Removing Removal's Unanimity Rule

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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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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). As its name suggests, the purpose of the Act was to implement jurisdictional and venue improvements to the Federal Rules of Civil Procedure. One of the Act's

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.


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. 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." 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

(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.

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 because it is commonly understood that plaintiffs fare better in state court than they do in federal court. The right of removal, however, gives defendants the power to override the plaintiff's choice of forum and remove the case to federal court. 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. 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.").


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").

called “unanimity rule,” all defendants in a removable action must agree to removal or the case remains in state court.\textsuperscript{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.\textsuperscript{16} Martin involved a lawsuit for wrongful death brought in Kansas state court against two railroad companies.\textsuperscript{17} One of the defendants sought to remove the action to federal court, alleging a federal cause of action.\textsuperscript{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.”\textsuperscript{19} In other words, the Supreme Court determined that there was a unanimity rule inherent in the then-existing removal statute.\textsuperscript{20}

Modern removal law is embodied in the Federal Rules of Civil Procedure, which were first promulgated in 1938.\textsuperscript{21} The removal right itself is codified in 28 U.S.C. § 1441,\textsuperscript{22} with the procedure before and after removal governed by §§ 1446 and 1447, respectively.\textsuperscript{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.\textsuperscript{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


\textsuperscript{17} Id. at 245.

\textsuperscript{18} Id. at 246.

\textsuperscript{19} Id. at 248.

\textsuperscript{20} Id.


\textsuperscript{23} See id. §§ 1446–1447.

\textsuperscript{24} 28 U.S.C. § 1441(a) (Supp. 2011) (“Any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.”); 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

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
(“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).
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).
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.\textsuperscript{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." 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.\textsuperscript{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.\textsuperscript{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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\textsuperscript{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).


\textsuperscript{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. 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."

As a result, many defendants are eager to get out of state court and into federal court. Conversely, plaintiffs' attorneys are continuously developing strategic methods to keep their actions in state court and out of federal court. 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."

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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 A1) (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.”).


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."\textsuperscript{44} "Forum is worth fighting over because outcome often turns on forum."\textsuperscript{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."\textsuperscript{46} Thus, forum selection is of pivotal importance, and any contest over forum can be the critical dispute in the case.\textsuperscript{47}

One commentator offered several reasons why one particular plaintiff preferred California state court to federal court.\textsuperscript{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."\textsuperscript{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.\textsuperscript{50}

\begin{itemize}
  \item \textsuperscript{44} Joseph, \textit{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. \textit{See generally} Walker, \textit{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." \textit{Id.} at 22.
  \item \textsuperscript{45} Clermont, \textit{supra} note 36, at 1921–22.
  \item \textsuperscript{46} Hines & Gensler, \textit{supra} note 6, at 781.
  \item \textsuperscript{47} Clermont, \textit{supra} note 36, at 1922. Moreover, the \textit{Iqbal} and \textit{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. \textit{See} Ashcroft v. \textit{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. \textit{Twombly}, 550 U.S. 544, 556 (2007); \textit{see also} Thomas P. Gressette, Jr., \textit{The Heightened Pleading Standard of Bell Atlantic Corp. v. Twombly} and \textit{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 \textit{Twombly} and \textit{Iqbal}).
  \item \textsuperscript{48} Scott Dodson, \textit{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. \textit{Id.} at 58 n.22.
  \item \textsuperscript{49} \textit{Id.} at 80.
  \item \textsuperscript{50} \textit{Id.} at 80 n.138; \textit{see also} Adam R. Prescott, \textit{On Removal Jurisdiction's Unanimous Consent Requirement}, 53 WM. & MARY L. REV. 235, 259 (2011) (noting several reasons a defendant might favor removal).
\end{itemize}
Indeed, the data shows that defendants do have better success in removed cases. 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%. In diversity cases, the plaintiffs' win rate dropped from 71% for cases initially brought in federal court to 34% in removed cases. In federal question cases, excluding prisoner litigation, the drop in win rate was analogous to that of removed diversity cases.

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, and/or (ii) case selection, i.e., removed cases might simply be weaker cases. Regardless of the explanation for what the authors deemed the "removal effect," it appears that "removal has a fairly express purpose of changing outcome."

