

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: MURPHY BROTHERS, INC., Petitioner v. MICHETTI
PIPE STRINGING, INC.

CASE NO: 97-1909 c. 2

PLACE: Washington, D.C.

DATE: Monday, March 1, 1999

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MURPHY BROTHERS, INC., :
4 Petitioner :
5 v. : No. 97-1909
6 MICHETTI PIPE STRINGING, INC. :

7 - - - - -X
8 Washington, D.C.
9 Monday, March 1, 1999

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:07 a.m.

13 APPEARANCES:

14 DEBORAH A. SMITH, ESQ., Birmingham, Alabama; on behalf of
15 the Petitioner.
16 J. DAVID PUGH, ESQ., Birmingham, Alabama; on behalf of the
17 Respondent.

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1 P R O C E E D I N G S

2 (11:07 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 97-1909, Murphy Brothers v. Michetti Pipe
5 Stringing, Inc.

6 Ms. Smith.

7 ORAL ARGUMENT OF DEBORAH A. SMITH

8 ON BEHALF OF THE PETITIONER

9 MS. SMITH: Mr. Chief Justice, and may it please
10 the Court:

11 The issue in this case is whether the 30-day
12 time period for removal begins to run when a named
13 defendant receives a copy of the complaint if service of
14 process has not yet been perfected.

15 28 U.S.C. section 1446(b) requires that notice
16 of removal be filed within 30 days after the receipt by
17 the defendant, through service or otherwise, of a copy of
18 the initial pleading. Relying upon the plain meaning of
19 the words, receipt through service or otherwise, the
20 Eleventh Circuit held that the removal period commences
21 when a named party comes into possession of a copy of the
22 complaint, even if service has not been made.

23 We submit to the Court that, when read as a
24 whole and in conjunction with the other removal statutes,
25 section 1446(b) is ambiguous. The ambiguity arises from

1 the use of the term, defendant. A defendant can mean
2 either a named party, a party who is named as the
3 defendant in the complaint, or it can mean, in more proper
4 sense, one who has been made a party defendant through
5 service of process.

6 In section 1441(b), Congress used the term
7 defendant in the narrower sense. 1441(b) states that
8 parties in interest -- or uses the phrase, parties in
9 interest who have been properly joined and served as
10 defendants.

11 QUESTION: That's 1441(b)?

12 MS. SMITH: Yes, sir.

13 QUESTION: And in what part of -- it's a short
14 section, but I didn't immediately follow where you were
15 getting the language from.

16 MS. SMITH: In 1441(b), the second sentence
17 states that any such action, any other such action shall
18 be removable only if none of the parties in interest
19 properly joined and served as defendants is a citizen of
20 the State in which such action is brought.

21 QUESTION: Do you think that's a definition of
22 defendant?

23 MS. SMITH: I think it is -- I don't think it
24 is -- was intended as a definitional provision. I think
25 it is a demonstration that Congress was using the term

1 there in a narrow sense, and suggests that perhaps
2 Congress was using that term in a narrow sense in section
3 1446(b) as well.

4 QUESTION: I don't see why it's being used in a
5 narrow sense. It would have been used in a narrow sense
6 if 1441(b) had just said, persons who are defendants, and
7 the very word defendants would embrace the terms, have
8 been properly joined and served.

9 MS. SMITH: Well, I --

10 QUESTION: It didn't -- Congress didn't think
11 that the word defendant automatically embraced those
12 terms, and therefore it said, who -- people who have been
13 joined and served as defendants. I'm not sure that it
14 helps your case more than hurts it.

15 MS. SMITH: Well, I think it -- I disagree with
16 you. I think it does help, because I think it
17 demonstrates that Congress felt a need to articulate in
18 what sense it was using the term, defendant, in
19 recognition that a defendant as -- in common usage a
20 defendant can mean, anybody who is named as a defendant in
21 a complaint, and doesn't necessarily infer only a
22 defendant who has been properly joined.

23 QUESTION: But your argument has to be based on
24 the proposition that Congress was using the term,
25 defendant, in 1441(b) in the same way it was using it in

1 1446(b) .

2 MS. SMITH: Well, our argument is that it
3 suggests, by the use of the term defendant in 1441(b), it
4 suggests that Congress was using the narrow term defendant
5 in 1446(b) as well. I think it demonstrates the ambiguity
6 in the term.

7 QUESTION: But then why didn't -- if you're
8 right, why didn't the Congress use all the qualifying
9 language from 1441(b) in 1446(b)?

10 MS. SMITH: Well, in 1441(b) we're dealing with
11 more than just parties who are named as defendants,
12 because we're talking about parties in interest, and that
13 could possibly be someone other than someone who has
14 actually been named as a defendant in the complaint.

15 QUESTION: Even if I -- I'm not sure I agree
16 with you, I think for the same reason that Justice
17 Scalia's question suggested, but assuming that I do agree
18 with you for the sake of argument, I still have a serious
19 problem with your position, and it's because of the usage
20 of defendant in 1448. 1448 clearly contemplates that some
21 individuals who are defendants in a case that has been
22 removed may not yet have been served, and therefore, in
23 1448, it seems clearly to be using defendant in the sense
24 of somebody who is simply called that in the pleadings,
25 whether or not served, and that's the sticking point that

1 I have.

2 How do you explain how I could accept your
3 position for 1446, given the language of 1448?

4 MS. SMITH: Well, I think you're correct. I
5 think in 1448 Congress was using the term in the broader
6 sense, in recognition that there would be cases where a
7 case had been removed and either the defendant who removed
8 it had not been properly served, or where there were other
9 defendants --

10 QUESTION: Or had not been served at all.

11 MS. SMITH: -- who hadn't been served at all.

12 QUESTION: Or had not been served at all.

13 MS. SMITH: I think it is a recognition that
14 that can happen, but it just -- it further demonstrates to
15 me the ambiguity of the term defendant.

