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Jayne Ressler
jayne.ressler@brooklaw.edu

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ARTICLE

REMOVING REMOVAL'S UNANIMITY RULE

*Jayne S. Ressler**

ABSTRACT

In December 2011, Congress passed legislation intended in part to prevent plaintiffs from "cheating" in the removal game. As this Article shows, this legislation solves only part of the problem it purports to remedy. Even worse, it entirely ignores a related problem that has for too long gone unnoticed. This Article argues that by codifying a longstanding unsound requirement of removal—the unanimity rule—Congress has disregarded and entrenched opportunities for abuse by *both* parties to the litigation. Scholars and lawmakers alike have overlooked the negative implications for fairness and transparency inherent in the unanimity rule. This Article is the first to examine this significant oversight.

The Article begins by elucidating the compelling incentives to exploit the removal process. It then demonstrates how both plaintiffs and defendants can utilize the requirements of the unanimity rule to subvert the system. This Article is the first scholarly piece to use game theory to diagram the strategic behavior that the unanimity rule engenders. It concludes with a bold proposal—that Congress

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* Associate Professor of Legal Writing, Brooklyn Law School. J.D., University of Pennsylvania Law School; B.S., Wharton School at the University of Pennsylvania; B.A., University of Pennsylvania. My thanks and gratitude to Miriam Baer, Derek Bambauer, Patricia Biswanger, Frederic Bloom, Robin Effron, Cynthia Godsoe, Edward Janger, and Lawrence Solan for their suggestions and comments on previous drafts of this Article, and to Andrew Cohen, Sean Comerford, Levi Grosswald, Amy Johnson, Adam Lovett, and Julian Miller for their invaluable research assistance. A special note of appreciation to Gavin Goldstein for being the best go-to-guy around. I am also grateful to President Joan Wexler and Dean Michael Gerber for their generous support of this project through the Brooklyn Law School Research Stipend. Finally, all my love to my family—Ken, Nate, and Benny.

abandon the unanimity rule and establish a framework whereby a judicially determined primary defendant has the sole authority to make the removal decision. This reform would substantially curtail improper strategic behavior, advance the normative values of fairness and transparency underlying the Federal Rules of Civil Procedure, and comport with the current focus on the primary defendant in class action and multijurisdictional litigation.

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I. INTRODUCTION

In December 2011, President Obama signed into law the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (FCJVCA).[1] As its name suggests, the purpose of the Act was to implement jurisdictional and venue improvements to the Federal Rules of Civil Procedure.[2] One of the Act's

1. Federal Courts Jurisdiction and Venue Clarification Act of 2011, Pub. L. No. 112-63, 125 Stat. 758 (codified as amended in scattered sections of 28 U.S.C.).

2. H.R. REP. NO. 112-10, at 4 (2011).

objectives was to thwart plaintiffs' abilities to "cheat" in the removal game.[3]

A provision of the Act not likely to attract much attention is § 1446(b)(2)(A), which explicitly codifies the requirement of defendant unanimity in the removal process.[4] This Article demonstrates that by codifying the unanimity rule, the FCJVCA solves only part of the problem it purports to remedy. Even worse, the legislation disregards and entrenches opportunities for inappropriate strategic behavior by *both* parties to the litigation.[5]

Although several scholars have written extensively about removal, none of this scholarship focuses on intrinsic flaws within the unanimity rule itself.[6] This Article addresses this void in the scholarly literature. This piece is also the first to utilize game theory to analyze the removal process.

The unanimity rule permits plaintiffs to conspire with defendants to defeat otherwise proper removal.[7] Furthermore, the unanimity rule invites rent-seeking[8] on the part of

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3. *See id.* at 13–14 (noting the possibility of plaintiffs' strategic use of service and stating that "[f]airness to later-served defendants, whether they are brought in by the initial complaint or an amended complaint, necessitates that they be given their own opportunity to remove, even if the earlier-served defendants chose not to remove initially").

4. 28 U.S.C. § 1446(b)(2)(A) (Supp. 2011) ("When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action."). Removal is the process by which a defendant moves a lawsuit that a plaintiff filed in state court to the federal district court for the federal judicial district in which the state court sits. *See generally* 28 U.S.C. § 1441 (2006 & Supp. 2011).

5. Of course strategic behavior is often a valued norm in our adversarial system. In this Article, I refer to the kind of strategic behavior that subverts the system and is unjust, wasteful, and nontransparent.

6. *See generally* Benjamin T. Clark, *A Device Designed to Manipulate Diversity Jurisdiction: Why Courts Should Refuse to Recognize Post-Removal Damage Stipulations*, 58 OKLA. L. REV. 221 (2005); Laura J. Hines & Steven S. Gensler, *Driving Misjoinder: The Improper Party Problem in Removal Jurisdiction*, 57 ALA. L. REV. 779 (2006); E. Farish Percy, *The* Tedford *Equitable Exception Permitting Removal of Diversity Cases After One Year: A Welcome Development or the Opening of Pandora's Box?*, 63 BAYLOR L. REV. 146 (2011); Steven Plitt & Joshua D. Rogers, *Charting a Course for Federal Removal Through the Abstention Doctrine: A Titanic Experience in the Sargasso Sea of Jurisdictional Manipulation*, 56 DEPAUL L. REV. 107 (2006) (suggesting that the unanimity rule allows plaintiffs to "manipulate the system"); Saurabh Vishnubhakat, *Pre-Service Removal in the Forum Defendant's Arsenal*, 47 GONZ. L. REV. 147 (2011); Katherine L. Floyd, Note, *The One-Year Limit on Removal: An Ace Up the Sleeve of the Unscrupulous Litigant?*, 24 GA. ST. U. L. REV. 1073 (2008). Scholars have also examined the "the conflict between removal, a defendant's tool, and the plaintiff's traditional role as master of the claim." Debra Lyn Bassett & Rex R. Perschbacher, *The Roots of Removal*, 77 BROOK. L. REV. 1, 3 (2011).

7. *See infra* Part IV.A.

8. "Rent-seeking" has been defined as "the socially costly pursuit of wealth transfers." Robert D. Tollison, *Rent Seeking*, *in* PERSPECTIVES ON PUBLIC CHOICE 506, 506

defendants. A defendant who has less at stake than other defendants in the litigation can, as the "price" for a removal vote, ask for payment (i.e., seek rent) from these other "higher risk" defendants.[9] Thus, the unanimity rule creates an unjust imbalance of power among defendants who are dissimilarly situated in the litigation. As one court put it, "The rule of unanimity gives each defendant an absolute veto over removal."[10] To make matters worse, defendants are incentivized to keep this manipulative activity secret, thus thwarting the transparency objectives that lie at the heart of the rules of civil procedure.

The Article posits that the drafters of the FCJVCA were mistaken to codify the unanimity rule, and it proposes a remedy. The Article recommends that the concept of the "primary defendant" replace the unanimity rule. This will minimize the current opportunities that the unanimity rule engenders for strategic behavior—both by plaintiffs and defendants. It will also add a level of transparency to a system that is currently unjust and opaque.

The Article begins by describing the unanimity rule and the modern removal scheme. From there it reviews the data regarding success rates for plaintiffs and defendants in state versus federal court, thereby illuminating the powerful incentives for both parties to engage in tactical conduct regarding removal. Next it discusses the opportunities for strategic behavior engendered by the unanimity rule, explaining the various approaches courts took regarding the

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(Dennis C. Mueller ed., 1997); *see also* PAUL MILGROM & JOHN ROBERTS, ECONOMICS, ORGANIZATION AND MANAGEMENT 270 (1992) ("Activities that serve no social function other than to transfer rents . . . have been called rent seeking.") (emphasis omitted); Lynn A. Stout, *Some Thoughts on Poverty and Failure in the Market for Children's Human Capital*, 81 GEO. L.J. 1945, 1946 n.7 (1993) ("Wealth transfers by definition do not increase the overall level of wealth enjoyed by a society, as any wealth increase enjoyed by the transferee must be matched by a wealth loss by the transferor. Indeed, to the extent that transfers involve transactions costs, they reduce net social wealth."). In other words, "a rent-seeker endeavors to obtain wealth without contributing to wealth creation." David W. Giattino, *Curbing Rent-Seeking by Activist Shareholders: The British Approach*, 25 TEMP. INT'L & COMP. L.J. 103, 104 (2011). Rent-seeking also wastes the resources expended in its pursuit, and it "distorts the . . . decision-making process, thereby generating influence costs. The wasted resources and influence costs constitute the social costs of rent-seeking." *Id.* (citing MILGROM & ROBERTS, *supra*, at 270); *see also* WARD FARNSWORTH, THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW 72–74 (2007) (discussing some of the ways in which rent seeking might occur in litigation, but not considering removal).

9. *See infra* Part IV.B. For purposes of this Article, I define "high-risk defendant(s)" as one or more defendants who have a larger financial stake in the outcome of a case, as compared to other defendants. In other words, the high-risk defendant(s) stands to lose a larger amount of money, as compared to other defendants, if the plaintiff wins the case.

10. Garside v. Osco Drug, Inc., 702 F. Supp. 19, 21 (D. Mass. 1988).

commencement of the removal clock before the recent enactment of the FCJVCA, and elucidating how some of these procedures afforded plaintiffs the opportunity to manipulate the system. It then analyzes how the FCJVCA reduces, but does not eliminate, the ability of plaintiffs to utilize the unanimity rule to their benefit. It explains how the unanimity rule invites plaintiffs to manipulate the process. From there the analysis employs game theory to diagram and illustrate defendants' opportunities for strategic behavior as a result of the unanimity rule. Finally, the Article concludes by proposing that the primary defendant model replace the unanimity rule. Utilizing the primary defendant in the broad removal context mirrors the current trend to incorporate this concept in recent class action and multijurisdictional legislation. This Article's proposal increases fairness and transparency in a system normatively committed to these objectives.

II. THE UNANIMITY RULE AND THE MODERN REMOVAL SCHEME

Plaintiffs routinely choose to file actions in state court that they otherwise could bring in federal court[11] because it is commonly understood that plaintiffs fare better in state court than they do in federal court.[12] The right of removal, however, gives defendants the power to override the plaintiff's choice of forum and remove the case to federal court.[13] In those cases in which the plaintiff tactically chooses state court, the defendant's choice to remove the action to federal court is also a strategic decision. The removal right, however, is not absolute. Defendants must file a notice of removal within thirty days after service upon them.[14] And pursuant to the so-

11. *See* Adam N. Steinman, *What is the* Erie *Doctrine? (And What Does It Mean for the Contemporary Politics of Judicial Federalism?)*, 84 NOTRE DAME L. REV. 245, 298 (2008) ("[P]laintiffs craft lawsuits with an eye toward keeping them in state court, and defendants strive mightily to justify removal of such lawsuits to federal court.").

12. 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, 594, 596–97 (1998) (noting a very low percentage of plaintiffs win in removed cases compared with those originally adjudicated in federal court, and that there is a generally higher success rate in state court than in federal court); Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?*, 81 NOTRE DAME L. REV. 591, 638–40 (2006) (describing higher median recoveries and attorney's fees in state court class actions than in federal court class actions).

13. 28 U.S.C. § 1446(a) (Supp. 2011); *see also* Scott R. Haiber, *Removing the Bias Against Removal*, 53 CATH. U. L. REV. 609, 618 (arguing "removal [is] a procedural device intrinsically necessary for the protection of a defendant's *equal* and *constitutional* right to litigate certain claims in federal court").

14. 28 U.S.C. § 1446(b)(1) (Supp. 2011).

called "unanimity rule," all defendants in a removable action must agree to removal or the case remains in state court.[15]

The Supreme Court first considered the notion of a unanimity rule in the context of removal in 1900 in *Chicago, Rock Island & Pacific Railway Co. v. Martin.*[16] *Martin* involved a lawsuit for wrongful death brought in Kansas state court against two railroad companies.[17] One of the defendants sought to remove the action to federal court, alleging a federal cause of action.[18] The Court held that both defendants had to agree in order for the case to be removed, stating: "Removal could not be effected unless all the parties on the same side of the controversy united in the petition."[19] In other words, the Supreme Court determined that there was a unanimity rule inherent in the then-existing removal statute.[20]

Modern removal law is embodied in the Federal Rules of Civil Procedure, which were first promulgated in 1938.[21] The removal right itself is codified in 28 U.S.C. § 1441,[22] with the procedure before and after removal governed by §§ 1446 and 1447, respectively.[23] The general removal statute, 28 U.S.C. § 1441(a), permits a defendant to remove to federal court only if the plaintiff could have filed the action in the federal system as an initial matter.[24]

The language of the removal statute prior to the enactment of the FCJVCA stated that a

> defendant *or defendants* desiring to remove any civil action . . . from a State court shall file in the district court . . . a notice of removal signed pursuant to Rule

15. *See* Yarber v. Morse, No. 11-166-GPM, 2011 U.S. Dist. LEXIS 24608, at *2–3 (S.D. Ill. Mar. 10, 2011); Reinhardt v. Mont. Human Rights Bureau, No. 10-17-H-CCL, 2010 WL 5391280, at *2 (D. Mont. Dec. 17, 2010).

16. Chi., Rock Island & Pac. Ry. Co. v. Martin, 178 U.S. 245, 248 (1900).

17. *Id.* at 245.

18. *Id.* at 246.

19. *Id.* at 248.

20. *Id.*

21. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 595 n.14 (2007).

22. *See* 28 U.S.C. § 1441 (2006 & Supp. 2011).