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 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.5, 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.\(^6\)

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.\(^6\)

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."\(^6\)

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.\(^6\) Initially courts promulgated the "first-
served defendant” rule, often referred to as the majority rule. Under this rule, the thirty-day clock begins to run upon the date the first defendant is served. If the first-served defendant does not file a notice of removal within thirty days of receipt of the initial pleading, 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. Courts that followed the first-served defendant approach believed that it ensued logically from the unanimity rule. 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. 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.

In order to give all defendants an opportunity to remove, some courts adopted the “intermediate” or “McKinney” rule. 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). Delaila v. Hanover Ins., 660 F.3d 180, 182 (3d Cir. 2011). The Sixth, Eighth, Ninth, and Eleventh Circuits adopted the “later-served” rule. Id.


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); McNally Enters. v. McNally, 107 F. Supp. 2d 1223, 1127–28 (C.D. Cal. 2000).

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. 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.

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, 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) but were then foreclosed from doing so. And although the Fourth Circuit adopted the intermediate/McKinney rule to combat the "inequity" created by the first-served defendant rule, 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."

Recently, courts moved toward adoption of the "last-served defendant" rule. 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. Courts that rejected the first-served defendant or intermediate rule and favored the last-served defendant rule

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.
77. McKinney, 955 F.2d at 927.
79. Destfino v. Reiswig, 630 F.3d 952, 956 (9th Cir. 2011).
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," and if Congress intended for the thirty-day removal period to commence upon service of the first defendant it could have explicitly said so. In addition, courts saw the last-served defendant rule as a commonsense answer to the inequalities to later-served defendants who otherwise would lose the right to seek removal. 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.

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. In part because of the confusion and inconsistency regarding removal timing, Congress passed and President Obama signed into law the

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 consistent 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. 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.

One objective of the FCJVCA was to clarify and simplify removal procedures. 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. 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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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.

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." 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. 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. 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. 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). 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

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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.").
93. *Id.* at 1042–43.
94. *Id.* at 1044.
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." 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." 

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. 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." 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. The district court held otherwise and remanded the case to state court due to the lack of unanimous consent to remove.

B. The Unanimity Rule and Defendants' Strategic Behavior

As noted above, the FCJVC, 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. 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)).
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. 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.

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.

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. Furthermore, one must assume that "people make the best decisions they can, given their beliefs about what others will do." 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. If the defendants remove the case to federal court, 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 x 0.70 = $70,000.

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. GEORGAPOULOS, 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 it]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."


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%).
court, the statistics change dramatically for P, who now has only a 30% chance of succeeding.\textsuperscript{109} P’s expected win now drops to $30,000 from each defendant.\textsuperscript{110} The numbers demonstrate quite clearly why P will do what it can to prevent the defendants from removing the case to federal court.\textsuperscript{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,\textsuperscript{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.\textsuperscript{113} Both defendants thus should equally desire removal, as doing so provides a “win” (or a loss reduction) of $40,000 each.\textsuperscript{114}

### Scenario 1

<table>
<thead>
<tr>
<th>DEFENDANT</th>
<th>Defendant X</th>
<th>Defendant Y</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do Not Support Removal</td>
<td>($70,000, $70,000)</td>
<td>($70,000, $70,000)</td>
</tr>
<tr>
<td>Support Removal</td>
<td>($70,000, $30,000)</td>
<td>($30,000, $30,000)</td>
</tr>
</tbody>
</table>

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

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

\textsuperscript{110} $100,000 \times 0.30 = $30,000.$

\textsuperscript{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.

\textsuperscript{112} $100,000 \times 0.70 = $70,000.$

\textsuperscript{113} $100,000 \times 0.30 = $30,000.$

\textsuperscript{114} $(100,000 \times 0.70) - (100,000 \times 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

<table>
<thead>
<tr>
<th>DEFENDANT</th>
<th>Y</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Do Not Support Removal</td>
</tr>
<tr>
<td>DEFENDANT X</td>
<td>($70,000, $560,000)</td>
</tr>
<tr>
<td>Support Removal</td>
<td>($70,000, $560,000)</td>
</tr>
</tbody>
</table>

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 x 0.70 = $70,000.