16 QUESTION: Well, assuming that is the case,
17 doesn't it also demonstrate that in 1446 Congress could
18 not have been using defendant in the narrow sense, i.e.,
19 that which -- sense that requires service, as part of the
20 meaning of the term?

21 MS. SMITH: I don't think so, because even if we
22 assume that a defendant can only remove, that there
23 couldn't be an early removal by a defendant who received a
24 copy of the complaint, decided to go ahead and remove it
25 even though his time had not begun to run under a service

1 interpretation. Aside -- taking that instance aside,
2 there are cases where a defendant's time begins to run
3 because he has been served with process, and there are
4 other defendants in the suit that haven't been served, so
5 1448 deals with those other defendants who have not been
6 served.

7 QUESTION: But it does use the word, the bare
8 word defendant, and there's every indication in our
9 Pullman case that we understand 1448 to apply to someone
10 who is named as a defendant but not yet served, as it
11 states on its face.

12 MS. SMITH: I think 1448 does apply to someone
13 who has been named but not served, but --

14 QUESTION: How do you relate Federal Rule of
15 Civil Procedure 81(c)? That rule deals with removed
16 actions, and when a defendant has to file his answer.

17 MS. SMITH: Your Honor, 81(c) is a -- poses a
18 real significant problem if the language, receipt through
19 service or otherwise, means receipt without service.

20 QUESTION: It uses the same language.

21 MS. SMITH: Yes, it does.

22 QUESTION: Receipt through service or otherwise
23 of a copy, and says that in a removed action in which the
24 defendant has not answered, the defendant has 20 days to
25 file a response, basically.

1 MS. SMITH: Correct. If -- and that language
2 was added to Rule 81(c) contemporaneously with the
3 amendment of 1446(b) for the purpose of consistency, so it
4 certainly should be interpreted to mean the same thing.
5 If it means only receipt in the absence of service, then
6 it puts the defendant in the position of having to
7 respond, not just remove the case without service but
8 respond to the complaint without service.

9 QUESTION: If you're right, Ms. Smith, that
10 there is an ambiguity, then how do you interpret the
11 meaning of the word, or otherwise, after the word, through
12 service, in 1446(b)?

13 MS. SMITH: I believe that the idea that
14 Congress was trying to set forth was that in a State where
15 the complaint is served with the summons your time runs
16 from receipt through service. In other States, where you
17 do not receive the complaint with the summons, then it
18 runs from receipt by some other means.

19 QUESTION: The situation that obtained in New
20 York at that time?

21 MS. SMITH: Correct.

22 QUESTION: I'm --

23 QUESTION: I had --

24 QUESTION: Let me ask just one -- the second
25 clause in 1446(b) seems to deal with that situation, that

1 says it should then run from the date of service.

2 MS. SMITH: Well --

3 QUESTION: And if that's true, there's nothing
4 left for the other one.

5 MS. SMITH: Well, the second clause in 1446(b)
6 was added to deal with a peculiarity in Kentucky where the
7 complaint is filed in court, but it never has to be served
8 on the defendant.

9 QUESTION: Right.

10 MS. SMITH: So if they didn't put in a specific
11 provision, the defendant's time in Kentucky would never
12 begin to run, because he never would receive a copy of the
13 complaint, or it could, that situation could occur, and
14 that is the purpose of adding that language to the second
15 phrase.

16 QUESTION: Or otherwise took care of the New
17 York-type States.

18 MS. SMITH: Correct.

19 QUESTION: But you needed the further one to
20 deal with this Kentucky State --

21 MS. SMITH: The Kentucky situation, correct.

22 QUESTION: Now, how does New York and
23 Kentucky -- what's the difference between those two?

24 MS. SMITH: In New York, the defendant -- the
25 complaint was filed and the -- and service of process was

1 perfected without filing or serving a complaint --

2 QUESTION: That's like --

3 MS. SMITH: -- but ultimately a complaint had to
4 be filed and served. The defendant ultimately did receive
5 a copy of the complaint.

6 QUESTION: But wouldn't the second clause cover
7 there rather than the first, even in New York, because if
8 the -- oh, you're saying the complaint need not be served
9 for a long period of time but must ultimately be served,
10 but it would have been filed at the time the suit was
11 filed, wouldn't it?

12 MS. SMITH: No. No. In --

13 QUESTION: You mean you can file suit without
14 ever filing a complaint?

15 MS. SMITH: That's right. You institute a suit
16 by filing a summons, and I think the procedure has changed
17 now, but at that time you instituted a suit by filing a
18 summons and serving it on the defendant, without any
19 requirement that the complaint be filed or served, so the
20 difference is, in Kentucky a defendant could go to the
21 courthouse and get a copy of the complaint. In New York,
22 the complaint wasn't necessarily there for the defendant
23 to go get it.