23. *See id.* §§ 1446–1447.

24. 28 U.S.C. § 1441(a) (Supp. 2011) ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending."); *see also* Jefferson Cnty. v. Acker, 527 U.S. 423, 430 (1999); Archuleta v. Lacuesta, 131 F.3d 1359, 1361 (10th Cir. 1997); Walker v. City of Collegedale, No. 1:04 CV 283, 2004 WL 3327266, at *4 (E.D. Tenn. Nov. 8, 2004). *See generally* 14A CHARLES ALAN WRIGHT, ARTHUR RAPHAEL MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE §§ 3721–3740 (2d ed. 1985 & Supp. 1997) (explaining law of removal).

> 11 . . . and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.[25]

Courts had construed the phrase "or defendants" to require unanimity—that is, "when there is more than one defendant, all must join in the removal petition."[26] If any one defendant refused to consent or failed to join in the removal, the removal notice was defective on its face and the case had to remain in state court.[27] The FCJVCA now explicitly codifies the unanimity rule, by stating that "all defendants who have been properly joined and served must join in or consent to the removal of the action."[28]

Some exceptions do limit the unanimity rule in cases where imposing it would create an unjust inability to remove. First, merely nominal defendants do not have to be in unanimity with the other defendants for otherwise proper removal to be valid.[29] Whether a defendant is nominal depends heavily on the facts of the case.[30] For example, courts consider a defendant to be nominal when there is no basis on which to impose liability,[31] when there is no realistic possibility for the plaintiff to establish a cause of action against a defendant,[32] or when the plaintiff does not seek "real relief" from a defendant.[33] Furthermore, defendants do not need to obtain the unanimous agreement of fraudulently joined defendants to remove.[34] Outside of these

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25. 28 U.S.C. § 1446(a) (2011) (emphasis added).

26. Lewis v. Rego Co., 757 F.2d 66, 68 (3d Cir. 1985); *see also* Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressmen & Assistants' Local 349, 427 F.2d 325, 326–27 (5th Cir. 1970) ("The law is clear that under 28 U.S.C. § 1446(a), removal procedure requires that all defendants join in the removal petition.").

27. For recent applications of this interpretation, see, for example, McCarrie v. GCA Servs. Grp., No. 10-531, 2010 WL 1741353, at *5 (E.D. Pa. Apr. 29, 2010) ("Because . . . Defendants . . . have all failed to consent to the removal in writing within the thirty-day period set forth in 28 U.S.C. § 1446(b), remand to state court is appropriate . . . ."); Guajardo v. Powermate Corp., No. C-10-208, 2010 WL 2990974, at *2 (S.D. Tex. July 28, 2010); and Nat'l Waste Assocs. v. TD Bank, N.A., No. 3:10-CV-289, 2010 WL 1931031, at *7 (D. Conn. May 12, 2010).

28. 28 U.S.C. § 1446(b)(2)(A) (Supp. 2011).

29. N. Ill. Gas Co. v. Airco Indus. Gases, 676 F.2d 270, 272 (7th Cir. 1982); *see also* Whitaker v. Am. Telecasting, Inc., 261 F.3d 196, 207 (2d Cir. 2001) ("[A] plaintiff may not defeat a federal court's diversity jurisdiction and a defendant's right of removal by merely joining as defendants parties with no real connection with the controversy.") (quoting Pampillonia v. RJR Nabisco, Inc., 138 F.3d 459, 460–61 (2d Cir. 1998)).

30. *Tri-Cities Newspapers, Inc.*, 427 F.2d at 327 (ordering remand to further explore facts in order to determine if party was nominal).

31. Shaw v. Dow Brands, Inc., 994 F.2d 364, 369 (7th Cir. 1993).

32. Norman v. Cuomo, 796 F. Supp. 654, 658 (N.D.N.Y. 1992).

33. *See* Thorn v. Amalgamated Transit Union, 305 F.3d 826, 833 (8th Cir. 2002).

34. "The unanimous consent or joinder of all defendants is not required . . . where a defendant has been fraudulently joined." Fellhauer v. City of Geneva, 673 F. Supp. 1445,

limited exceptions, the unanimity rule mandates that all defendants must consent to removal.[35]

III. WHY REMOVE? SUCCESS RATES FOR PLAINTIFFS AND DEFENDANTS IN STATE AND FEDERAL COURT

As many scholars have noted, "The name of the game is forum shopping."[36] Indeed, "there is a widespread perception among attorneys, litigants, and policymakers" alike that federal court provides defendants with a more favorable forum than it does plaintiffs.[37] This is particularly true in diversity cases, because this form of federal subject matter jurisdiction is premised on the notion that citizens of one state may not receive entirely fair treatment in the courts of another.[38] Some observers have gone so far as to argue that some local state court juries view cases as an opportunity for wealth redistribution, taking money from large, foreign corporate defendants and giving it to

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1447 n.4 (N.D. Ill. 1987). The purpose of the fraudulent joinder doctrine is to "strike a reasonable balance among not rewarding abusive pleading by the plaintiff, the plaintiff's tactical prerogative to select the forum, and the defendant's statutory right to remove." Diaz v. Kaplan Univ., 567 F. Supp. 2d 1394, 1402 n.26 (S.D. Fla. 2008) (quoting 14B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3723 (3d ed. 1998)) (internal quotation marks omitted).

35. *See* Soliman v. L-3 Commc'ns Corp., No. C 08-04838 WHA, 2008 WL 5383151, at *3 (N.D. Cal. Dec. 24, 2008) (citing Abrego Abrego v. Dow Chem. Co., 443 F.3d 676, 680 (9th Cir. 2006)). Interestingly, there is a circuit split regarding whether each defendant is required to express in writing its consent to remove, or whether one defendant can in effect "vouch" for the consent of another defendant. The Fifth, Seventh, and Eighth Circuits have held that each defendant must expressly state in writing its agreement to remove. *See* Getty Oil Corp. v. Ins. Co. of N. Am., 841 F.2d 1254, 1262 n.11 (5th Cir. 1988); Roe v. O'Donohue, 38 F.3d 298, 301 (7th Cir. 1994); Pritchett v. Cottrell, Inc., 512 F.3d 1057, 1062 (8th Cir. 2008). Conversely, the Sixth and Ninth Circuits permit a defendant to indicate another defendant's consent to remove. *See* Harper v. AutoAlliance Int'l, Inc., 392 F.3d 195, 201–02 (6th Cir. 2004); Proctor v. Vishay Intertechnology Inc., 584 F.3d 1208, 1225 (9th Cir. 2009); *see also* Boruff v. Transervice, Inc., No. 2:10–CV–00322 JD, 2011 WL 1296675, at *1–2 (N.D. Ind. 2011) (discussing the circuit split).

36. Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1921 (2009) (citing, *inter alia*, Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79 (1999) (discussing the propriety of forum shopping)); Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1508, 1514–15 (1995) (explaining forum selection's "major impact on outcome").

37. Thomas H. Cohen, Do Federal and State Courts Differ in How They Handle Civil Trial Litigation: A Portrait of Civil Trials in State and Federal District Courts 2–3 (June 28, 2006) (unpublished working paper), *available at* http://ssrn.com/abstract=912691; Heather R. Barber, *Developments in the Law: Federal Jurisdiction and Forum Selection: Removal and Remand*, 37 LOY. L.A. L. REV. 1555, 1555 (2004) ("The presumption is that federal courts are more defendant-friendly.").

38. *See, e.g.*, Pappas v. Middle Earth Condo Ass'n, 963 F.2d 534, 539 (2d Cir. 1992) ("Diversity jurisdiction . . . was in the view of some scholars instituted to obviate the fear that state courts would be prejudiced against out-of-state litigants.").

local plaintiffs.[39] One journalist observed of several state courts, "'It's almost impossible to get a fair trial if you're a defendant in some of these places . . . . Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or the law is.'"[40]

As a result, many defendants are eager to get out of state court and into federal court.[41] Conversely, plaintiffs' attorneys are continuously developing strategic methods to keep their actions in state court and out of federal court.[42] This is true even for cases whose federal subject matter jurisdiction is based on a federal question. Indeed, one observer noted that "plaintiffs with non-federal causes of action flee federal court, and those with federal claims scour the books for state law analogues."[43]

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39. *See, e.g.*, Paul Rosenthal, *Improper Joinder: Confronting Plaintiffs' Attempts to Destroy Federal Subject Matter Jurisdiction*, 59 AM. U. L. REV. 49, 57 n.41 (2009) (quoting Jerry Mitchell, *Jefferson County Ground Zero for Cases*, CLARION-LEDGER (Jackson, Miss.), June 17, 2001, at 1A) (noting that some lawyers have begun referring to the Jefferson County Courthouse as "the center for the redistribution of wealth"); *see also* Taco Bell Corp. v. Cracken, 939 F. Supp. 528, 530 (N.D. Tex. 1996) ("Duval County was perceived to be a 'plaintiff's venue' . . . . Attorneys and others in the legal community viewed cases pending in Duval County as having a higher settlement value based on a higher probability of a large recovery at trial.").

40. Jim Copland, Op-Ed., *The Tort Tax*, WALL ST. J., June 11, 2003, at A16.

41. *See, e.g.*, Willging & Wheatman, *supra* note 12, at 603 (noting that defendant attorneys in removed case reported their expectations that federal courts "would apply class certification rules strictly and that substantive law, discovery rules, and expert evidence rules would favor their side"); Neil J. Marchand, *Where's the Party: Do Class Action Plaintiffs Really Prefer State Courts?*, 22–23 (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1334923 (finding that 27.5% of Michigan state court class action lawsuits are removed to federal court). *But see* Cohen, *supra* note 37, at 9–12 (reviewing general civil jury trials in a sample of state courts and all federal district courts in 1992, 1996, and 2001 and concluding that overall plaintiff win rates are nearly the same in both state and federal courts and that the damages awarded to plaintiffs in federal courts are substantially higher compared to their state counterparts).

42. *See generally* Erik B. Walker, *Keep Your Case in State Court: Defendants Know That Litigating in Federal Court Can Be Costly and Time-Consuming for Plaintiffs; Knowing How to Combat Removal Attempts Will Ensure Timely Justice for Your Client*, TRIAL, Sept. 2004, at 22.

43. Gregory P. Joseph, *Federal Litigation—Where Did It Go Off Track?*, LITIG., Summer 2008, at 5, 5. The Class Action Fairness Act was drafted because lawmakers and policymakers saw the federal courts as being more neutral with regard to the parties in class action cases than the state courts. *Class Action Fairness Act of 2003: Hearing on H.R. 1115 Before the H. Comm. on the Judiciary*, 108th Cong. 23 (2003) (statement of John H. Beisner, Partner, O'Melveny & Myers LLP), *available at* http://judiciary.house.gov/legacy/87093.PDF ("[T]here can no longer be any question that some local judges are exhibiting bias against out-of-state defendants . . . the very type of bias that led to the creation of diversity jurisdiction in the first place."); *see also* Emery G. Lee & Thomas E. Willging, *The Impact of the Class Action Fairness Act on the Federal Courts: An Empirical Analysis of Filings and Removals*, 156 U. PA. L. REV. 1723, 1733–34 (2008) (noting that CAFA was enacted out of concern that cases of national importance were being kept out of federal courts); Cohen, *supra* note 37, at 3.

Conversely, "defendants strain to achieve a federal forum."[44] "Forum is worth fighting over because outcome often turns on forum."[45] Scholars have noted: "It is no secret that plaintiffs often deliberately structure their state court lawsuits to prevent removal by defendants to federal court."[46] Thus, forum selection is of pivotal importance, and any contest over forum can be the critical dispute in the case.[47]

One commentator offered several reasons why one particular plaintiff preferred California state court to federal court.[48] "First, California [state law] requires only a three-fourths jury majority for a verdict, whereas the federal rules require unanimity. Second, the county jury pool was likely to be more favorable to individual plaintiffs and hostile to business defendants than the district pool."[49] Additionally, the plaintiff's attorneys may have felt more comfortable in state court

> and more integrated into the local bar, whereas [the corporate defendant's] attorneys may have felt more comfortable in federal court with nationally followed federal procedures; [the plaintiff] may have seen state court as less receptive than federal courts to summary judgments or dismissals in favor of defendants; [the plaintiff] may have viewed state-court litigation as less expensive; or [either the plaintiff or the defendant] may have believed that defendants generally have a higher win rate in removed cases.[50]

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44. Joseph, *supra* note 43, at 62. Indeed, an article in an issue of Trial magazine included a piece regarding strategies for plaintiffs to oppose removal efforts. *See generally* Walker, *supra* note 42. The message in the opening paragraphs of the article was clear: "Plaintiff attorneys' preference for state courts is undisputed.... Defense attorneys... upon receiving a state court complaint... frequently search for any conceivable basis to remove the lawsuit to federal court." *Id.* at 22.

45. Clermont, *supra* note 36, at 1921–22.

46. Hines & Gensler, *supra* note 6, at 781.

47. Clermont, *supra* note 36, at 1922. Moreover, the *Iqbal* and *Twombly* decisions make federal court an even more attractive forum for defendants, since the procedural hurdles facing plaintiffs just to survive a 12(b)(6) motion are now higher. *See* Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss."); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 (2007); *see also* Thomas P. Gressette, Jr., *The Heightened Pleading Standard of* Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal*: A New Phase in American Legal History Begins*, 58 DRAKE L. REV. 401, 442–48 (2010) (discussing the defendant-friendly trend in circuit court opinions after *Twombly* and *Iqbal*).