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

118. For X, $100,000 x 0.30 = $30,000. For Y, $800,000 x 0.30 = $240,000.
So what can X do? Armed with the knowledge of Y's increased vulnerability, X can "seek rent" from Y. 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. Once X is out of the case (an outcome favorable to both P, who gets the money she was seeking, and X, 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. As is clear by having an equal vote in the removal process, the low-risk defendant 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, the Supreme Court ruled

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.
that these sanctions are only applicable when there lacks an objectively reasonable basis for filing a notice of removal.\textsuperscript{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:

\begin{quote}
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.\textsuperscript{126}
\end{quote}

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.\textsuperscript{127} P is satisfied because she gets the relief that she sought from X, with relatively little time and expense spent in litigation.\textsuperscript{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.\textsuperscript{129} Y is better off because he has reduced his expected monetary loss.\textsuperscript{130}


\textsuperscript{126} 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 Pharm., 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).

\textsuperscript{127} Cange v. Stotler & Co., 826 F.2d 581, 596 (7th Cir. 1987) (Easterbrook, J., concurring).

\textsuperscript{128} 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.

\textsuperscript{129} See, e.g., Steven Shavell, \textit{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).

\textsuperscript{130} 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, \textit{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](image)

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 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**

\[
P \xrightarrow{\$100k} X (\text{Blogger})
\]

\[
\xleftarrow{\$800k} Y (\text{Microsoft})
\]

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. 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. Indeed, plaintiffs have incentives to add deep-pocket defendants to cover what the shallow-pocket defendants cannot. Similarly, when a defendant seeking to remove "buys"

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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 litigation cost (again, with respect to defendant X). 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. Indeed, "behavioral economics literature suggests that decisionmakers are more willing risk takers when less money is at stake . . . [the] so-called 'peanuts effect', where people take risks when playing for 'peanuts.' 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. The unanimity rule gives a defendant with the least at stake in the litigation an inordinate, and unjust, amount of power.

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.

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.


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), and in the Class Action Fairness Act (CAFA). In fact, the concept of the "primary defendant" has a long history in the legal jurisprudential landscape. Admittedly, substituting the newly codified unanimity rule with the primary defendant rule is not without its drawbacks. But the primary defendant rule is a step toward achieving the efficiency that informs the rationale behind the MMTJA and CAFA and the fairness and transparency objectives that lie at the heart of much judicial reform, including, ironically, the FCJVCA itself.

1. The Evolution of the Primary Defendant. The concept of the primary defendant was first codified in 2002 in the MMTJA. However, the Supreme Court recognized the idea as early as 1911. In United States v. American Tobacco, the United States sued various defendants for alleged antitrust violations. The Supreme Court stated: "We 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
[defendants], because of their relation to the controversy[,] as the
accessory, and the fifty-nine other [defendants] as the subsidiary
defendants."\textsuperscript{148}

Since \textit{American Tobacco}, courts have employed the term
"primary defendant" in a variety of situations such as RICO
actions,\textsuperscript{149} securities fraud litigation,\textsuperscript{150} and tort cases.\textsuperscript{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."\textsuperscript{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."\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{157} In an action for
indemnification and contribution, the Sixth Circuit, interpreting

\begin{footnotes}
\item[148] Id. at 143.
\item[149] See, e.g., Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 650 (3d Cir.
2004).
Woodward v. Metro Bank of Dallas, 522 F.2d 84, 94 (5th Cir. 1975)).
\item[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); \textit{Restatement (Second) of Torts} § 886B, cmt. c (1979) (describing
the terms "primary" and "secondary" responsibility in the context of indemnification); 4 \textit{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).
\item[153] Woodward, 522 F.2d at 94.
\item[154] \textit{Marrero}, 487 F. Supp. at 572.
\item[156] Id. at 476, 486–88.
\item[157] Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 650 (3d Cir. 1998).
\end{footnotes}
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.\textsuperscript{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.\textsuperscript{169} 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.\textsuperscript{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."\textsuperscript{161} Furthermore, the MMTJA permits removal, with exceptions, despite the presence of a defendant who is a resident of the forum state.\textsuperscript{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.\textsuperscript{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.\textsuperscript{164}

Congress included in the MMTJA the concept of the "primary defendant."\textsuperscript{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."\textsuperscript{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.\textsuperscript{167}