24 QUESTION: It wasn't even filed in the Clerk's
25 Office?

1 MS. SMITH: It did not have to be filed in the
2 Clerk's Office when the case was commenced, that's
3 correct.

4 QUESTION: In trying to give some meaning to or
5 otherwise, which I find difficult to do, does it help to
6 construe it as covering cases by publication? You can
7 either be served --

8 MS. SMITH: Well, I think that the problems in
9 interpreting the or otherwise language are much less
10 significant if service of process has already been
11 perfected, because then you don't have the same kinds of
12 concerns about whether the defendant has actually gotten
13 notice that there is a formal proceeding against him.

14 QUESTION: Well, but I was wondering if the or
15 otherwise covers that situation. I'm trying to give some
16 narrow meaning to or otherwise, other than just any other
17 means other than service, and I'm having difficulty doing
18 that. I was wondering if --

19 MS. SMITH: I --

20 QUESTION: -- if you can find it if you said
21 that it was to take care of publication.

22 MS. SMITH: I have not been able to come up with
23 any narrow meaning of the phrase, or otherwise.

24 QUESTION: There's not much disagreement, is
25 there, that the or otherwise was inserted particularly to

1 take care of the New York situation, where you start an
2 action by filing -- by serving the summons and unlike the
3 Federal pattern, where they're served together, so they
4 put receipt of the complaint or otherwise, not by process,
5 but that you actually receive the complaint, and I think
6 it's agreed that you have to actually receive the
7 complaint to trigger, under anybody's interpretation.

8 MS. SMITH: I believe that's correct.

9 QUESTION: So --

10 QUESTION: Well, that's because of the word
11 receipt.

12 QUESTION: Right.

13 MS. SMITH: Correct.

14 QUESTION: I mean --

15 QUESTION: Can I ask a technical, minor thing,
16 following up Justice Stevens? Is this right? My
17 understanding was in the last clause they're talking about
18 a case where the initial pleading, i.e. the complaint, has
19 been filed in court and is not required to be served on
20 the defendant.

21 MS. SMITH: That's correct.

22 QUESTION: That's Kentucky.

23 MS. SMITH: That's correct.

24 QUESTION: And in New York, those words do not
25 apply, because in New York a complaint is required to be

1 served on the defendant, but at a later time.

2 MS. SMITH: Correct.

3 QUESTION: Is that right?

4 MS. SMITH: That's correct.

5 QUESTION: All right.

6 QUESTION: Well, you're -- let me be sure I have
7 your position correct. A case is filed, and the -- but
8 the party -- I see, but the party is not served, and
9 you're mailing a copy of the complaint that's actually
10 been filed. You don't consider that otherwise, because
11 there's no service yet.

12 MS. SMITH: That -- I believe that's correct. I
13 think that's a proper interpretation by reason of, who is
14 a defendant.

15 QUESTION: But if there were service -- I mean,
16 I suppose the hypothetical case that this applies to is
17 one where the service of the summons comes at a different
18 time from service of the complaint, but I don't think
19 there are any -- they don't do that any place, do they?
20 If they require service of the complaint, it always
21 accompanies the summons, doesn't it?

22 MS. SMITH: No. It didn't in New York, and that
23 was the very problem that they were addressing. Now --

24 QUESTION: Because it didn't require any
25 service.

1 MS. SMITH: No. The -- a summons had to be
2 served in New York. A summons was served when the case
3 was commenced, but it did not require that the complaint
4 be attached to it.

5 QUESTION: So --

6 MS. SMITH: Nor did the complaint have to be
7 filed in court.

8 QUESTION: So the otherwise covers the New York
9 practice of mailing the complaint or --

10 MS. SMITH: Serving it --

11 QUESTION: -- having a private processor
12 delivering it.

13 MS. SMITH: Serving the complaint at some other
14 time after service of process.

15 QUESTION: Well then, how -- if we think that's
16 the congressional intent, how do we then define otherwise?
17 What's the general definition of otherwise that is narrow
18 enough to address just this circumstance?

19 MS. SMITH: I think or otherwise can mean any
20 other -- other way, and if service of process has been
21 perfected to deal with the New York rule.

22 QUESTION: What you're saying is, there must be
23 a preliminary. You must have --

24 QUESTION: It must --

25 QUESTION: Your bottom line is, whatever else,

1 you must have service of a summons, so if you have the
2 complaint served together with the summons, that's fine,
3 that's the Federal pattern. Or if you receive the
4 complaint apart from service of the summons, but after
5 service of the summons, so I think your ground position
6 is, you must have service. The complaint can be served
7 simultaneously, or it can be served later, but at a
8 minimum, you must have service.

9 MS. SMITH: Correct. You must have service, and
10 if you do have service, the problems with notice aren't
11 there. The defendant is on notice once service has been
12 made. He has been properly --

13 QUESTION: It's very difficult to reconcile with
14 the language of the statute, which doesn't say -- it says
15 receipt by service or otherwise, so to say that you must
16 have service to get the thing rolling, it seems quite
17 contrary to the language of the statute.

18 MS. SMITH: I disagree, because I think
19 defendant was intended to mean only a defendant who had
20 been made a defendant through service of process.

21 QUESTION: Let me ask you a practical
22 consequence of the Eleventh Circuit's formulation, which
23 is different than what you urge. If the defendant has not
24 been served with a summons, but has received a copy of the
25 complaint, and if we interpret the statute as requiring

1 removal to be made within the requisite time from receipt
2 of the complaint, does the defendant waive the right to
3 assert lack of personal jurisdiction for failure to be
4 served? I guess no one disputes that.

