



## Finding More Time to Perfect Removal to Federal Court

Joseph P. Moriarty

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Even practitioners well-accustomed to federal practice often overlook the critical rule regarding the deadline for removal when a defendant has been served through a statutory agent, an agent appointed to receive process by operation of law, such as a state insurance commissioner or secretary of state. Most courts have held that the thirty-day window for removal in such a situation does not begin to run until the defendant has received the complaint. Thus, service on a statutory agent alone does not trigger the countdown to remove. Keeping the majority rule in mind when considering whether a case is removable may provide the extra time needed to remove a case that, at first glance, appeared destined to remain in state court.

### **An (All-Too-Common) Scenario**

Frequently, defense counsel for an out-of-state defendant receives the case well after the statutory agent has been served with process. Especially in product liability cases involving multiple defendants, determining the citizenship of each defendant can take time. For example, it may not be immediately apparent what entities or people are members of a co-defendant LLC. Given the delay between when many statutory agents, such as secretaries of state, receive process and when they transmit it to the defendant, the majority rule may provide the additional time needed to ascertain the citizenship of each defendant. Measuring the period for removal from the date when your client actually received the complaint may add the critical few days needed to pull together the loose ends that otherwise would prevent timely removal, if service on the statutory agent was the benchmark for calculating the removal period.

### **“Receipt by the Defendant” Through Service on a Statutory Agent**

Title 28 of the United States Code establishes a thirty-day period for removal. The removal statute provides:

The notice of removal of a civil action or proceeding shall be filed within 30 days after the **receipt by the defendant**, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within 30 days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

28 U.S.C. § 1446(b)(1) (emphases added). Accordingly, “receipt by the defendant” of the complaint, through service of process, triggers the beginning of the thirty-day period in which the defendant can remove the action. In most cases, the application of this rule is straightforward, because the plaintiff obtains service of process on the defendant through its registered agent.

When the plaintiff serves a defendant's statutory agent, the analysis becomes more complicated. Statutory agents are agents appointed by operation of law to accept process for a defendant. Though the defendant does not select it, as it would a registered agent, by statute, the agent—often a government entity—is deemed to be the defendant's agent for the purposes of accepting service. If the plaintiff serves a statutory agent, in one sense, the defendant has received a copy of the complaint through its agent. After all, generally, a corporation is in “receipt” of the complaint when an agent authorized to receive service of process on behalf of the corporation has received same. In cases involving a statutory

agent, the entity that receives service has—by statute—been deemed authorized to accept service of process on behalf of the corporation. But if the entity that received service only is the defendant's agent by operation of a statute, can it truly be said that the defendant is in "receipt" of the complaint?

A few courts have answered that question in the affirmative and concluded that service of process on a statutory agent constitutes "receipt by the defendant" of the complaint, beginning the thirty-day period for the defendant to remove. For example, a Kansas district court has held that service on the Kansas state insurance commissioner qualified as "receipt by the defendant," because a statute mandated that service on the commissioner "constitute[d] service upon an insurance company's registered agent." *Ortiz v. Biscanin*, 190 F. Supp. 2d 1237, 1242 (D. Kan. 2002). In a similar case out of the Middle District of Florida, the court found that, without a "definitive interpretation" of the portion of the removal statute regarding receipt of the complaint, the removal statute was ambiguous. *Masters v. Nationwide Mut. Fire Ins. Co.*, 858 F. Supp. 1184, 1189 (M.D. Fla. 1994). Based on such ambiguity, in light of the rule that the removal statute must be strictly construed against removal, the court found that service on the Florida Insurance Commissioner was "receipt by the defendant" of the complaint because, under Florida law, the Commissioner was deemed to be an agent of the insurance company for the purposes of receiving service. *Id.*

However, the vast majority of courts that have considered the issue have concluded that service on a statutory agent does not qualify as "receipt by the defendant"; instead, the time to remove begins to run when the defendant actually has received a copy of the complaint. District courts across the country have held that, for removal purposes, a statutory agent is not a true agent of the defendant, such that a defendant is in "receipt" of the complaint when same is served on the statutory agent. See, e.g., *White v. Lively*, 304 F. Supp. 2d 829, 831 (W.D. Va. 2004). Under the majority rule, the period for removal does not begin to run until the defendant actually has received a copy of the complaint. These

courts have recognized that the intent of the thirty-day period is "to ensure that defendants know that they are the subject of a suit as well as the basis for the suit before the removal period begins." *Tucci v. Harford Fin. Servs. Grp., Inc.*, 600 F. Supp. 2d 630, 634 (D.N.J. 2009) (emphasis in original). Because a defendant must be able to review the complaint before it can evaluate whether it can (and should) remove the case, it follows that the removal period should be calculated based on when the defendant has received the complaint, rather than when the plaintiff has served it on the statutory agent. After all, allowing service on a statutory agent to trigger the running of the removal period effectively would shorten the period of time in which a defendant could remove, even though the defendant cannot review the complaint until it has received same from the statutory agent.