48. Scott Dodson, *In Search of Removal Jurisdiction*, 102 NW. U. L. REV. 55, 80 (2008). Dodson notes, "[i]n the interest of full disclosure," that he was one of the attorneys assisting this plaintiff on her petition for certiorari. *Id.* at 58 n.22.

49. *Id.* at 80.

50. *Id.* at 80 n.138; *see also* Adam R. Prescott, *On Removal Jurisdiction's Unanimous Consent Requirement*, 53 WM. & MARY L. REV. 235, 259 (2011) (noting several reasons a defendant might favor removal).

Indeed, the data shows that defendants do have better success in removed cases.[51] In one study, the data revealed that the overall "win rate" by plaintiffs in federal civil cases is 53%, but in the subset of those cases that were removed the plaintiffs' win rate dropped to 33%.[52] In diversity cases, the plaintiffs' win rate dropped from 71% for cases initially brought in federal court to 34% in removed cases.[53] In federal question cases, excluding prisoner litigation, the drop in win rate was analogous to that of removed diversity cases.[54]

The authors of the study attributed this disparity in outcomes to one or both of two causes: (i) forum impact, i.e., the defendant's defeat through removal of the plaintiff's state court forum advantage,[55] and/or (ii) case selection, i.e., removed cases might simply be weaker cases.[56] Regardless of the explanation for what the authors deemed the "removal effect,"[57] it appears that "removal has a fairly express purpose of changing outcome."[58]

IV. THE UNANIMITY RULE AND OPPORTUNITIES FOR STRATEGIC BEHAVIOR

Prior to the recent adoption of the FCJVCA, § 1446(b) limited the time within which the defendant had to file a notice of removal as follows:

> The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading[59] setting forth the claim for relief upon which such

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51. *See* Clermont & Eisenberg, *supra* note 12, at 581 ("Plaintiffs' win rates in removed [diversity] cases are very low, compared to cases brought originally in federal court and to state cases."); Matthew J. Richardson, *Clarifying and Limiting Fraudulent Joinder*, 58 FLA. L. REV. 119, 121 & n.6, 184 (2006) ("[T]he federal forum [is] often less sympathetic to plaintiffs than the state courts in which they originally filed their complaints.").

52. Clermont & Eisenberg, *supra* note 12, at 593 & n.42, 594. The term "win rate" is defined as "the fraction of plaintiff wins among judgments for either plaintiff or defendant." *Id.* at 593. *But see* Cohen, *supra* note 37, at 9–10.

53. Clermont & Eisenberg, *supra* note 12, at 593. Indeed, removal appears to bring diversity defendants to a much more favorable forum, even more favorable than for those diversity defendants who plaintiffs sued initially in federal court. *Id.* at 593–94.

54. *Id.* at 593–95.

55. *Id.* at 599–602.

56. *Id.* at 602–06. However, the authors suggest that "arguments exist that the set of removed cases is, in fact, not a weaker set of cases at all." *Id.* at 605–06.

57. *Id.* at 592–93.

58. Clermont & Eisenberg, *supra* note 36, at 1514 n.18.

59. In those states in which an action may be commenced by service of a summons without the complaint, it is unclear whether service of the summons alone qualifies as an "initial pleading" triggering the thirty-day period. The Third Circuit, in considering a

> action or proceeding is based, or within thirty days after service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.
>
> If the case stated by the initial pleading is not removable, a notice of removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable, except that a case may not be commenced on the basis of jurisdiction conferred by section 1332 of this title [diversity of citizenship] more than 1 year after commencement of the action.[60]

The unanimity rule complicated the calculation of the thirty-day requirement when there were multiple defendants, because there were no directives as to when the removal clock began. Indeed, the statutory language regarding the time in which to file a notice of removal contemplated only one defendant.[61] The absence of clear congressional guidelines created tremendous procedural difficulty for the judiciary. Judges expressed concern that the rules "force them to waste time determining jurisdictional issues at the expense of adjudicating underlying litigation."[62]

Because of the lack of congressional guidance, courts were forced to look outside the removal statutory language—often to policy concerns and legislative intent—to determine when the removal clock began.[63] Initially courts promulgated the "first-

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Pennsylvania case, has held that "a writ of summons alone can no longer be the 'initial pleading' that triggers the 30-day period for removal under the first paragraph of 28 U.S.C. § 1446(b)." Sikirica v. Nationwide Ins. Co., 416 F.3d 214, 223 (3d Cir. 2005), *overruling* Foster v. Mut. Fire, Marine & Inland Ins. Co., 986 F.2d 48 (3d Cir. 1993). Thus, in the Third Circuit at least, the thirty-day period for seeking removal does not begin to run until service of the *complaint* on the defendant.

60. 28 U.S.C. § 1446(b) (2006).

61. "The notice of removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant . . . ." 28 U.S.C. § 1446(b) (2006); *see also* Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 532 (6th Cir. 1999); McKinney v. Bd. of Trs., 955 F.2d 924, 926 (4th Cir. 1992).

62. COMM. ON THE JUDICIARY, FEDERAL COURTS JURISDICTION AND VENUE CLARIFICATION ACT OF 2011, H.R. REP. NO. 112-10, at 2 (2011). Indeed, as early as 1912, one court noted: "That 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." Hagerla v. Miss. River Power Co., 202 F. 771, 773 (S.D. Iowa 1912).

63. *See, e.g.*, Bailey v. Janssen Pharmaceutica, Inc., 536 F.3d 1202, 1205–06 (11th Cir. 2008); Bonadeo v. Lujan, No. CIV-08-0812 JB/ACT, 2009 WL 1324119 (D. N.M. Apr. 30, 2009); Pilot Trading Co. v. Hartford Ins. Group, 946 F. Supp. 834, 837–38 (D. Nev. 1996).

served defendant" rule, often referred to as the majority rule.[64] Under this rule, the thirty-day clock begins to run upon the date the *first* defendant is served.[65] If the first-served defendant does not file a notice of removal within thirty days of receipt of the initial pleading,[66] the window to file the notice of removal closes and all of the defendants the plaintiff serves after the initial thirty-day window lose the opportunity to seek removal.[67] Courts that followed the first-served defendant approach believed that it ensued logically from the unanimity rule.[68] They posited that the first-served defendant's failure to remove operated as a constructive waiver of its right to seek removal, which would defeat unanimity if a later-served defendant sought to remove.[69] In other words, though the later-served defendant had a statutory right to file a notice of removal, unanimity failed because the first-served defendant had already "voted" against removal by failing to file such a notice.[70]

In order to give all defendants an opportunity to remove, some courts adopted the "intermediate" or "*McKinney*" rule.[71] Under the intermediate rule, the clock for removal begins upon

64. *See* Plitt & Rogers, *supra* note 6, at 116. Courts were split in interpreting this rule. The Fourth and Fifth Circuits held that the thirty-day period ends thirty days after the first defendant is served (the "first-served" rule). Delalla v. Hanover Ins., 660 F.3d 180, 182 (3d Cir. 2011). The Sixth, Eighth, Ninth, and Eleventh Circuits adopted the "later-served" rule. *Id.*

65. Marano Enters. v. Z-Teca Rests., 254 F.3d 753, 755 (8th Cir. 2001).

66. Or within thirty days after receipt of information first indicating that the case has become removable. 28 U.S.C. § 1446(b) (2006); *see also* Walker v. Philip Morris USA, Inc., 443 Fed. App'x. 946, 949–50 (6th Cir. 2011); Cole v. Knowledge Learning Corp., 416 Fed. App'x. 437, 439 (5th Cir. 2011); Music v. Arrowood Indem. Co., 632 F.3d 284, 286 (6th Cir. 2011).

67. *See* Harris v. Bankers Life, 425 F.3d 689, 693–95 (9th Cir. 2005); Brown v. Demco, Inc., 792 F.2d 478, 481–82 (5th Cir. 1986).

68. *Brown*, 792 F.2d at 481–82.

69. *Id.* at 481–82. This reasoning suggests that the unanimity rule would not permit manipulation of service by the plaintiff, as waiting to serve another defendant after the thirty-day window would theoretically not affect the unanimity requirement.

70. *See* Hensley v. Irene Wortham Ctr., Inc., No. 1:07CV403, 2008 WL 2183946, at *4–5 (W.D.N.C. Apr. 4, 2008). Courts supporting the "first served defendant" rule argued that since the statute only contemplated one defendant, every occurrence when a later-served defendant is served after the initial thirty-day window would not be clearly permitted by the removal statute. *Id.* Furthermore, these courts noted that allowing a later-served defendant the opportunity to remove conflicts with the desire to determine forum as early as possible a contrary ruling would result in extreme unfairness to the plaintiff as well as waste of judicial resources. *See, e.g.*, Brown v. Demco, Inc., 792 F.2d 478, 482 (5th Cir. 1986); McAnally Enters. v. McAnally, 107 F. Supp. 2d 1223, 1127–28 (C.D. Cal. 2000).

71. Named after the decision in *McKinney v. Bd. of Trs. of Md. Cmty. Coll.*, 955 F.2d 924, 928 (4th Cir. 1992), and as adopted by the District Court for the District of Columbia. *See* Princeton Running Co. v. Williams, Civil Action No. 05-1461, 2006 WL 2557832, at *2 (D.D.C. 2006); Phillips v. Corr. Corp. of Am., 407 F. Supp. 2d 18, 21 (D.D.C. 2005).

service of the first defendant, while another defendant, if served within the first defendant's initial period for removal, is given a full thirty days from its own date of service to join the first-served defendant's notice of removal.[72] Courts favoring this rule emphasized that denying later-served defendants less than the full thirty days to vote to remove would be inequitable, and the text of the then-in-effect § 1446(b) did not imply that later-served defendants had any less than thirty days from the date of their own service in which to vote to remove.[73]

Both the first-served defendant and the intermediate/*McKinney* rules were ripe for manipulation by plaintiffs. With the first-served defendant rule, plaintiffs could strategically serve defendants not likely to remove,[74] wait until the thirty days had passed, and then serve other defendants who would have voted to remove (and who might have convinced the first-served defendants to do so as well)[75] but were then foreclosed from doing so.[76] And although the Fourth Circuit adopted the intermediate/*McKinney* rule to combat the "inequity" created by the first-served defendant rule,[77] the opportunity for plaintiffs to engage in strategic behavior remained. A plaintiff could simply wait until the thirty days had run after serving the first defendant and then serve additional defendants. As one scholar aptly noted regarding the first-served and intermediate rules, "A plaintiff enjoys ample room to manipulate the system."[78]

Recently, courts moved toward adoption of the "last-served defendant" rule.[79] This rule gives each defendant thirty days to file a notice of removal from the date of its own personal service, without regard to the date of service on earlier-served defendants in the suit.[80] Courts that rejected the first-served defendant or intermediate rule and favored the last-served defendant rule

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72. Barbour v. Int'l Union, 640 F.3d 599, 612 (4th Cir. 2011).

73. *Id.* at 608. The intermediate rule still enabled an early determination of the forum in which the lawsuit was to commence, as the deadline for removal would be determinable and predicated upon the plaintiff's date of serving later-served defendants. *McKinney*, 955 F.2d at 927. If a plaintiff desired to determine forum as early as possible, the intermediate rule encouraged expeditious and simultaneous service upon all defendants. *Barbour*, 640 F.3d at 608.

74. Perhaps because of lack of sophistication. *See* Howard B. Stravitz, *Rocking the Removal Trigger*, 53 S.C. L. REV. 185, 209 (2012).

75. Paul E. Lund, *The Timeliness of Removal and Multiple-Defendant Lawsuits*, 64 BAYLOR L. REV. 50, 78 n.157 (2012).

76. *See, e.g.*, Auchinleck v. LaGrange, 167 F. Supp. 2d 1066, 1069–70 (E.D. Wis. 2001).

77. *McKinney*, 955 F.2d at 927.

78. Haiber, *supra* note 13, at 650 & nn.336–39.

79. Destfino v. Reiswig, 630 F.3d 952, 956 (9th Cir. 2011).

80. Bailey v. Janssen Pharmaceutica, 536 F.3d 1202, 1208–09 (11th Cir. 2008).

explained that their approach was more consistent with the statutory removal language. They opined that the first-served defendant rule "would require [the court] to insert 'first' before 'defendant' into the language of the statute,"[81] and if Congress intended for the thirty-day removal period to commence upon service of the first defendant it could have explicitly said so.[82] In addition, courts saw the last-served defendant rule as a common-sense answer to the inequalities to later-served defendants who otherwise would lose the right to seek removal.[83] They reasoned that even if the first-served defendant did not file a notice of removal (and thus presumably would not want to remove, thereby defeating the requirements of the unanimity rule) a later-served defendant should still have the opportunity to discuss the option of removal with co-defendants.[84]

Indeed, observers lamented the opportunities available to plaintiffs to utilize the removal clock, in conjunction with the requirements of the unanimity rule, to their advantage and to strategically stagger service upon defendants in order to prevent otherwise proper removal.[85] In part because of the confusion and inconsistency regarding removal timing, Congress passed and President Obama signed into law the

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81. Brierly v. Alusuisse Flexible Packaging, Inc., 184 F.3d 527, 533 (6th Cir. 1998).

82. *Id.*; *see also Bailey*, 536 F.3d at 1207.

83. *Bailey*, 536 F.3d at 1206; *see also Brierly*, 184 F.3d at 533.