5 MS. SMITH: No. No, I don't think that anybody
6 has asserted that you waive personal jurisdiction. The
7 problem with Rule 81(c), though, is that our history and
8 our Federal procedures and our understanding of the law is
9 that a defendant doesn't have to do anything until he's
10 been properly served with process.

11 QUESTION: But at least you acknowledge that
12 even if he is required to remove he can say, but I've
13 never been served and I -- he can reserve that, of course.

14 MS. SMITH: Well, he has to file a responsive
15 pleading, and he may say in his responsive pleading, Rule
16 12(b), I haven't been properly served, yes.

17 QUESTION: May I just make this additional
18 observation? It wouldn't necessarily have to be service.
19 I suppose the defendant could enter an appearance, and --
20 without being served, and then the time would start to run
21 if he got a copy of the complaint.

22 Say they mailed him a copy of the complaint and
23 said, this was filed, we've sent the marshal off, we can't
24 find you, the defendant could enter an appearance when --
25 and then the copy would be enough.

1 MS. SMITH: Could waive service, in other words.

2 QUESTION: Yes. Yes.

3 MS. SMITH: Yes, I think that's correct, but
4 a -- an interpretation that requires service and receipt I
5 think is the most consistent with the legislative history
6 and it also avoids the problems with Rule 81(c), and it
7 also comports with fundamental fairness.

8 QUESTION: Well, maybe they should have written
9 it that way. I mean, to -- you're saying, to achieve what
10 they wanted to achieve, they should have written it
11 differently. But if, in fact, they didn't write it
12 differently and went further than they should have gone, I
13 don't know that we have the authority to cut it back.

14 You're giving this a very artificial definition
15 of defendant. Defendant means -- I mean, there are a lot
16 of conditions for being a proper defendant. Surely
17 service isn't one of them. I mean, service isn't the only
18 one. I mean, you could be an improper defendant,
19 improperly joined, right?

20 MS. SMITH: No -- well, certainly you could be
21 an improperly joined, misjoined --

22 QUESTION: A misjoined defendant.

23 MS. SMITH: -- defendant, but I don't --

24 QUESTION: But you would still be a defendant.

25 MS. SMITH: I -- yes, absolutely.

1 QUESTION: For your purposes. Well, why pick
2 out the one qualification that you have to have been
3 served?

4 MS. SMITH: Because that's what gives the court
5 jurisdiction over you. I mean, that is what, in our
6 history, the -- has told the defendant that he had to take
7 action. Before service of process was made, a defendant
8 didn't have to do anything.

9 It didn't matter if he knew that that suit was
10 sitting out there against him. Until he had been served
11 with process he didn't have to do anything, and I think
12 Congress was acting with that understanding in amending in
13 1949. They understood that a defendant doesn't have to do
14 anything. A defendant is truly a defendant only when he
15 has been served with process.

16 QUESTION: Well, what if a defendant, several
17 defendants have been named, diversity of citizenship
18 alleged, and one defendant is, in fact, served, the others
19 are not, and that defendant comes in and says, I want this
20 dismissed because by the allegations of the complaint
21 itself it shows there's no diversity here.

22 Now, aren't those other defendants defendants in
23 any normal sense of the word?

24 MS. SMITH: They are defendants for determining
25 diversity jurisdiction --

1 QUESTION: So --

2 MS. SMITH: -- whether diversity jurisdiction,
3 because you have to look at everybody --

4 QUESTION: Yes.

5 MS. SMITH: -- in the -- named in the complaint.

6 QUESTION: Well, is that 100 percent true? What
7 if a motion to dismiss on jurisdictional grounds was made
8 before the wrong defendants had been served? Couldn't the
9 plaintiff at that time say I've decided to dismiss those,
10 never serve them, just say that I'll just abandon my claim
11 against those?

12 MS. SMITH: Well, I can't answer that.

13 QUESTION: Well, isn't -- a plaintiff can always
14 drop a party when all there has been is a complaint. The
15 com --

16 MS. SMITH: Correct.

17 QUESTION: You're not forced to sue anyone.

18 MS. SMITH: Correct.

19 QUESTION: And that's the easy answer.

20 MS. SMITH: So if -- certainly if a lawsuit is
21 filed in Federal court the -- on diversity grounds, and
22 they have named a nondiverse defendant, they can drop that
23 defendant, correct.

24 QUESTION: But your point is the defendant who
25 isn't served doesn't have to do anything.

1 MS. SMITH: Correct.

2 QUESTION: Doesn't have to answer the complaint,
3 doesn't have to make a motion, can just sit back and until
4 he's served with process he doesn't have to act
5 affirmatively.

6 MS. SMITH: That's correct.

7 QUESTION: Well, I mean, that's nice until they
8 passed this statute. What this statute says is, and once
9 you have a copy of the complaint, if you want to remove to
10 Federal court, remove to Federal court. I mean, the world
11 won't stop if you set up that thing, it's true, that prior
12 to this statute we had this different system, but what the
13 statute says is that once you get the complaint, through
14 service or otherwise, you have 30 days.

15 MS. SMITH: Well, I don't disagree that Congress
16 could do that. They could say that yes, you have to
17 remove before you have been served with process.