The minority rule also would force the defendant to "depend upon the rapidity and accuracy with which statutory agents inform their principals of the commencement of litigation against them." *Calderon v. Pathmark Stores, Inc.*, 101 F. Supp. 2d 246, 247 (S.D.N.Y. 2000) (quoting *Cygielman v. Cunard Line Ltd.*, 890 F. Supp. 305 (S.D.N.Y. 1995)). If the statutory agent has a serious enough backlog, the thirty-day period for removal might elapse even before the statutory agent has transmitted the complaint to the defendant. In other words, under the minority rule, a defendant might never have the opportunity to remove the case, because the statutory agent's delay will prevent it from even learning of the complaint within the thirty-day period, much less filing a notice of removal.

Given those problems with measuring the period for removal from the date of service on the statutory agent, rather than when a defendant actually has received the complaint, it is perhaps unsurprising that the two circuit courts of appeal to consider the question have rejected the former rule and embraced the latter. See *Elliott v. Am. States Ins. Co.*, 883 F.3d 384, 394 (4th Cir. 2018) ("[W]e now hold that service on a statutory agent is not service on the defendant within the meaning of § 1446(b)(1)."); *Anderson v. State Farm Mut. Auto. Ins. Co.*, 917 F.1126, (9th Cir. 2019) ("We join the Fourth

Circuit and hold that the thirty-day removal clock under 28 U.S. § 1446(b)(1) does not begin upon service on and receipt by a statutorily designated agent, and begin in this case only when [defendant] actually received [plaintiffs'] complaint.”); *see also Gordon v. Hartford Fire Ins. Co.*, 105 F. App’x 476, 480 (4th Cir. 2004) (unpublished) (per curiam). “These holdings reflect what ‘appears to be settled law’ nationwide ‘that the time for removal begins to run only when the defendant or someone who is the defendant’s agent-in-fact receives the notice via service.’” *Sara v. Talcott Resolution Life Ins. Co.*, No. 21-CV-3094, at \*6 (S.D.N.Y Jan. 3, 2022) (citing 14C Charles Alan Wright et al., *Federal Practice & Procedure* § 3731 (Rev. 4th ed. 2021 update)).

As an important caveat, even under the majority approach, courts have distinguished between service on a statutory agent and service on a registered agent. When a defendant has specifically designated an agent to receive process on its behalf, as opposed to having one appointed for it by operation of law, service of process on the designated agent triggers the removal period, even if the defendant does not receive, from the agent, a copy of the complaint until a later time. *See, e.g., Val Energy, Inc. v. Ring Energy, Inc.*, No. 14-1327-RDR, 2014 WL 5510976, at \*2 (D. Kan. Oct. 31, 2014) (unpublished). Courts distinguish service on a registered agent from service on a statutory agent because of the greater degree of control exercised over a registered agent. *See, e.g., Hardy v. Square D Co.*, 199 F. Supp. 2d 676, 683-84 (N.D. Ohio 2002). Because a defendant itself selects a registered agent, the registered agent likely will be more accountable to the defendant for promptly notifying it of service and forwarding process than a statutory agent. *Id.* Accordingly, the receipt rule applicable to service on a statutory agent does not apply to service on a registered agent, and the time period for removal begins to run when process is served on the registered agent.

## **Conclusion**

When an initial assessment suggests that the deadline for removal may already have passed, defense counsel should not overlook the possibility of additional time to remove following service on a statutory agent. Remembering the “receipt by the defendant” rule can be the difference between an unfavorable state-court venue and removal to federal court when a defendant has been served through a statutory agent.

**Joseph P. Moriarty**  
Willcox Savage  
440 Monticello Avenue, Suite 2200  
Norfolk, Virginia 23510  
[jmoriarty@wilsav.com](mailto:jmoriarty@wilsav.com)  
(757) 628-5502