84. Marano Enters v. Z-Teca Rests., L.P., 254 F.3d 753, 755 (8th Cir. 2001). This would also be fair to later-served defendants who enter into litigation with unsophisticated co-defendants. Howard B. Stravitz, *Recocking the Removal Trigger*, 53 S.C. L. REV. 185, 209 (2002). Interestingly, the shift toward the last-served defendant rule was due largely to the Supreme Court's decision in *Murphy Bros. v. Michetti Pipe Stringing, Inc.*, although the case does not specifically address the issue of which rule courts should follow. *See Bailey*, 536 F.3d at 1208–09; *Marano*, 254 F.3d at 756. In *Murphy Bros.*, the Court held that a defendant is required to take action for removal only upon formal service of process or waiver thereof, not informal notification that the plaintiff has commenced a lawsuit. *Murphy Bros.*, 526 U.S. at 350. Though *Murphy Bros.* implicated removal, the question resolved by the Court was whether a "courtesy copy" of a complaint fell under the language "service *or otherwise*" in the removal statute triggered the thirty-day removal clock. *Id.* at 347–48 (emphasis added).

85. *See* Lund, *supra* note 75, at 78 n.157, 79. "In the typical scenario, a plaintiff sues multiple defendants, who are served in random sequence. A defendant who is served toward the end of this temporal daisy chain seeks to remove the action: that defendant acts within thirty days of its receipt of the initial pleading, but after earlier-served defendants have let their respective thirty day periods run without incident. (It must be remembered that there is no uniform 'D day' applicable to *all* defendants; each has thirty days from its receipt of the initial pleading within which to remove, 28 U.S.C. § 1446(b), so if defendants are served on different dates, their action deadlines will also be different.) In such a situation, courts have been consentient in holding that, even if the movant secures the acquiescence of the earlier-served defendants in the removal initiative, the petition must, upon timely objection by the plaintiff, be denied." Gorman v. Abbott Labs., 629 F. Supp. 1196, 1201 (D.R.I. 1986).

FCJVCA.[86] The FCJVCA, *inter alia*, (i) codifies the unanimity rule and (ii) gives each defendant thirty days after service to file a notice of removal:

> § 1446(b)(2)(A) When a civil action is removed solely under section 1441(a), all defendants who have been properly joined and served must join in or consent to the removal of the action.
>
> § 1446(b)(2)(B) Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal.[87]

One objective of the FCJVCA was to clarify and simplify removal procedures.[88] Section 1446(b)(2)(B) resolves the long-standing circuit split regarding when to begin the removal clock when plaintiffs serve multiple defendants at different times.[89] It also prevents plaintiffs from staggering service on multiple defendants in order to defeat removal, since service on each defendant in essence restarts the thirty-day removal clock. However, the FCJVCA does nothing to prevent plaintiffs from bargaining with defendants to defeat removal, nor does it stop intra-defendant strategic behavior. Both of these scenarios I

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86. Federal Courts Jurisdiction and Venue Clarification Act of 2011. Pub. L. No. 112-63,125 Stat. 758 (codified as amended in scattered sections of 28 U.S.C.).

87. *Id.*

88. H.R. REP. NO. 112-10, at 12 (2011) (discussing the effect of "Proposed Amendments to Section 1441"); *see also* Vishnubhakat, *supra* note 6, at 162.

89. Although the Supreme Court instructed that the removal statute should have "uniform nationwide application," Grubbs v. Gen. Elec. Credit Corp., 405 U.S. 699, 705 (1972), a circuit split existed nonetheless. *Compare* Getty Oil Corp. v. Ins. Co. of N. Am., 841 F.2d 1254, 1262–63 (5th Cir. 1988), *with* Bailey v. Janssen Pharmaceutica, Inc., 536 F.3d 1202, 1206–09 (11th Cir. 2008). *See also* Davidson v. Rand, No. Civ.05-CV-012, 2005 WL768593, at *3 (D.N.H. Apr. 6, 2005) ("Unfortunately, the governing statute - 42 [sic] U.S.C. § 1446 - is vague and inartfully drafted. Ambiguity has directly lead to the ongoing confusion over whether a defendant, whose time to remove has lapsed, may, nonetheless, consent to a later-served defendant's removal."). Indeed, divisions of option existed between the two leading Federal Practice treatises regarding the commencement of the removal clock. *See* 14C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3731, at 592 (4th ed. 2009) (recommending later-served defendant rule); Georgene Vairo, *Removal*, *in* MOORE'S FEDERAL PRACTICE § 107.30[3][a] (Daniel R. Coquillette et al. eds., 3d. ed. 1997) (recommending the first-served defendant rule); *see also* Yellow Cab Co. v. Gasper, 994 F. Supp. 344, 346 (W.D. Penn. 1998) (comparing "the two principal treatise[s']" split on the issue); Jay O'Keeffe, Barbour *Redux: Fourth Circuit Resolves Removal in Multiple-Defendant Cases (Again)* (Feb. 4, 2011), http://www.virginiaappellatelaw.com/2011/02/articles/opinions-and-analysis/barbour-redux-fourth-circuit-resolves-removal-in-multipledefendant-cases-again/ (contrasting three different circuit interpretations of § 1446); Charles D. Hansen, *Removal to Federal Court in Multi-Defendant Litigation: Two Rules You Can't "Wait" to Learn*, LITIGATOR, July 2010, at 4, 4–5 (describing the split between the circuits regarding the removal clock).

describe and illustrate below. In fact, as I explain, the unanimity rule *enables* this activity. To make matters worse, courts have stated that "in the removal context, faithful adherence to the statutory language is more important than avoiding potential unfairness."[90] In other words, courts will adhere to the unanimity requirement even when doing so creates opportunities for behavior that is unjust and nontransparent and which thwarts the spirit, if not the letter, of the rules of civil procedure.

A. The Unanimity Rule and Plaintiffs' Strategic Behavior

The codification of the last-served defendant rule will not extinguish plaintiffs' capacity to utilize the unanimity rule to defeat removal. It is true that the last-served defendant rule eliminates the problem of foreclosing the ability of a defendant that the plaintiff serves outside the thirty-day window to voice its desire to remove. But because unanimity is still a requirement for removal, the last-served defendant rule does nothing to prohibit the plaintiff from conspiring with any defendant to prevent removal.

In fact, courts have explicitly and implicitly condoned agreements by plaintiffs with defendants for the specific purpose of defeating removal.[91] In *Russell Corp. v. American Home Assurance Co.*, an insured brought an action in state court against multiple defendant insurance companies, seeking a determination of coverage.[92] One of the insurer-defendants, First State, had previously agreed to a service of suit clause providing that the insurer would consent to jurisdiction wherever the insured brought an action against it.[93] When the defendants sought to remove, the district court held that the service of suit clause prevented First State from consenting to remove, since by contracting to the clause First State in essence agreed to jurisdiction in state court (as that was where the plaintiff brought suit).[94] The remaining defendants argued that the service of suit clause did not prohibit the First State defendants from consenting to remove, and they appealed to the Eleventh

90. Ballard Nursing Ctr., Inc. v. GF Health Prods., Inc., No. 07 C 5715, 2007 WL 3448731, at *4 (N.D. Ill. Nov. 14, 2007) (quoting Auchinleck v. LaGrange, 167 F. Supp. 2d 1066, 1069 (E.D. Wis. 2001)).

91. *But see* English v. Unum Life Ins. Co. of Am., No. 610-CV-00318, 2010 WL 3269794, at *5 (M.D. Fla. June 21, 2010) ("In order to demonstrate fraudulent joinder . . . the removing party must show . . . [that] plaintiff colluded with the non-consenting defendant to defeat removal.").

92. Russell Corp. v. Am. Home Assurance Co., 264 F.3d 1040, 1042 (11th Cir. 2001).

93. *Id.* at 1042–43.

94. *Id.* at 1044.

Circuit.[95] That court concurred with the district court and affirmed its ruling, noting that "every federal court . . . interpreting this clause has determined that language essentially identical to that contained in the First State policy constitutes a waiver of the right to remove."[96] The court explained that "[t]he defendants' right to remove a case is their right alone. They can waive it, exercise it, or *bargain it away*. The court and the public have no interest in what the defendants do with their right to remove."[97]

In *Hernandez v. Seminole County, Florida*, relatives of a pretrial detainee who died while in custody brought a § 1983 action in state court against multiple defendants.[98] After the plaintiffs filed the suit they entered into an agreement with one of the groups of defendants, the "Dube defendants," "with a purpose of defeating any possible removal of the case from state court."[99] The other defendants in the case joined in filing a notice of removal and alleged that although the Dube defendants did not consent to remove, they were nominal defendants and thus their vote was unnecessary.[100] The district court held otherwise and remanded the case to state court due to the lack of unanimous consent to remove.[101]

B. The Unanimity Rule and Defendants' Strategic Behavior

As noted above, the FCJVCA, while curtailing some strategic behavior on the part of plaintiffs, leaves in place plaintiffs' ability to utilize the unanimity rule to thwart otherwise proper removal by contracting with a defendant to prevent it.[102] Perhaps more significantly, the unanimity rule enables some *defendants* to act in their own self-interest by engaging in strategic behavior. By giving each defendant an equal voice in the decision to remove, regardless of that defendant's litigation exposure, opportunities are ripe for defendants to utilize the requirements of the unanimity rule to subvert the system. Scholars have heretofore overlooked these defendant-focused tactical opportunities. And

95. *Id.* While the defendants argued that the court should recognize a "fairness exception" to the unanimity requirement, the court noted that "no federal court has ever recognized such an exception." *Id.* at 1050.

96. *Id.* at 1047.

97. *Id.* at 1048 (emphasis added) (quoting Archdiocese of Milwaukee v. Underwriters at Lloyd's, London, 955 F. Supp. 1066, 1069 (E.D. Wis. 1997)).

98. Hernandez v. Seminole Cnty., Fla., 334 F.3d 1233, 1235 (11th Cir. 2003).

99. *Id.*

100. *Id.*

101. *Id.* at 1241–42.

102. *See supra* Part IV.A.

the recent codification of the unanimity rule serves, in essence, to sponsor such actions.

To illustrate the ability that the unanimity rule creates for defendants to engage in strategic behavior, I discuss a simple lawsuit between one plaintiff and two defendants. I diagram the possible interactions between the two defendants resulting from the unanimity rule by using a traditional game theory model called a normal form game.[103] Both "players" in the game make a choice that is best for them based upon the presumption that their "opponent" will also make the respective self-interested best choice.[104]

The normal form game consists of three elements:

1. The players in the game;
2. The strategies available to the players; and
3. The payoff each player receives for each possible combination of strategies.[105]

Appreciating the game requires the supposition that individuals are rational in the sense that they consistently prefer outcomes with higher payoffs to those with lower payoffs.[106] Furthermore, one must assume that "people make the best decisions they can, given their beliefs about what others will do."[107] When the assumption is that a defendant will be rational in the sense that he or she will seek to decrease his or her potential losses as much as possible, the strategy that the co-defendant should likely pick is clear.

In scenario 1 below, assume that a plaintiff (P) brings one action against two diverse defendants (X) and (Y) in state court, suing each for $100,000. Statistically, the likelihood of success for P in state court is 70%, meaning that P's expected win from both X and Y is $70,000 each.[108] If the defendants remove the case to federal

103. *See* KEVIN LEYTON-BROWN & YOAV SHOHAM, ESSENTIALS OF GAME THEORY 3 (Ronald J. Brachman & Tom Dietterich eds., 2008) (defining "normal form game" as "a representation of every player's utility for every state of the world, in the special case where states of the world depend only on the players' combined actions").

104. *See* NICHOLAS L. GEORGAKOPOULOS, PRINCIPLES AND METHODS OF LAW AND ECONOMICS 50–51 (Cambridge Univ. Press 2005). "The formulation of a game into a matrix structure is one of the most powerful tools developed by game theory pioneers [because t]his form helps the decision maker to realize that other players in the game are also making decisions, so that no outcome is the result of an isolated decision." ILHAN KUBILAY GEÇKIL & PATRICK L. ANDERSON, APPLIED GAME THEORY AND STRATEGIC BEHAVIOR 2–3 (Chapman and Hall/CRC 2010).

105. DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, GAME THEORY AND THE LAW 7–8 (Harvard Univ. Press 1994) (emphasis omitted).

106. *Id.* at 11.

107. *Id.*

108. *See* Clermont & Eisenberg, *supra* note 12, at 593 (finding that the win rate in original diversity cases is 71%). For ease of calculation I have rounded 71% down to 70%. Thus for the purposes of this scenario, $100,000 × 0.70 = $70,000.

court, the statistics change dramatically for P, who now has only a 30% chance of succeeding.[109] P's expected win now drops to $30,000 from each defendant.[110] The numbers demonstrate quite clearly why P will do what it can to prevent the defendants from removing the case to federal court.[111]

What about the defendants? They too have opportunities for strategic behavior. To demonstrate, one needs to examine the above scenario from the point of view of the defendants. To remain in state court gives them expected monetary losses of $70,000 each,[112] (in other words, they each are expected to lose $70,000 to the plaintiff) while to remove to federal court decreases that expected loss to $30,000 each.[113] Both defendants thus should equally desire removal, as doing so provides a "win" (or a loss reduction) of $40,000 each.[114]

Scenario 1

		DEFENDANT Y	
		Do Not Support Removal	**Support Removal**
DEFENDANT X	**Do Not Support Removal**	($70,000, $70,000)	($70,000, $70,000)
	Support Removal	($70,000, $70,000)	($30,000, $30,000)

The above is a matrix used in game theory to diagram the defendants' possible actions and the results of these actions. The two possible actions available to defendants X and Y (do not support removal or support removal) are represented along the horizontal and vertical planes, respectively. Within each of the four cells, the expected monetary loss for each defendant is indicated with the convention that the first number in each pair is the expected monetary loss for

109. *Id.* (finding that the win rate in removed diversity cases is 34%). For ease of calculation, I lowered this win rate to 30%.