18 I think the question, though, is that what they
19 intended in 1949.

20 QUESTION: Well, it's a question, is that what
21 they said in 1949.

22 MS. SMITH: Well, correct, but if we get past
23 the ambiguity issue, then we do need to look at what they
24 intended by their language. And I think in 1949, when
25 they amended this statute, all they were trying to do was

1 correct a very narrow problem. And in 1948, when the
2 statutes were -- Title 28 was refiled and revised in
3 1928 -- in 1948, excuse me, they specifically tied the
4 removal time to State rules of service and commencement,
5 so I think any suggestion that they were trying to divorce
6 the removal statutes, or the removal procedure from the
7 State rules of service is incorrect. They specifically
8 tied it to that in 1948.

9 In 1949, they were trying to only correct this
10 very specific problem of a defendant who had been served,
11 the suit had been commenced, but he didn't have any means
12 of determining whether his suit was removable, and that is
13 the problem that they were trying to correct.

14 QUESTION: Ms. Smith, may I ask you another
15 question? Do you think the word defendant is a term that
16 is governed by Federal law or State law?

17 Supposing the State had a statute that said, a
18 person becomes a defendant as soon as he -- one State has
19 a statute that says a person is a defendant when the
20 complaint is filed. Another State has a statute that says
21 a person is not a defendant until he's served with
22 process.

23 MS. SMITH: I think it is an issue -- for 1446
24 purposes and for removal purposes it is an issue of
25 Federal law, who is a defendant under Federal law.

1 QUESTION: So that even if a State had a statute
2 that said, you are a defendant when the complaint is
3 filed, that would not be controlling --

4 MS. SMITH: I think that's --

5 QUESTION: -- and I suppose your opponent would
6 make the same answer with respect to the other statute.

7 MS. SMITH: Well, I mean, what we have to look
8 at is who is a defendant under 1446(b), and that has got
9 to be an issue of Federal law. Requiring both service and
10 receipt is consistent with fundamental fairness. It is --
11 it voids a lot of difficult interpretive problems that
12 result from solely a receipt rule.

13 The lower courts have begun superimposing the
14 service-type ideas on top of the term receipt in order to
15 deal with the concerns about whether the defendant has
16 notice, the proper notice in order to put him on notice
17 that he needs to do something in respond to the -- in
18 response to the complaint when he just receives it by fax
19 or by mail without the formal procedures attendant to
20 service of process.

21 We submit to you that that approach makes no
22 sense, because if Congress did, indeed, intend receipt to
23 mean any receipt, then superimposing service rules on top
24 of what receipt is is contrary to congressional intent,
25 so --

1 QUESTION: Is it clear under this statute that
2 the complaint has to be filed in court, or can it just be
3 something drafted in the lawyer's office?

4 MS. SMITH: I think that that is tied to the use
5 of the term initial pleading. And while I think that
6 ordinarily an initial pleading would have to be filed in
7 court, I don't know if there were some quirky States -- I
8 mean, what we were dealing with was quirky service and
9 receipt rules, I hesitate to use that term, but in the
10 State courts, and I do not know if there was some State
11 where you did not have to file your initial pleading, but
12 I think ordinarily the initial pleading would be a
13 complaint that had been filed, already filed in State
14 court.

15 If there are no further questions, I'll reserve
16 my time.

17 QUESTION: Thank you, Ms. Smith.

18 Mr. Pugh, we'll hear from you.

19 ORAL ARGUMENT OF J. DAVID PUGH

20 ON BEHALF OF THE RESPONDENT

21 QUESTION: Mr. Pugh, do you think the complaint
22 has to be filed, in any event, under this statute?

23 MR. PUGH: Justice O'Connor, yes, and I do agree
24 that the requirement for filing the complaint is implicit
25 in the terms and initial pleadings setting forth a

1 removable cause of action.

2 QUESTION: What if the complaint in this case
3 had been obtained not by the intentional act of faxing it,
4 but by a different means? What if the lawyer for the
5 defendant had simply been in the plaintiff's lawyer's
6 office, had seen a copy of the complaint on the desk of
7 his opposing counsel, and had just walked away with it.
8 Would the period of time start running then?

9 MR. PUGH: Justice Souter, the position that the
10 respondent would take would require more information. For
11 example, we agree that by initial pleading it would have
12 to be a complaint that had been filed. There would have
13 to be some indicia on the complaint that that is in fact
14 the case.

15 QUESTION: Okay. It's --

16 MR. PUGH: So there would need to be a file
17 stamp.

18 QUESTION: Okay. I'll add that to my hypo. It
19 has been filed, but it has not been served and, in fact,
20 without any invitation or authority defense counsel simply
21 picked it up off plaintiff's counsel's desk and said,
22 we'll have an early look, and walked away with it. Would
23 the period start running then?

24 MR. PUGH: Again, Justice Souter, a few more
25 facts --

1 QUESTION: Want some more --

2 MR. PUGH: -- might be necessary.

3 QUESTION: Okay. You complete my hypothetical
4 for me, and then you can answer it.

5 (Laughter.)

6 MR. PUGH: Well, the facts in the case before
7 the Court are the ideal situation for one reason,
8 primarily.

9 QUESTION: Well, I --

10 MR. PUGH: There's nothing -- other than the
11 means of conveyance. Other than the means of conveyance,
12 there is nothing left to be done in the facts before the
13 case.