To date there have been only two sets of cases employing the MMTJA.\textsuperscript{168} The first set of cases was consolidated in \textit{Passa v.}

\begin{quote}
164. \textit{Id.}
166. \textit{Id.} (emphasis added).
168. One set of cases to invoke the MMTJA involved the destruction Hurricane Katrina caused in Louisiana in 2005. \textit{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.\textsuperscript{169} In the wake of the fire, various plaintiffs filed numerous cases in both state and federal court in Rhode Island.\textsuperscript{170} Some of the state cases were removed to the district court while others were brought in the district court in the first instance.\textsuperscript{171} The District Court of Rhode Island was faced with the task of determining whether jurisdiction was proper in that court under § 1369(b).\textsuperscript{172} This section would have required the court to abstain from adjudicating the litigation if, \textit{inter alia}, the “substantial majority of all plaintiffs” and all of the “primary defendants” were from Rhode Island.\textsuperscript{173} The court noted that the term “primary defendants” was “not defined within the text of § 1369 [and legislative history also fails to shed much light on which defendants Congress considered ‘primary’].”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{176} Next, the court considered the argument that the primary defendant should be the defendant “most culpable for the nightclub fire.”\textsuperscript{177} The court deemed the culpability standard “unworkable,” stating that “at such

\begin{itemize}
\item \textsuperscript{169} Passa v. Derderian, 308 F. Supp. 2d 43, 46 (D.R.I. 2004).
\item \textsuperscript{170} Id. at 46–47.
\item \textsuperscript{171} Id.
\item \textsuperscript{172} Id. at 48.
\item \textsuperscript{173} Id. at 58.
\item \textsuperscript{174} Id. at 61.
\item \textsuperscript{175} Id. at 61–62.
\item \textsuperscript{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).
\item \textsuperscript{177} Passa, 308 F. Supp. 2d at 61.
\end{itemize}
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).


180. Id. at 62-63.

181. Id. at 63 (emphasis added).


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).


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.

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.” In enacting CAFA, Congress followed the lead of the District of Rhode Island 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.” 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.”

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. 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. 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. All of the defendants then filed a notice of removal to the Western District of Kentucky. Since, under CAFA, a case

194. Id. at *1–2.
195. Id. at *1.
must be remanded if all of the primary defendants are not
diverse, the issue before the Adams court was whether Rogers
was a primary defendant. 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. 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.”
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.

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.” 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.

The court in Passa suggested that the primary defendant be
identified by examining the face of the complaint. 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. 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

198. Id. at *1, *5.
199. Id. at *5.
*1, *7 (C.D. Cal. Nov. 21, 2005).
(S.D. Ill. Nov. 22, 2006).
203. See supra note 181 and accompanying text.
directly liable under the plaintiff's theory. Further, if a plaintiff asserts alternative grounds for relief, such alternatives may create multiple and at times contradictory interpretations. 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.

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. 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. 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, because the requirement of proper subject matter jurisdiction as a prerequisite for removal would be unaffected.

205. Id.
206. Id.
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.”).
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. One commentator noted that “[b]lad 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.”

Another stated that “[l]awyers need to re-engineer the process of interacting with opposing counsel to promote efficiency [and] transparency.” 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) in determining which defendant is primary. PSLRA permits a court to consolidate multiple class actions containing common questions of law and fact. Under PSLRA, the court determines who is the “most adequate” plaintiff to act as “lead plaintiff” in the consolidated action. 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.


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. 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. 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. If the
plaintiff seeks something other than money damages, such as an injunction or specific performance, the court can utilize existing methods for quantifying such actions.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{224} Indeed on its face this proposal might appear to create additional work for the judiciary, a proposition counter

\textsuperscript{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).

\textsuperscript{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.

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

\textsuperscript{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.

\textsuperscript{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.\(^\text{225}\) 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.\(^\text{226}\) The primary function of a magistrate judge is to improve the efficiency of the judicial system and to handle pretrial and preliminary matters.\(^\text{227}\) 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.\(^\text{228}\) In *Consolidated Energy Inc. v. Berkshire Hathaway, Inc.*, a magistrate issued a Report and Recommendation that the case be remanded for lack of unanimity.\(^\text{229}\) In *Frazier v. Pioneer Americas LLC*, a magistrate opined that removal was proper under CAFA’s jurisdictional

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

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. 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. However, a court may

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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. And as discussed above, if another defendant believes that it is indeed the primary defendant then it should be free to argue as such. 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


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.