110. $100,000 × 0.30 = $30,000.

111. As discussed above, the FCJVCA eliminates one such mechanism for plaintiffs to prevent removal—the ability to stagger service upon defendants to manipulate the thirty-day clock.

112. $100,000 × 0.70 = $70,000.

113. $100,000 × 0.30 = $30,000.

114. ($100,000 × 0.70) – ($100,000 × 0.30) = $40,000.

defendant X, while the second number in each pair is the expected monetary loss for defendant Y.

Since removal requires defendant unanimity, only the lower right cell (where both defendants support removal) represents the expected monetary loss for each defendant in federal court. As noted above, federal court is obviously the best forum for the defendants, since it affords them the smallest loss ($30,000 each instead of $70,000 each in state court). It is clear that there should be universal support among the defendants for removal, since, as rational actors seeking to minimize their potential losses, removal is the preferred strategy for both defendants.

Now consider a second scenario in which the defendants' interests are not as well aligned, once more focusing on the defendants' options. Assume that, as in the first scenario, P brings one action against diverse defendants X and Y in state court. This time, however, P seeks $100,000 from X but $800,000 from Y. As before, the statistical likelihood of success for P in state court is 70%—said from the perspective of the defendants, their likelihood of loss in state court is 70%.[115] Thus, the expected monetary loss for X in state court remains at $70,000.[116] However, for Y the expected monetary loss in state court jumps to $560,000.[117] After removal to federal court the expected monetary loss for X remains as it was in scenario 1 at $30,000, while for Y this figure increases from scenario 1's amount of $30,000 to $240,000.[118] As a result of the inequality in potential liability in this second scenario, removal is more valuable to Y than it is to X. Simply put, Y wants removal more than X does.

Scenario 2

		DEFENDANT Y	
		Do Not Support Removal	**Support Removal**
DEFENDANT X	**Do Not Support Removal**	($70,000, $560,000)	($70,000, $560,000)
	Support Removal	($70,000, $560,000)	($30,000, $240,000)

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115. *See* Clermont & Eisenberg, *supra* note 12, at 593 (finding that the win rate in original diversity cases is 71%).

116. For X, $100,000 × 0.70 = $70,000.

117. For Y, $800,000 × 0.70 = $560,000.

118. For X, $100,000 × 0.30 = $30,000. For Y, $800,000 × 0.30 = $240,000.

So what can X do? Armed with the knowledge of Y's increased vulnerability, X can "seek rent" from Y.[119] In other words, X can extract value from Y in exchange for X's removal vote. One way to accomplish this would be to ask Y to pay for a settlement between X and P. In essence, Y would provide the funds needed for P to settle with X. The settlement amount will be a figure between $30,000 and $100,000. If P desires a quick settlement with X, and X convinces P that X is about to cooperate with Y and file a notice of removal, the number should approach the low end of that range. If, in contrast, P successfully threatens to hold out for the full $100,000 (thereby gambling on whether X and Y will agree and remove), then Y should be willing to pay toward the top of the range for X to get out of the case, since even the $100,000 amount is far below the value to Y of removing the case.[120] Once X is out of the case (an outcome favorable to both P, who gets the money she was seeking, and X,[121] who is out of the case and does not have to expend time in litigation or money on attorney's fees), Y is free to remove. By removing to federal court, Y decreases its expected monetary loss from $560,000 to $240,000, thus "saving" $320,000. Even with the $100,000 that Y spent to "buy" X's removal vote (or, in other words, to eliminate the need for it), Y still has decreased its expected monetary loss by $220,000. Indeed, as long as the price for X to settle with P is less than the difference between Y's expected monetary loss in federal versus state court, it is always in Y's best interest economically to "buy away" X's vote.[122] As is clear by having an equal vote in the removal process, the low-risk defendant[123] holds disproportionate bargaining power over the high-risk defendant.

On its face, one might denounce such actions as bad faith behavior between co-parties. However, after Congress added Rule 11 sanctions to the removal statute in 1988,[124] the Supreme Court ruled

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119. For a definition of rent-seeking, see *supra* note 8.

120. $100,000 is less than the difference between Y's potential liability in state versus federal court.

121. But note that since X may not desire a settlement on record, this may not always be X's preferred strategy.

122. This transaction would need to take place quickly, because Y has only thirty days to vote to remove. 28 U.S.C. § 1441(e)(1) (2006). This thirty-day limit was unchanged by the FCJVCA. *See* 28 U.S.C. § 1446(b)(2)(B) (2011).

123. For purposes of this Article I define "low-risk defendant(s)" as one or more defendants who have a smaller financial stake in the outcome of a case, as compared to other defendants. In other words, the low-risk defendant stands to lose less money, as compared to other defendants, if the plaintiff wins the case.

124. "A defendant or defendants desiring to remove any civil action . . . from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed *pursuant to Rule 11 of the Federal Rules of Civil Procedure*." 28 U.S.C. § 1446(a) (2006) (emphasis added). Under the Rules of

that these sanctions are only applicable when there lacks an objectively reasonable basis for filing a notice of removal.[125] Thus, it appears that a defendant bargaining for a removal vote with another party (including another defendant) is not sanctionable conduct. As Judge Easterbrook explained:

> The beneficiary of the statutory right [of removal] may enjoy it or trade it for something he prefers; when a court observes that the right has been surrendered (traded) in a contract, it may not leap to the conclusion that the statutory plan has been defeated. The contract tells us only that the parties valued something else more highly.[126]

Indeed, the opportunity for defendants to seek rent as illustrated in scenario 2 above could be viewed as a win-win situation for all of the parties in the case.[127] P is satisfied because she gets the relief that she sought from X, with relatively little time and expense spent in litigation.[128] X is pleased because she is out of the case and had to expend nothing (save court costs and attorneys' fees to that point) to get there.[129] Y is better off because he has reduced his expected monetary loss.[130]

Civil Procedure in existence before the 1988 amendment, removal merely required a "verified petition." *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702 Stat. 4642, 4699 (1988); Financial Timing Publ'ns, Inc. v. Compugraphic Corp., 893 F.2d 936, 939 n.3 (8th Cir. 1990).

125. Martin v. Franklin Capital Corp., 546 U.S. 132, 136 (2005); *see also* Davis v. Veslan Enters., 765 F.2d 494, 500 (5th Cir. 1985) (imposing sanctions when the defendants filed a notice of removal in bad faith to cause delay); Elanex Pharms., Inc. v. Wegner & Bretschneider, P.C., 129 F.R.D. 381, 381 (D.D.C. 1989) (awarding sanctions when a defendant did not conduct a reasonable inquiry to find that its codefendants were nondiverse); McLaughlin v. Western Cas. & Sur. Co., 603 F. Supp. 978, 980–82 (D. Ala. 1985) (imposing sanctions when defendants filed a notice of removal when the case was no longer removable and where removal was filed for the improper purpose of delaying trial).

126. Cange v. Stotler & Co., 826 F.2d 581, 596 (7th Cir. 1987) (Easterbrook, J., concurring).

127. There are instances in which particular defendants might eschew opportunities to seek rent. For instance, a defendant might conclude that a mutual defense with a cooperative codefendant is more valuable than the rent that it might otherwise obtain through rent-seeking. In other words, a defendant might avoid potentially alienating a codefendant by seeking rent, and choose instead to pursue a strategy of working together toward a common defense. This might be particularly true if the defendant anticipates interacting with the codefendant in future litigation. Additionally, to the extent that an insurance company is the true defendant in a particular action, it might simply follow standard protocol (for example, always remove whenever possible) and not consider investigating alternative strategies. Put another way, the insurance company defense model may be uniformly to follow the path of the lowest transaction costs.

128. *See, e.g.*, Steven Shavell, *The Level of Litigation: Private Versus Social Optimality of Suit and Settlement*, 19 INT'L REV. L. & ECON. 99, 102 (1999) (noting that the cost of litigation is a factor that incentivizes settlement).

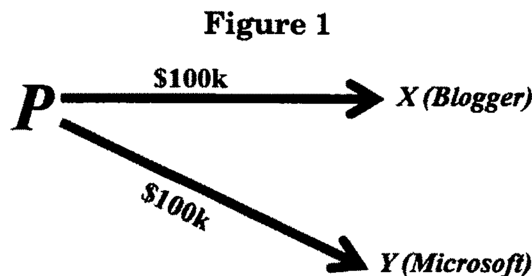
129. Of course the public can lose if the action is settled, particularly if the case involves a potentially important public matter. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–86 (1984) (discussing adjudication and certiorari, which promise a

However, it is important to note that scenario 1 assumed not only that the plaintiff sued the two defendants for the same amount, but also that the value of a dollar was equal for both X and Y. In other words, for every dollar that Y's expected monetary loss increased and X's expected monetary loss stayed the same, the value of X's vote increased dollar for dollar for Y. With this inference, Y's higher expected monetary loss made X's vote more valuable to Y.

But if one revisits scenario 1 by replacing X and Y with actual parties, while keeping all of the remaining parameters the same, the outcome can differ. Suppose that X is a law school student with a blog, and Y is Microsoft.

The lawsuit looks like Figure 1 below, with the arrows representing the amount for which the plaintiff is suing each defendant:

Figure 1



One can envision that in this scenario, it is Microsoft's removal vote that is more important to the law student blogger than vice versa, even though Microsoft's expected monetary loss in state court is, in absolute terms, the same as that for the blogger. This is because the relative value of the dollar is not equal. The $100,000 for the law student blogger may be his or her life's savings (more likely a portion of his or her debt burden), while $100,000 for Microsoft is negligible.

The effects of relative value are even starker in the next scenario. If X and Y again are replaced with the law student

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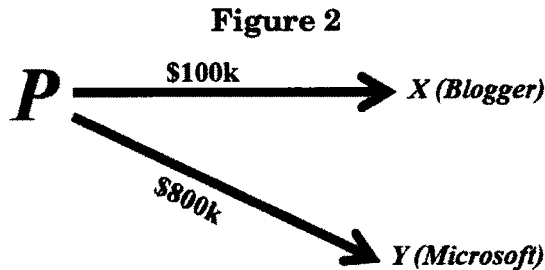
devotion to public ends); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2624–25 (1995) (arguing that adjudication may prove superior to settlements because it creates rules and precedents and leads to the discovery and publicizing of useful facts).

130. However, it is understood that state court costs are lower than those in federal court. *See* 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, 1174 (1995); Neil Miller, *Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction*, 41 AM. U. L. REV. 369, 404 (1992). This is an issue that necessarily factors in to Y's decisionmaking process. If the expected monetary loss to Y in federal court does not exceed the expected increase in court costs, a decision to remove is unwarranted.

blogger and Microsoft respectively, the lawsuit looks like Figure 2 below, again with the arrows representing the amount for which the plaintiff is suing each defendant:

Figure 2



In this scenario, it still is likely to be Microsoft's removal vote that is more important to the law student blogger than vice versa, even though Microsoft's expected monetary loss in state court is, in absolute terms, significantly higher than that for the blogger. This is again because the relative value of the dollar is not equal. But the blogger is in no position to buy Microsoft's vote, and thus he or she is at the mercy of Microsoft's decision on whether to vote to remove.

The unanimity rule also creates similar, but opposite, inequities that result from the doctrine of joint liability. Under this doctrine, once the plaintiff has established liability, the defendants fight amongst themselves to apportion their individual responsibility.[131] The plaintiff drops out of the case and avoids further litigation expense. Opponents of joint liability argue that it leads to situations in which a party with a very minor portion of the responsibility winds up paying the majority of the damages.[132] Indeed, plaintiffs have incentives to add deep-pocket defendants to cover what the shallow-pocket defendants cannot.[133] Similarly, when a defendant seeking to remove "buys"

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131. W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 268, § 47, at 328–30, §§ 50–52, at 336–55 (West, 5th ed. 1984).

132. *Id.* at 475–76 ("[F]ailure to consider the negligence of all tortfeasors . . . prejudices the joined defendants who are thus required to bear a greater portion of the plaintiff's loss than is attributable to their fault."); *see also* Kathios v. Gen. Motors Corp., 862 F.2d 944, 950–51 (1st Cir. 1988) (recognizing the waste of judicial resources and the unfairness to a defendant who might be forced to pay a judgment that is not in proportion to his percentage of fault).