14 QUESTION: Okay, but how -- let's get back to my
15 hypothetical. Picks it up off the desk --

16 MR. PUGH: It would need to be file-stamped. We
17 believe Rule 11 would require --

18 QUESTION: Why does it have to be file-stamped?

19 MR. PUGH: That's an indicia that the action is
20 actually pending against the defendant.

21 QUESTION: So in other words, what you're
22 getting at is, there's got to be some affirmative
23 indication on the plaintiff's part that the plaintiff is
24 going ahead with this, that it's a real lawsuit, and not
25 just some preliminary pleadings that may be -- may or may

1 not be used.

2 MR. PUGH: Yes.

3 QUESTION: Well, also some evidence of
4 authenticity, isn't it?

5 MR. PUGH: Yes, Mr. Chief Justice.

6 QUESTION: Are you sure --

7 QUESTION: Well, where does all this come from
8 in the statute? Why does it -- the statute just says a
9 copy. Supposing that instead of mailing a file-stamped
10 copy you had mailed a -- just an office copy with a note
11 on it, this is a copy of what we filed today, wouldn't
12 that be receipt of a copy, or would it, in your view?

13 MR. PUGH: The extent to which courts may have
14 to go in interpreting receipt does present some
15 problems --

16 QUESTION: My question is the word copy. If you
17 mail a verbatim copy of the paper you filed in there, but
18 one that is not a photostat of the file-stamped copy, is
19 that a copy within the meaning of the statute?

20 MR. PUGH: If, in fact, there is -- if, in fact,
21 the action is pending against the --

22 QUESTION: Yes, the copy -- it is pending.

23 MR. PUGH: And there is some indicia on the face
24 of the complaint --

25 QUESTION: Well, the indicia is that one lawyer

1 trusts another lawyer and he writes a letter to the lawyer
2 saying, this is what I filed today. That generally is
3 acceptable among reputable counsel.

4 MR. PUGH: A court could find that that is
5 enough.

6 QUESTION: Okay. There is --

7 QUESTION: Now, my second question -- let me
8 just -- please, may I finish with this one thought. The
9 usual situation that I was familiar with in practice is,
10 before you file the complaint you will -- as a courtesy
11 you will sometimes fill out and mail a copy to the
12 intended defendant saying, this is a copy of what I
13 propose to file. It's word for word what you do file
14 5 days later.

15 Then, has he received -- and then 5 days later
16 he becomes a defendant, the defendant. Has the defendant
17 received a copy within the meaning of the statute?

18 MR. PUGH: We do not think that on those facts,
19 that the language in the statute would extend to those
20 facts.

21 QUESTION: Okay, but in --

22 QUESTION: Why not? Literally it does. Why
23 wouldn't it?

24 MR. PUGH: There's no action pending. It's not
25 an initial pleading. He is not a defendant. He might

1 become one at some point.

2 QUESTION: Yes, but I'm talking about what he
3 has in his possession after he becomes the defendant. He
4 has a copy of the complaint. He has received a copy of
5 the complaint, and he is a defendant, but you say the
6 statute doesn't apply.

7 MR. PUGH: The language of the statute --

8 QUESTION: Wait, you say it would apply once
9 it's filed.

10 QUESTION: So we don't follow the plain language
11 in all cases.

12 QUESTION: I thought your position was, it would
13 apply once it's filed, when he receives it. 5 days before
14 the complaint is filed the statute is not complied with,
15 but if he gets it 5 days before, and then later, Justice
16 Stevens goes and files the complaint, as he said he would.
17 Wouldn't, at that point, the statute be complied with? He
18 would have received, been in receipt of a copy of the
19 initial pleading.

20 MR. PUGH: Justice Scalia, the action -- I'm
21 going to create some language of my own -- would be
22 inchoate. There's no safeguard against further editing of
23 the complaint. There's no assurance, the defendant would
24 have no assurance that what he had, which was a conception
25 of an action, of an initial pleading, to use the language

1 of the statute, was, in fact, or did evolve into an
2 initial pleading or an action.

3 QUESTION: Then look at what happens in your two
4 examples, the way you have it.

5 Example one, in New York, somebody serves, the
6 plaintiff serves the defendant. 8 days later -- without a
7 copy. 8 days later, he sends to the defendant, who
8 receives it, a copy of the complaint, but not file-
9 stamped. He just sent it from his office. In New York,
10 under your theory, the period doesn't run. I mean, we're
11 all mixed up, aren't we.

12 Case number 2 -- maybe it's the null case. The
13 null case may be, there may be a State somewhere where you
14 can actually serve someone before you actually begin the
15 case. Is there such a -- do we know if there is such a
16 State?

17 MR. PUGH: I don't know of such a --

18 QUESTION: We don't know. So all we have to
19 have is a State where it's possible to serve the defendant
20 before you file the case. Then what happens?

21 What you've produced is an interpretation of the
22 statute which will get people very mixed up, I think. And
23 indeed, her basic claim, your opponent's, is the only way
24 that we won't get people mixed up, finding out, you know,
25 somebody happened to get a copy sent by a paper airplane,

1 and it went in the office, and there had been no such case
2 filed.

3 The only way not to get them mixed up is if we
4 simply read the word otherwise to say, otherwise after
5 service. That's all. Otherwise after service, and then
6 nobody gets mixed up, it's clear, everybody understands
7 it. Now, I'm --

8 QUESTION: The difficulty with that is, it
9 doesn't say that.

10 QUESTION: No, it doesn't. It also doesn't say
11 otherwise not by paper airplane. It also doesn't say,
12 otherwise and we're talking in the United States. It also
13 doesn't --

14 QUESTION: And it also isn't her position. I
15 think her position is after summons. She does not require
16 that the complaint have been given.

