sues Defendant A, a resident of Maine, and Defendant B, a resident of Virginia. The suit is filed in Virginia state court, an appropriate forum for the claim. The amount in controversy is $500,000, and there is no federal question at issue. Due to the forum-defendant rule, this suit appears unremovable. However, further assume that Defendants A and B have never met. Defendant A honestly and reasonably believes that, based on limited paperwork he has regarding the lawsuit, Defendant B is actually a resident of Maryland, not Virginia. Suddenly, Defendant A believes that the forum-defendant prohibition does not apply. He files his notice of removal, which is based on diversity jurisdiction, and vouches in it that Defendant B consents. In the notice, Defendant A states in good faith that Defendant B is a resident of Maryland.

If the Virginia federal district court interprets the unanimity rule as only requiring vouching for the other defendant's consent, the case now appears to be properly removed. Defendant B, by not having to actually sign any statement filed with the court, avoids having to represent himself as a resident of Virginia.[230] The burden is thus shifted to Plaintiff to discover that fact and to seek remand. The protections Rule 11 is meant to offer, many of which are significant reasons in support of the vouching rule, are in fact skirted under the rule.[231] Moreover, the attorney for Defendant B may not be subject to Rule 11 sanctions because he never actually

229. *See, e.g.*, *supra* text accompanying note 74 (discussing the risk of an unwilling defendant being dragged into federal court).

230. The lack of a signature, which is essential to binding an attorney under Rule 11, is responsible for this loophole.

231. *See supra* Part II.A (stating the role of Rule 11 in decisions adopting the vouching rule).

filed anything with the court. As such, not only do the language and purpose of Rule 11 not support the vouching method, and not only does Rule 11 on numerous occasions express principles that the vouching rule directly frustrates, but vouching may also allow avoidance of Rule 11 altogether.

CONCLUSION

Removal jurisdiction is a unique and powerful procedural weapon for many litigators. The plaintiff, as master of the complaint, initially receives great leeway to control the forum in which the case will be litigated. But removal allows the defendant to frustrate the plaintiff's forum choice by quickly whisking away the lawsuit to a federal court with the expectation that being in the federal forum will lead to a more favorable outcome. Although not a constitutionally enumerated right, removal's long history—which dates back to the earliest judiciary acts—indicates its importance in American litigation. Today, the unanimity rule exists among removal's numerous complex procedural requirements. As a common law creation, however, the unanimity rule has yet to be statutorily codified. The requirement has, nevertheless, steadfastly remained an important aspect of the removal process, and it continues to operate as one of the many possible roadblocks to a defendant's successful removal.

Without explicit congressional or Supreme Court guidance regarding how to interpret the unanimous consent requirement, federal courts across the country have been charged with the task of establishing the rule's exact procedural application. Importantly, that responsibility has included determining how each defendant must express consent to the removal. As discussed in Part II, federal courts have reached divergent interpretations of the unanimous consent requirement. Many federal courts have applied a lenient test that only requires the defendant who files the notice of removal to state that the other joined defendants have consented to the removal. Bound by Federal Rule of Civil Procedure 11, the moving defendant is trusted to accurately vouch for the unanimous consent of his codefendants. Several other federal courts have taken a different approach, however. These courts require what they describe as independent and unambiguous consent. This interpreta-

tion prohibits vouching and instead compels each defendant to individually express written consent to the court.

Although statutory language and legitimate policy rationales support each of these requirements, the independent-and-unambiguous consent rule more acutely promotes those policy goals and is more consistent with the language of the removal statutes. This clear and simple consent rule promotes certainty, and, consequently, it reduces litigation time and costs. The interpretation also aligns with the language and purpose of Rule 11. Finally, the independent consent requirement ensures that all nonmoving defendants are afforded proper notice before being haled into federal court, as due process requires. If every federal court adopts the independent-and-unambiguous consent requirement, all parties to a lawsuit—both plaintiffs and defendants—will immediately benefit from the efficiency and simplicity of the rule.

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