133. Carol A. Mutter, *Moving to Comparative Negligence in an Era of Tort Reform: Decisions for Tennessee*, 57 TENN. L. REV. 199, 307–08, n.499 (1990). One study has also found that plaintiffs recover three to four times as much from deep-pocket defendants, including government entities and corporations, than from individual defendants. AUDREY CHIN & MARK A. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS 43 (1985).

the vote of another defendant by paying for a settlement with the plaintiff, the plaintiff gets a damage reward (at least with respect to defendant X in scenario 2 above) and avoids further ligation cost (again, with respect to defendant X).[134] But while joint liability incentivizes plaintiffs to add defendants with deep pockets, the unanimity rule invites plaintiffs to add defendants who are low-risk, because the more low-risk defendants a plaintiff includes in a lawsuit, the greater the likelihood that one of these defendants will engage in strategic behavior.[135] Indeed, "behavioral economics literature suggests that decisionmakers are more willing risk takers when less money is at stake . . . t[he] so-called 'peanuts effect', where people take risks when playing for 'peanuts.'"[136] The FCJVCA's codification of the last-served defendant rule only increases these opportunities, since with the addition of each new defendant comes an additional thirty days in which to bargain.[137] The unanimity rule gives a defendant with the least at stake in the litigation an inordinate, and unjust, amount of power.[138]

C. The Primary Defendant Rule

I posit that Congress erred in explicitly codifying the unanimity rule in the FCJVCA. Instead, I suggest that Congress would have been wiser to amend the removal statutes to state that unanimity is *not* necessary for defendants to remove a case.

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134. *See supra* Part IV.B.

135. Of course adding multiple defendants (particularly those that are low-risk) is not a cost-free endeavor. In addition to higher service of process costs and attorney fees, by adding multiple defendants, plaintiffs run the risk of creating distraction from the main issues in the case and increasing grounds for dismissal.

136. Elizabeth Chamblee Burch, *Optimal Lead Plaintiffs*, 64 VAND. L. REV. 1109, 1126 (2011) (citing Harry Markowitz, *The Utility of Wealth*, 60 J. POL. ECON. 151, 151 (1952)); Drazen Prelec & George Loewenstein, *Decision Making over Time and Under Uncertainty: A Common Approach*, 37 MGMT. SCI. 770, 782 (1991); Bethany J. Weber & Gretchen B. Chapman, *Playing for Peanuts: Why Is Risk Seeking More Common for Low-Stakes Gambles?*, 97 ORG. BEHAV. & HUM. DECISION PROCESSES 31, 31–33 (2005).

137. *See* 28 U.S.C. § 1446 (b)(2)(B) (Supp. 2011) ("Each defendant shall have 30 days after receipt by or service on that defendant of the initial pleading or summons described in paragraph (1) to file the notice of removal."); 28 U.S.C. § 1446 (b)(2)(C) (Supp. 2011) ("If defendants are served at different times, and a later-served defendant files a notice of removal, any earlier-served defendant may consent to the removal even though that earlier-served defendant did not previously initiate or consent to removal.").

138. The unanimity rule could also lead to an anticommons phenomenon. The anticommons theory states that when a resource has too many owners who retain the privilege to exclude others, the resource is susceptible to underutilization. *See* Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 667 (1998). This is in contrast to a commons, a resource where everyone has a right to use the resource thereby subjecting it to overuse. *Id.* at 675; *see also* LAWRENCE LESSIG, THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD 19–20 (2001).

Instead, in place of the unanimity rule Congress should have required that the decision whether to remove rests solely with the "primary defendant." In other words, I suggest that Congress should have codified a "primary defendant rule."

The notion of a statutory reference to a "primary defendant" is not a new idea in the choice-of-forum context, as Congress has already included the term in the Multiparty, Multiforum Trial Jurisdiction Act (MMTJA),[139] and in the Class Action Fairness Act (CAFA).[140] In fact, the concept of the "primary defendant" has a long history in the legal jurisprudential landscape.[141] Admittedly, substituting the newly codified unanimity rule with the primary defendant rule is not without its drawbacks.[142] But the primary defendant rule is a step toward achieving the efficiency that informs the rationale behind the MMTJA and CAFA[143] and the fairness and transparency objectives that lie at the heart of much judicial reform, including, ironically, the FCJVCA itself.[144]

1. *The Evolution of the Primary Defendant.* The concept of the primary defendant was first codified in 2002 in the MMTJA.[145] However, the Supreme Court recognized the idea as early as 1911.[146] In *United States v. American Tobacco*, the United States sued various defendants for alleged antitrust violations.[147] The Supreme Court stated: "[W]e classify the corporate defendants . . . as follows: The American Tobacco Company, . . . because of its dominant relation to the subject-matter of the controversy, as the primary defendant; five other

139. 28 U.S.C. § 1369 (2006); *see infra* Part IV.C.2.

140. 28 U.S.C. § 1332(d) (2006); *see infra* Part IV.C.3.

141. *See* Passa v. Derderian, 308 F. Supp. 2d 43, 61–62 (D.R.I. 2004) (addressing different meanings in different contexts for term "primary defendant" throughout modern case law, including RICO claims, securities fraud actions, and tort actions); *see also* Standard Oil Co. v. United States, 283 U.S. 163, 166 (1931) (discussing that the owner of the patents as issues were the primary defendants while the defendants which licensed those patents were "merely" secondary defendants).

142. *See infra* Part V.

143. *See* H.R. CONF. REP. NO. 107-685, at 199 (2002), *reprinted in* 2002 U.S.C.C.A.N. 1120, 1151.

144. *See* 136 CONG. REC. 12,613 (1990) (statement of Rep. Kastenmeier) (stating that a fundamental reason for the MMTJA is fairness to the litigants); *see also* H.R. CONF. REP. NO. 107-685, at 200 (2002), *reprinted in* 2002 U.S.C.C.A.N. 1120, 1152 (discussing several problems that arise from overlapping and fragmented class actions in state and federal courts, including discovery conflicts, difficult consolidation of cases, and increased costs to parties because of duplicative litigation); H.R. REP. NO. 107-370, at 7–8 (2002) (describing abuses in state court that rendered class action litigation unfair).

145. See *infra* Part IV.C.2.

146. *See* United States v. Am. Tobacco Co., 221 U.S. 106, 143 (1911).

147. *Id.* at 142–43.

[defendants], because of their relation to the controversy[,] as the accessory, and the fifty-nine other [defendants] as the subsidiary defendants."[148]

Since *American Tobacco*, courts have employed the term "primary defendant" in a variety of situations such as RICO actions,[149] securities fraud litigation,[150] and tort cases.[151] For example, in an action for violation of the Sherman Anti-Trust Act, the U.S. Supreme Court classified patent-holding defendants as "primary" and licensees as "secondary."[152] In litigation involving securities fraud, the Fifth Circuit distinguished the primary defendant from those sued "under the secondary liability theory of aiding and abetting."[153] In another securities fraud action, the Eastern District of Louisiana noted that only the "actual purchasers and sellers" of the stock had a dominant relation to the subject matter and thus were "primary" defendants, while "secondary" defendants "included all others with some nexus or 'legally cognizable relationship' to the plaintiff."[154]

The D.C. Circuit, inquiring into the theory upon which a burglar's live-in companion could be found civilly liable, found it essential to distinguish the primary and secondary actors.[155] Defining the primary defendant as the "primary tortfeasor," and thus directly liable to the plaintiff, the court reasoned that a nonparticipant, secondary defendant could only be vicariously liable.[156] The Third Circuit held similarly when it characterized RICO defendants as primary or secondary based on whether or not the defendant allegedly "participated in the operation and management . . . of racketeering activity."[157] In an action for indemnification and contribution, the Sixth Circuit, interpreting

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148. *Id.* at 143.

149. *See, e.g.*, Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 650 (3d Cir. 1998) (reversed on other grounds); Passa v. Derderian, 308 F. Supp. 2d 43, 62 (D.R.I. 2004).

150. *See* Marrero v. Banco di Roma, 487 F. Supp. 568, 572 (E.D. La. 1980) (citing Woodward v. Metro Bank of Dallas, 522 F.2d 84, 94 (5th Cir. 1975)).

151. *See, e.g.*, Sims v. Chesapeake & Ohio Ry. Co., 520 F.2d 556, 559 (6th Cir. 1975) (using terms "primary defendant" and "secondary defendant" in the context of indemnification); RESTATEMENT (SECOND) OF TORTS § 886B, cmt. c (1979) (describing the terms "primary" and "secondary" responsibility in the context of indemnification); 4 AM. JUR. 2d *Appellate Review* § 104 (stating that under a contribution order, a joint tortfeasor is liable to the "primary defendant" for any amount paid over a stated sum).

152. Standard Oil Co. v. United States, 283 U.S. 163, 165–66 (1931).

153. *Woodward*, 522 F.2d at 94.

154. *Marrero*, 487 F. Supp. at 572.

155. Halberstam v. Welch, 705 F.2d 472, 475–76 (D.C. Cir. 1983).

156. *Id.* at 476, 486–88.

157. Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 650 (3d Cir. 1998).

Ohio state law, held that when a secondary defendant is found to be liable to the plaintiff, that defendant may recover from the "primary defendant" via indemnification.[158]

2. *The Primary Defendant and the MMTJA.* The MMTJA provides for federal jurisdiction over claims between citizens of the same state, where the litigation involves an accident in which seventy-five or more people die.[159] In other words, the MMTJA eliminates the statutory mandate of complete diversity when an accident of large magnitude occurs, substituting instead a "minimal diversity" requirement.[160] The MMTJA defines "minimal diversity" as existing when "any party is a citizen of a State and any adverse party is a citizen of another State."[161] Furthermore, the MMTJA permits removal, with exceptions, despite the presence of a defendant who is a resident of the forum state.[162] Congress intended the MMTJA to be a mechanism by which litigation stemming from one major disaster could easily be consolidated for adjudication in one federal court.[163] Thus, the MMTJA increases judicial efficiency by avoiding unnecessary costs to defendants and multiple lawsuits concerning the same subject matter in various state and federal courts.[164]

Congress included in the MMTJA the concept of the "primary defendant."[165] Section 1369(b) of the MMTJA, regarding limitations of federal court jurisdiction, states: "The district court shall abstain from hearing any civil action described . . . in which (1) the substantial majority of all plaintiffs are citizens of a single State of which the *primary defendants* are also citizens; and (2) the claims asserted will be governed primarily by the laws of that State."[166] Legislative history indicates that the MMTJA's drafters intended the term "primary defendant" to mean one who is expected to suffer the greatest loss if found liable.[167]

To date there have been only two sets of cases employing the MMTJA.[168] The first set of cases was consolidated in *Passa v.*

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158. Sims v. Chesapeake & Ohio Ry. Co., 520 F.2d 556, 559–60 (6th Cir. 1975).

159. 28 U.S.C. § 1369(a) (2006).

160. 28 U.S.C. § 1369(a) (2006).

161. 28 U.S.C. § 1369(c)(1) (2006).

162. 28 U.S.C. § 1441(e)(1)(A) (2006).

163. *See* H.R. CONF. REP. NO. 107-685, at 199–200 (2002), *reprinted in* 2002 U.S.C.C.A.N. 1120, 1151–52.

164. *Id.*

165. 28 U.S.C. § 1369(b) (2006).

166. *Id.* (emphasis added).

167. H.R. REP. NO. 107-370, at 30 (2002).

168. One set of cases to invoke the MMTJA involved the destruction Hurricane Katrina caused in Louisiana in 2005. *See, e.g.*, Preston v. Tenet Healthsystem Mem'l Med. Ctr., Inc.,

Derderian, in which one-hundred people were killed and hundreds more injured in a massive fire at a nightclub in Rhode Island.[169] In the wake of the fire, various plaintiffs filed numerous cases in both state and federal court in Rhode Island.[170] Some of the state cases were removed to the district court while others were brought in the district court in the first instance.[171] The District Court of Rhode Island was faced with the task of determining whether jurisdiction was proper in that court under § 1369(b).[172] This section would have required the court to abstain from adjudicating the litigation if, *inter alia*, the "substantial majority of all plaintiffs" and all of the "primary defendants" were from Rhode Island.[173] The court noted that the term "primary defendants" was "not defined within the text of § 1369 [and l]egislative history also fails to shed much light on which defendants Congress considered 'primary.'"[174]

The parties proffered three competing arguments for how the court should define "primary defendant": (i) the defendants with the deepest pockets; (ii) the most culpable defendants; or (iii) those defendants with "direct liability . . . excluding all defendants joined as secondary or third-party defendants for purposes of vicarious liability, indemnification, or contribution."[175]

The District Court of Rhode Island summarily dispensed with the idea that the primary defendant should be the one with the deepest pockets, holding that "the measure of a particular defendant's ability to pay a judgment should have no bearing on this Court's evaluation of a Rule 12(b)(1) motion."[176] Next, the court considered the argument that the primary defendant should be the defendant "most culpable for the nightclub fire."[177] The court deemed the culpability standard "unworkable," stating that "at such

463 F. Supp. 2d 583, 591 (E.D. La. 2011); Yount v. Lafayette Ins. Co., No. 06-7382, 2006 WL 3240790, at *1 (E.D. La. Nov. 7, 2006). A point of inquiry of these cases included the MMTJA's definition of the term "accident," and they are thus not relevant to this paper.

169. Passa v. Derderian, 308 F. Supp. 2d 43, 46 (D.R.I. 2004).

170. *Id.* at 46–47.

171. *Id.*

172. *Id.* at 48.

173. *Id.* at 58.

174. *Id.* at 61.

175. *Id.* at 61–62.

176. *Id.* at 61. In a CAFA case, the Southern District of Illinois stated that basing a determination of primacy on the relative wealth of the defendants could lead to "arbitrary and unfair results, for plaintiffs and defendants alike, if a 'primary defendant' . . . were always the wealthiest defendant in a case, however peripheral that defendant's relationship to the wrongdoing at issue may have been." Kitson v. Bank of Edwardsville, No. 06-528-GPM, 2006 WL 3392752, at *16 (S.D. Ill. Nov. 22, 2006).