17 QUESTION: What?

18 QUESTION: All she would require is that there
19 have been a summons. Whether or not the person -- these
20 same problems arise under the interpretation that the
21 other side would give, because the other side does not
22 require the complaint to have been served.

23 QUESTION: No, no, the --

24 QUESTION: The other side only requires a
25 summons to have been issued, with or without a complaint.

1 QUESTION: That's --

2 QUESTION: But with the copy of the complaint
3 having been delivered.

4 QUESTION: Other --

5 QUESTION: And the ambiguity is, what is a copy
6 of the complaint? This side says it's got to file-
7 stamped, and filed. The other side might say it is a copy
8 if it has the same language in it word for word, even
9 though it's delivered ahead of time.

10 QUESTION: Would you like to participate in the
11 Court's argument?

12 (Laughter.)

13 MR. PUGH: I'm enjoying -- I'm enjoying the
14 discussion.

15 QUESTION: Let me ask you this question, Mr.
16 Pugh. You agree that we can't read the statute in its
17 plainest plain meaning, that there has got to be some act
18 on the part of the plaintiff to indicate that in fact a
19 real lawsuit is being filed, rather than merely drafted
20 pleadings being circulated. I mean, that's your file-
21 stamp example. We've got to have something more.

22 Assuming that to be a sensible position, why
23 isn't the best way to serve that end to say that there's
24 got -- as your opposing counsel says, there's got to be a
25 service officially of something upon the defendant so the

1 defendant knows beyond any peradventure of doubt that a
2 real lawsuit has been commenced, and knows that at that
3 point he better look at the rules and find out when the
4 time starts running.

5 Why isn't that the easiest way to satisfy what
6 she claims and what you yourself admit has got to be
7 something more than merely awareness of drafted pleadings?

8 MR. PUGH: Justice Souter, I think this will
9 answer both yours and Justice Breyer's question. In the
10 words of Mr. Chief Justice, quite simply, the petitioner
11 asks this Court to import the phrase, not service, but
12 service of process into this statute. The words, service
13 of process, do not appear in the statute. They were there
14 in '48.

15 QUESTION: Neither does stamping of the
16 complaint appear. In other words, you're importing
17 things, too. And if you're going to import things for the
18 very sensible purpose of saying, we've got to know that
19 this is a real lawsuit and not a preliminary drafting
20 exercise, then I'm not sure why we should stop at your
21 point rather than her point, because her point puts
22 somebody definitively on notice, and yours doesn't. Yours
23 has the problems that Justice Breyer's question raises.

24 MR. PUGH: In 1948, prior to the 1949 amendment,
25 the removal statute expressly adopted a service of process

1 methodology to commence the running of the time. Congress
2 very quickly recognized the same difficult situations with
3 hypotheticals. They had some real examples before them.

4 But we think it's improper to conclude, and the
5 legislative history certainly doesn't indicate that the
6 conclusion is well-founded, that the change in '49 was
7 limited solely to New York and Kentucky.

8 QUESTION: Would you concede it was triggered by
9 that? Because New York, with serving the summons but not
10 the complaint, just didn't fit into this scheme. So I
11 think that even if you don't even look at legislative
12 history, that's conceded that Congress was moved by
13 people, States that had New York's pattern.

14 I don't know of any other one that did at the
15 time, but --

16 MR. PUGH: Yes, those were the immediate
17 problems. But to solve the problem, what Congress did was
18 abandon, abandon service of process, and opt instead for
19 what they hoped would be a uniform Federal standard, and
20 that's the receipt --

21 QUESTION: Is there any other -- to decide
22 whether Congress really did that, I wondered whether
23 there's any other instance in all of Federal procedure
24 where a defendant is required to do something on pain of
25 forfeiture, because if you don't do the 30 days, then you

1 can't remove, on pain of forfeiture, without being served
2 with a summons, without having a substitute for that
3 sheriff seizing you.

4 MR. PUGH: Justice Ginsburg, we believe the
5 answer is yes. In fact that's --

6 QUESTION: What else?

7 MR. PUGH: That's the answer to the Rule 81(c)
8 problem. If a defendant believes he has been improperly
9 served, or that process was improper --

10 QUESTION: Not improper. It didn't happen.

11 MR. PUGH: It didn't happen, but nonetheless,
12 he's received the complaint. The proper procedure, and in
13 fact it's been the policy of the courts consistently, is
14 to resolve that issue quickly by exercising a Rule
15 12(b)(4) or (b)(5) right. In fact, the Eleventh Circuit
16 has a case where --

17 QUESTION: But that, Rule 12(b)(4) or (5) is a
18 responsive pleading. And you're not required to respond
19 to a pleading until you're made a defendant, right?

20 MR. PUGH: Just by way of one example, the
21 Eleventh Circuit has held to the contrary, and Moore's
22 echoes that as a general policy, that in those limited
23 instances, and it's a limited appearance, you go -- the
24 proper procedure is to go and challenge that. If the
25 defendant is correct --

1 QUESTION: I thought the Federal Rules had done
2 away with limited and special appearances.

3 MR. PUGH: I use an archaic term, but that in
4 effect is what it is. You go and challenge the
5 sufficiency of the service. If service was improper, that
6 defendant is done.