177. *Passa*, 308 F. Supp. 2d at 61.

an early stage in the court proceedings, before either discovery or a trial on the merits, it becomes difficult, if not impossible . . . to assign either culpability or liability."[178]

The third potential definition of "primary defendant," the one upon which the court agreed, is founded upon whether a defendant is directly liable to the plaintiff. Indeed, the court itself suggested this meaning of primacy at oral argument.[179] The direct liability standard includes as primary defendants those "facing direct liability," and it excludes "all defendants joined as secondary or third-party defendants for purposes of vicarious liability, indemnification or contribution."[180] The court reasoned that the direct liability model is preferable because "it does not require the Court to make a pre-trial determination of liability or culpability, but rather *requires only a review of the complaint* to determine which defendants are sued directly."[181]

3. *The Primary Defendant and CAFA*. Borrowing from the MMTJA's concept of "primary defendant," in 2005 Congress passed the Class Action Fairness Act.[182] CAFA was implemented to "remedy the influx of complex class action suits in state court, as well as to regulate plaintiffs' attempts to defeat federal diversity jurisdiction by naming 'token defendants.'"[183] CAFA provides for federal jurisdiction in suits that have minimal diversity[184] and an amount in controversy in excess of five million dollars,[185] thereby requiring plaintiffs to bring nearly all class action claims in federal court.[186]

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178. *Id.* at 61–62. In a CAFA case, the Central District of California noted that a classification of defendant primacy based on relative culpability would be "inappropriate and unworkable" because determining issues of culpability before adjudicating the merits of the case would be "too fact-based" at a purely procedural stage. Kearns v. Ford Motor Co., No. CV 05-5644 GAF(JTLX), 2005 WL 3967998, at *8 (C.D. Cal. Nov. 21, 2005).

179. *Passa*, 308 F. Supp. 2d at 62.

180. *Id.* at 62–63.

181. *Id.* at 63 (emphasis added).

182. Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

183. Amanda Coney, *Defining "Primary Defendants" in the Class Action Fairness Act of 2005*, 67(3) LA. L. REV. 903 (2007) (citing S. REP. NO. 109-14, at 10 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 11); Andrée Sophia Blumstein, *A New Road to Resolution: The Class Action Fairness Act of 2005*, TENN. B.J., Apr. 2005, at 19.

184. 28 U.S.C. § 1332(d)(2)(A)–(C) (2006) (minimal diversity exists when at least one member of the plaintiff class is diverse from any defendant).

185. 28 U.S.C. § 1332(d) (2006).

186. CAFA does not apply if the aggregate number of class action members is less than one hundred, if the action involves certain federal securities laws, or if there is a relation to the internal affairs or governance of a corporation arising under the laws of the state in which the corporation is incorporated. Anthony Rollo & Gabriel A. Crowson, *Mapping the New Class Action Frontier—A Primer on the Class Action Fairness Act and Amended Federal Rule 23*, 59 CONSUMER FIN. L.Q. REP. 11, 14 (2005).

In contrast to its expansive design, CAFA contains an "interests of justice" exception, which provides that

> a district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction . . . over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the *primary defendants* are citizens of the State in which the action was originally filed . . . .[187]

Further, CAFA exempts from its purview "any class action in which the *primary defendants* are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief."[188] In enacting CAFA, Congress followed the lead of the District of Rhode Island[189] and expressly stated that "primary defendants" are "those defendants who are the real targets of the lawsuit—i.e., the defendants who would be expected to incur most of the loss if liability is found."[190] Following this definition, in *In re Ingram Barge Co.*, the Eastern District of Louisiana found the primary defendant to be "the party that will . . . bear most of the liability if the plaintiffs prevail."[191]

Most courts have defined the "primary defendants" under CAFA as those with direct liability to the plaintiff—the same standard that the *Passa* court followed when evaluating claims brought under the MMTJA.[192] For example, in *Adams v. Federal Materials Co., Inc.*, the plaintiffs sued the defendant Federal Materials directly for breach of contract and breach of express warranties.[193] Federal Materials then filed a third-party complaint against Rogers Group, a diverse party, who the plaintiffs, in an amended complaint, then added as a defendant.[194] All of the defendants then filed a notice of removal to the Western District of Kentucky.[195] Since, under CAFA, a case

187. 28 U.S.C. § 1332(d)(3) (2006) (emphasis added).

188. 28 U.S.C. § 1332(d)(5)(A) (2006) (emphasis added).

189. *See* Passa v. Derderian, 308 F. Supp. 2d 43, 62 (D.R.I. 2004).

190. 151 CONG. REC. H732 (daily ed. Feb. 17, 2005).

191. *In re* Ingram Barge Co., No. CIV.A. 05-4419, 2007 WL 148647, at *2 (E.D. La. Jan. 10, 2007).

192. *See* Anthony v. Small Tube Mfg., 535 F. Supp. 2d 506, 515 (E.D. Pa. 2007) ("Most courts have construed 'primary defendants' by relying on a construction of an analogous provision of the Multiparty, Multiforum, Trial Jurisdiction Act of 2002, 28 U.S.C. § 1369, offered in *Passa v. Derderian* . . . .").

193. Adams v. Fed. Materials Co., No. Civ.A 5:05CV-90-R, 2005 WL 1862378, at *1 (W.D. Ky. July 28, 2005).

194. *Id.* at *1–2.

195. *Id.* at *1.

must be remanded if all of the primary defendants are not diverse,[196] the issue before the *Adams* court was whether Rogers was a primary defendant.[197] Although Federal Materials initially brought Rogers into the lawsuit as a third-party defendant, the Western District of Kentucky held that because the plaintiffs amended their complaint to include a claim directly against Rogers, Rogers' liability was "not distinguishable" from the other defendants' liability.[198] The court noted that "the lack of a principled distinction" between Rogers' position and that of the other defendants, given that the plaintiffs sued Rogers directly, left "no basis for treating Rogers as a secondary defendant."[199] In a class action lawsuit against Ford Motor Company and a local dealer, the Central District of California noted the similarity in goals of the MMTJA and CAFA and held that the plaintiff's allegations established that Ford was a "primary defendant" because "Ford is the defendant whose conduct forms a significant basis for the claims asserted by Plaintiff."[200]

Other courts have also focused on the existence of direct liability when determining which defendants were primary. For example, the Eastern District of Pennsylvania held in a toxic tort action that "there are four 'primary defendants' in this action because all four named defendants face direct liability."[201] Likewise, in a consumer fraud action, the Southern District of Illinois distinguished between the defendants by describing the secondary defendant's liability as "entirely vicarious" to that of the primary defendant.[202]

The court in *Passa* suggested that the primary defendant be identified by examining the face of the complaint.[203] However, doing so is not without its difficulties. Indeed, the Eastern District of Kentucky noted that making a determination of primacy from the pleadings could be a process fraught with assumptions and speculation.[204] For instance, courts would have to assume the plaintiff's interpretation of the relevant statute is correct to determine whether or not a defendant would be

196. 28 U.S.C. § 1332(d)(4)(B) (2006 & Supp. 2011).

197. *Adams*, 2005 WL 1862378, at *2, *5–6.

198. *Id.* at *1, *5.

199. *Id.* at *5.

200. Kearns v. Ford Motor Co., No. CV 05-5644 GAF(JTLX), 2005 WL 3967998, at *1, *7 (C.D. Cal. Nov. 21, 2005).

201. Anthony v. Small Tube Mfg, 535 F. Supp. 2d 506, 518 (E.D. Pa. 2007).

202. Kitson v. Bank of Edwardsville, No. 06-528-GPM, 2006 WL 3392752, at *17 (S.D. Ill. Nov. 22, 2006).

203. *See supra* note 181 and accompanying text.

204. Meiman v. Kenton Cnty., Ky., No. 10-156-DLB, 2011 WL 350465, at *6 (E.D. Ky. Feb. 2, 2011).

directly liable under the plaintiff's theory.[205] Further, if a plaintiff asserts alternative grounds for relief, such alternatives may create multiple and at times contradictory interpretations.[206] Nonetheless, despite these challenges, several courts have followed the District of Rhode Island's lead and focused on the plaintiff's allegations in the complaint when determining which defendant is primary.[207]

V. PROPOSAL: REPLACING THE UNANIMITY RULE WITH THE PRIMARY DEFENDANT

I propose that the drafters of the FCJVCA were mistaken to codify the unanimity rule. I argue instead that the concept of the primary defendant should replace the unanimity rule. The primary defendant in any given action should have the exclusive power to determine whether to file a notice of removal.[208] If another defendant disagrees with the primary defendant's choice, it should be that other defendant's burden to prove that it instead is the primary defendant. Under this proposal, only one defendant's vote—that of the primary defendant—is necessary for removal. Although this would likely lead to an increase in removed cases because the consent of multiple parties would be unnecessary, this result is consistent with the expansion of federal court jurisdiction through the removal process as contemplated by the MMTJA and CAFA.[209] It is important to note that replacing the unanimity rule with the primary defendant rule would not run afoul of the well-established mandate that the removal statute be construed strictly against removal,[210] because the requirement of proper subject matter jurisdiction as a prerequisite for removal would be unaffected.

205. *Id.*

206. *Id.*

207. *See, e.g.*, Green v. SuperShuttle Int'l, Inc., No. 09-2129 ADM/JJG, 2010 WL 419964, at *4 (D. Minn. Jan. 29, 2010); McClendon v. Challenge Fin. Investors Corp., No. 1:08CV1189, 2009 WL 589245, at *13 (N.D. Ohio Mar. 9, 2009); Anthony v. Small Tube Mfg., 535 F. Supp. 2d 506, 515–16 (E.D. Pa. 2007): Adams v. Fed. Materials Co., No. Civ. A 5:05CV-90-R, 2005 WL 1862378, at *5 (W.D. Ky. July 28, 2005).

208. Of course, the case would need to meet all of the existing requirements for proper removal, minus the unanimous consent of the defendants.

209. *But see* Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1553 (2008) ("[J]udges [have] interpreted [CAFA] in a way that dampened the early hopes of overly enthusiastic removers. . . .[T]he federal judiciary has not warmly embraced the statute.").

210. *See, e.g.*, Lontz v. Tharp, 413 F.3d 435, 440 (4th Cir. 2005); California ex rel. Lockyer v. Dynegy, Inc., 375 F.3d 831, 838 (9th Cir. 2004) ("The removal statute is strictly construed against removal jurisdiction.").

Furthermore, utilizing the primary defendant rule will add needed transparency to the removal process. It is a fundamental tenant of modern procedural rules that transparency is an essential component of a successful and effective system.[211] One commentator noted that "[b]ad private procedures subvert transparency by hiding the creation, form, or implementation of procedures from the public, [perhaps] because of private human enforcement. . . . Similarly, procedural justice demands participation by the parties to a dispute, and sometimes by the public as well."[212] Another stated that "[l]awyers need to re-engineer the process of interacting with opposing counsel to promote efficiency [and] transparency."[213] Under the current unanimity rule, defendants who object to removal are not accountable for their decisions or actions. In other words, there is no process for identifying which defendant(s) elected to forgo removal and their motivation for making this choice. Thus, if the reason that removal did not occur was because the plaintiff contracted with a defendant to prevent it or because a defendant "bought" another defendant's vote, this is likely to remain undisclosed to the court, the other parties, and the public. In fact, the parties have incentives to keep these strategic actions unknown, since they might anticipate being repeat players in litigation and want to avoid revealing their tactics to future litigants.

I recommend that courts follow the guidance of the Private Securities Litigation Reform Act (PSLRA)[214] in determining which defendant is primary. PSLRA permits a court to consolidate multiple class actions containing common questions of law and fact.[215] Under PSLRA, the court determines who is the "most adequate" plaintiff to act as "lead plaintiff" in the consolidated action.[216] The court assesses, *inter alia*, "who has the

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211. *See, e.g.*, Ira S. Nathenson, *Civil Procedures for a World of Shared and User-Generated Content*, 48 U. LOUISVILLE L. REV. 911, 952 (2010) ("Scholarship on procedure generally focuses on court procedures, which consist of rules and statutes that are promulgated pursuant to open processes. Because transsubstantive rules such as those in the Federal Rules of Civil Procedure are created and enforced publicly, transparency values are embedded in the system.").

212. *See id.* at 952.

213. George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 RICH. J.L. & TECH. 1, 16 (2007), http://jolt.richmond.edu/v13i3/article10.pdf.

214. 15 U.S.C. § 78u-4(a)(3) (2006).

215. 15 U.S.C. § 78u-4(a)(3)(B)(ii) (2006).

216. *Id.* There are important differences between the lead plaintiff and the primary defendant. For example, the due process concerns inherent in selecting a lead plaintiff in class action litigation are absent in the removal context since at worst the case will simply be heard in state rather than federal court. *See* Burch, *supra* note 136, at 1118. Furthermore, whereas lead plaintiffs are responsible for making many representative decisions throughout the course

largest financial interest" in the action.[217] In making such a determination, I suggest that courts follow the lead of the several district courts that have already done so and base their identifications of the primary defendant on the allegations as set forth in the complaint. An assessment of the defendant who has the greatest potential liability in the lawsuit (as alleged by the plaintiff) should underlie the court's selection of the primary defendant. Other methods for making such a selection—such as which defendant is most culpable or which defendant has the deepest pockets—are problematic for the reasons outlined by the court in *Passa*.[218] Specifically, focusing on culpability at such a preliminary stage of the proceedings would require a foray into the merits of the action not appropriate for making this procedural determination. And perhaps more importantly, selecting as primary the defendant with the deepest pockets ignores the inequities I described in the Microsoft and law student blogger example in Figure 1, *supra*. Indeed, it is the very fact that Microsoft has the deepest pockets that makes Microsoft the wrong choice as primary defendant, given that, in relative dollar terms, Microsoft has the least incentive to remove.

So, for example, if P sues X for $10,000 and Y for $10,000,000, the court can readily ascertain, based on the plaintiff's allegations, that Y has higher potential liability than does X, and thus Y would be the primary defendant.[219] If the

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of the litigation, primary defendants would make only one initial decision—whether to remove the case to federal court. *See id.* at 1118. Finally, while courts must monitor the behavior of lead plaintiffs to ensure that constitutional mandates are satisfied, no such monitoring is necessary for primary defendants in the removal context. *See id.* at 1117–20.

217. Richman v. Goldman Sachs, 274 F.R.D. 473, 475 (S.D.N.Y. 2011). Interestingly, the lead plaintiff, with court approval, will be able to pick counsel who will represent the entire class. 15 U.S.C. § 78u-4(a)(3)(B)(v) (2006). The idea is to have a party with a large personal stake in the action represent the class responsibly and in concert with the best interests of the class members. *See* Switzenbaum v. Orbital Scis. Corp., 187 F.R.D. 246, 249 (E.D. Va. 1999) (asserting that the purpose of allowing lead plaintiff to choose counsel is "to ensure that prosecution of the action is coordinated only by those who have a serious and legitimate interest in doing so on behalf of the putative class"). One can argue that the notion of the lead plaintiff acting in the best interests of the class is comparable to the primary defendant having the power to choose the forum, presumably acting in the best interests of the defendants.

218. *See supra* Part IV.C.2.

219. However, because the plaintiff knows that the magistrate likely will accept at face value her allegation of damages, the plaintiff might inflate the amount she seeks from a particular defendant in order to then enter into an agreement with that defendant not to remove. Part of the work thus will be assessing the motives behind the plaintiff's assertion of damages. This is similar to the assessment of nominal parties, who, under the unanimity rule, are not required to join in the removal petition. *See* Shaw v. Dow Brands, Inc., 994 F.2d 364, 369 (7th Cir. 1993); Matchett v. Wold, 818 F.2d 574, 576 (7th Cir. 1987); *supra* Part II; *see generally* Wright, Miller & Cooper, *supra* note 24, § 3731 n.10.

plaintiff seeks something other than money damages, such as an injunction or specific performance, the court can utilize existing methods for quantifying such actions.[220] Thus if P sues X for $10,000 and Y for an injunction prohibiting him from selling a certain product, the court can evaluate the value of the injunctive relief and determine which defendant has the most potential liability in the action.[221]

As fairness dictates, occasions may exist in which the court should focus on *relative* potential liability. So, if P sues X for $100,000 and Y for $800,000, if X believes that the relative value of $100,000 is higher to X than $800,000 is to Y (as in the Microsoft and law student blogger example in Figure 2, *supra*), X can petition the court to make a determination of primacy based on equitable circumstances. If the court finds that there are compelling reasons to appoint X as primary, then the choice to remove will belong to X. Admittedly, this method is less efficient and more burdensome than focusing on absolute value.[222] But taking relative risk into account enables the court to work to remedy the injustice inherent in the current removal scheme, by avoiding having a low-risk defendant control the removal decision. And given that in the majority of situations it will be in the primary defendant's best interest to remove, it likely will be the rare occasion when assessing relative value will be necessary. On balance, in most cases the identity of the primary defendant will be clear.[223]

One could argue that adopting the "primary defendant" concept from the MMTJA and CAFA simply expands the difficulties inherent in defining those terms into a broader context.[224] Indeed on its face this proposal might appear to create additional work for the judiciary, a proposition counter

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220. *See, e.g.*, McCarty v. Amoco Pipeline Co., 595 F.2d 389, 392–93 (7th Cir. 1979) (noting that such methods include determining the value of the injunction to the plaintiff, determining the cost to the defendant of complying with the injunction, or determining the cost or value to the party invoking federal jurisdiction).

221. It would be prudent in this scenario to evaluate the cost of the defendant's compliance with the injunction, since it is the defendants' burden upon which the primary defendant scheme focuses.

222. The court, for example, will need to review detailed financial documentation to assess relative assets.

223. Admittedly, however, at times determining which defendant is "primary" will not always be a simple task. For example, there may be occasions where differentiating one potentially primary defendant from another is virtually impossible. In these situations the court should designate all such defendants as primary (assuming, of course that the defendants meet the criteria required for primacy selection) and permit *any* primary defendant to remove unilaterally.

224. *See supra* Part IV.C.3. (describing the difficulties courts have in applying the "primary defendant" standard in CAFA and MMTJA cases).

to the goals of fairness and efficiency. However, I propose that a magistrate judge should be designated to determine—in the event of a dispute—who qualifies as the "primary" defendant.[225] This would circumvent excessive judicial entanglement in procedural matters and be an ideal use of a federal magistrate's authority under 28 U.S.C. § 636.[226] The primary function of a magistrate judge is to improve the efficiency of the judicial system and to handle pretrial and preliminary matters.[227] In fact, magistrates are already integrally involved in offering guidance to courts regarding several aspects of the removal process. For example, in *Atlantic National Trust LLC v. Mt. Hawley Insurance Co.*, a magistrate judge recommended that the action be remanded because two defendants had not consented to removal.[228] In *Consolidated Energy Inc. v. Berkshire Hathaway, Inc.*, a magistrate issued a Report and Recommendation that the case be remanded for lack of unanimity.[229] In *Frazier v. Pioneer Americas LLC*, a magistrate opined that removal was proper under CAFA's jurisdictional

225. For a similar discussion of the use of a magistrate in the context of pseudonymous litigation, review of civil contempt confinement, and pleading personal jurisdiction see, respectively, Jayne S. Ressler, *Privacy, Plaintiffs, and Pseudonyms: The Anonymous Doe Plaintiff in the Information Age*, 53 U. KAN. L. REV. 195, 237–39 (2004), Jayne S. Ressler, *Civil Contempt Confinement and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: An Examination of Debtor Incarceration in the Modern Age*, 37 RUTGERS L.J. 355, 394–97 (2006), and Jayne S. Ressler, *Plausibly Pleading Personal Jurisdiction*, 82 TEMP. L. REV. 627, 654–55 (2009) [hereinafter Ressler, *Plausibility Pleading*].

226. 28 U.S.C. § 636 states in relevant part: "Notwithstanding any provision of law to the contrary . . . a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court." 28 U.S.C. § 636(b)(1)(A) (2006).

227. S. REP. NO. 96-74, at 3 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1469, 1471–72 (expressing the purpose of the Federal Magistrates Act as facilitating rational division of labor among district court judicial officers, since magistrate relieves judges from personally hearing each pretrial motion or proceeding in preparation of case for trial); S. REP. NO. 92-1065, at 3 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3350, 3351 (noting that magistrates provide valuable assistance to district court judges, thereby allowing those judges to spend more time on actual trial of cases). The Supreme Court has also affirmed the intentions of Congress in establishing the position of the federal magistrate. *See e.g.*, Peretz v. United States, 501 U.S. 923, 934 (1991) (holding that Federal Magistrates Act was designed to relieve district courts of "subordinate duties that often distract the [district] courts from more important matters"); McCarthy v. Bronson, 500 U.S. 136, 142 (1991) (finding that policy behind the 1976 amendment to the Federal Magistrates Act authorizes greater use of magistrates to assist federal judges); Mathews v. Weber, 423 U.S. 261, 268 (1976) (finding that Congress intended magistrates to assist with vast amount of additional work created for district courts); Wingo v. Wedding, 418 U.S. 461, 463 (1974) (noting that the Federal Magistrates Act authorizes magistrates to perform duties formerly allocated to U.S. commissioners).

228. Atl. Nat. Trust LLC v. Mt. Hawley Ins. Co., 621 F.3d 931, 933 (9th Cir. 2010).

229. Consol. Energy Inc. v. Berkshire Hathaway, Inc., 252 Fed. App'x. 481, 483 (3d Cir. 2007).

scheme.[230] In *Hammer v. Scott*, a magistrate reported that removal was improper because unanimity was lacking.[231]

Courts called upon to determine the "primary defendant" in the MMTJA or CAFA contexts can utilize the opinions of magistrates in the standard removal cases to inform their decisions.[232] Indeed, as the body of case law defining the term "primary defendant" expands, precedential guidance will streamline the process of determining which defendant is primary and lead to greater efficiency and fairness.

To be clear, adopting the primary defendant scheme does not eliminate opportunities for strategic behavior, but it does reduce them significantly. Even under the primary defendant scheme a plaintiff would remain free to negotiate and contract with a defendant for the specific purpose of defeating removal. However, under the unanimity rule the plaintiff can bargain with any defendant, including a low-risk defendant, and potentially offer relatively little in return for that defendant to agree to vote against removal. In contrast, under the primary defendant rule, in order to defeat removal, a plaintiff would be forced to negotiate with only the primary defendant, since the decision to remove would be her choice alone. By definition, the primary defendant has the highest potentially liability in the lawsuit, and therefore she will be the defendant most reticent to forgo an opportunity to decrease her potential loss through removal. Thus in most instances the plaintiff will have to provide more in return for the primary defendant to forgo removal than it would if the plaintiff had the option to contract with any defendant for the same purpose. In other words, requiring the plaintiff to bargain with the primary defendant makes the proposition of contracting to defeat removal more costly to the plaintiff. Thus, a plaintiff's ability to contract with a defendant to prevent removal under the primary defendant scheme is decreased.

One could posit that the plaintiff could simply inflate the amount that it seeks from a particular defendant in order to ensure that particular defendant's selection as the primary defendant, with the prior understanding between the two parties that they will contract to avoid removal.[233] However, a court may

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230. Frazier v. Pioneer Ams. LLC, No. 05-1338-D-M1, 2006 WL 5670538, at *5 (M.D. La. Mar. 23, 2006), *aff'd*, 455 F.3d 542, 544 (5th Cir. 2006).

231. Hammer v. Scott, 137 Fed. App'x. 472, 475 (3d Cir. 2005).

232. *See* Ressler, *Plausibly Pleading*, *supra* note 225, at 655–56 (noting the precedential value of magistrates issuing written opinions, particularly when the inquiry is fact-intensive).

233. This is in effect the same strategy as fraudulently joining a defendant specifically to prevent removal. *See supra* note 34.

impose costs or sanctions on a plaintiff who participates in frivolous litigation, which includes inflating a damage claim.[234] And as discussed above, if another defendant believes that it is indeed the primary defendant then it should be free to argue as such.[235] A magistrate can evaluate the situation and make the appropriate recommendation regarding which defendant is in fact primary.

From the defendants' perspective, the primary defendant rule would not prevent the primary defendant from seeking rent from other defendants in exchange for her singular removal vote. However, the opportunities to do so would be substantially reduced since it is the primary defendant that stands to lose the most without removal and thus has the most incentive to make removal happen. The primary defendant might believe that the amount she could receive in rent from other defendants would exceed the decrease in expected monetary loss she would incur as a result of removal and thus she might seek to negotiate with other defendants. But the low-risk defendants likely would be unafraid to "call the primary defendant's bluff" because they would have less to lose if the case remained in state court. And of course the primary defendant would be pressured to secure rent very quickly, given the thirty-day time limit in which to file her notice of removal. Additionally, if the primary defendant elected to forgo removal, the parties and the public would know which of the multiple defendants made such a determination, since the primary defendant would be the only entity that had such a choice to make. While the reasons for this choice might not be readily apparent (and indeed might never become known), knowing the party responsible for the decision to decline removal is an element of transparency not available under the unanimity rule.

VI. CONCLUSION

Scholars and lawmakers alike have devoted much attention to the removal process. One point of focus has been the ways in which the system affords plaintiffs the ability to engage in strategic behavior to avoid otherwise proper removal. Plaintiffs' ability to manipulate the system is a powerful tool because the

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234. *See, e.g.*, Yanez v. Am. W. Airlines, No. Civ.A. MJG-03-1717, 2004 WL 2434725, at *2, *7 (D. Md. Oct. 13, 2004) (dismissing action when plaintiff, *inter alia*, "engaged in a pattern of fraud and deception to inflate his damages"); *see also* 28 U.S.C. § 1332(b) (2006) (providing for the imposition of costs against a plaintiff who recovers less than $75,000 in a case whose federal subject matter jurisdiction is founded on diversity).

235. *See supra* Part V.

forum in which litigation is heard can have a large, if not decisive, impact on the case's likely outcome. These commentators, however, have neglected to consider that an integral part of removal procedure, namely the unanimity rule, might itself be flawed. Indeed, scholars have heretofore overlooked the fact that the unanimity rule creates opportunities for *both* parties to the litigation to engage in strategic behavior. While strategic behavior is often a respected norm in our adversarial system, the unanimity rule creates opportunities for actions that are unjust, wasteful, and nontransparent. These consequences are indisputably not valued.

Thus, Congress was mistaken to codify the unanimity rule in the FCJVCA. Instead, I propose that the concept of the "primary defendant" replace it. Utilizing the primary defendant rule will minimize the current opportunities that the unanimity rule engenders for inappropriate strategic behavior by both parties. While the primary defendant rule is not without its drawbacks, it provides a level of fairness, efficiency, and transparency to the removal process that the unanimity rule reduces.

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