7 QUESTION: Well, suppose -- and the term initial
8 pleading may help your case. If you define an initial
9 pleading as a paper that has been filed in the court, you
10 couldn't have a copy of an initial pleading unless the
11 initial pleading had been -- a pleading means something
12 that's been filed in court.

13 MR. PUGH: Mr. Chief Justice, that's precisely
14 the definition we would opt for.

15 QUESTION: Does it always mean in the rules a
16 piece of paper that has on it a time stamp or the
17 equivalent?

18 MR. PUGH: It would need to have --

19 QUESTION: I mean, one could have a copy of that
20 pleading which has been filed, but that doesn't indicate
21 on it that it has been filed.

22 MR. PUGH: Even if it did not, but the defendant
23 had some other objective indicia that an action was
24 pending, such as the summons that was date-stamped, and an
25 undate-stamped --

1 QUESTION: Perfect. Then the --

2 MR. PUGH: Those two together, then it's got --

3 QUESTION: Then the objective indication is that
4 there was a service.

5 MR. PUGH: In that limited example. But what
6 Congress wanted to do in '49 is move away from that
7 problem and opt for a receipt, a uniform receipt.

8 QUESTION: No, but Mr. Pugh, you said they
9 totally abandoned service, but the second half of 1446(b)
10 does depend on time of service.

11 MR. PUGH: The second phrase, which speaks of
12 service of a summons?

13 QUESTION: Yes.

14 MR. PUGH: And that, in fact, is where -- the
15 only place that a service of process requirement is
16 imposed.

17 QUESTION: Yes, but they -- I'm saying, but they
18 did keep it for that case, so you can't say they abandoned
19 it.

20 MR. PUGH: Which, when contrasted with the first
21 part of the statute, affirms the respondent's position
22 that in those cases when a summons has not been served,
23 which expressly contemplates that the situation could
24 arise, then all that's needed, and what Congress thought
25 was most important, was receipt of a pleading that gave

1 that defendant notice that a removable cause of action was
2 pending. Now, often --

3 QUESTION: So do I understand from what you've
4 said, then -- you get the fax copy, a fax copy of what was
5 actually filed in court, so what the Chief suggested has
6 been satisfied.

7 However, 30 days go by, and you never have been
8 served with process. On day 40 you are served with
9 process. Do I take it that you can't remove under your
10 reading?

11 MR. PUGH: If you've received the complaint, it
12 was -- an action had --

13 QUESTION: You've got this fax, this courtesy
14 thing that was sent to you. Then there's the 30 days to
15 remove, but you sit there, and you have never actually
16 gotten any kind of summons at all, and then you get a
17 summons on day 40.

18 MR. PUGH: Under the plain meaning of the
19 present version of section 1446, that defendant would have
20 waived the right of removal.

21 Now, it's always been recognized that it was a
22 limited and waivable right. It hasn't lost any due
23 process. It can still appear in court. It still has a
24 right to trial by jury, a right to be represented by
25 counsel, the rules of evidence, rules of civil procedure,

1 the appellate rights that it would have. It's just lost
2 that limited, waivable right to an alternative form.

3 Now, the assertion that the 1949 amendment was a
4 major change, and in fact the Senate report refers to it
5 as a major change, is consistent with a longer view of the
6 legislative history of the removal right.

7 In the earliest years, a defendant could
8 exercise that right all the way up until the time of
9 trial. It was there because of the perception of local
0 prejudice.

1 Down through the years, as the perception,
2 hopefully reality of local prejudice abated, Congress has
3 consistently drawn back the time in which that right must
4 be exercised.

5 QUESTION: Right. Your point -- is this your
6 point? I'm beginning to see what I think I missed before.
7 You say that the case has to have begun, so that if, in
8 fact, the defendant gets a copy of the complaint, but gets
9 it before there's been any filing in court, that nothing
0 happens, it's void, it doesn't have an effect, but there
1 has to be a case that's begun.

2 Now, once that case has begun, in your opinion,
3 the copy that he has has to be a copy that he knows is
4 official, and if he's received through service of process
5 an indication the case has begun, that will probably be

1 enough. If he hasn't received that, then if the complaint
2 is time-stamped by the court, that will give him the
3 necessary notice that it's official.

4 MR. PUGH: Yes, Justice Breyer.

5 QUESTION: That's your point.

6 MR. PUGH: Precisely.

7 QUESTION: Now, I come from a State that Justice
8 Breyer alluded to in an earlier question in which the
9 theory is that the suit begins not upon filing in court,
10 but upon service on the defendants, so that when, in fact,
11 the copy of the complaint is served upon the defendant,
12 there can't be any date stamp because you don't file
13 anything in court until you've completed your service.

14 Under your interpretation, the time period does
15 not run in my State, I take it, even upon service, is that
16 correct?

17 MR. PUGH: The action --

18 QUESTION: There's no stamp on it. Nothing's
19 been filed in court. Does the -- when the first defendant
20 is served, does the 30-day period start running as to that
21 defendant, in the State of New Hampshire?

22 MR. PUGH: In your hypothetical case, I think
23 not. An action had not been commenced. Now, again, the
24 facts of the case --

25 QUESTION: But we don't know if any State allows

1 such a thing, do we?

2 QUESTION: Well, yeah. I come from one.

3 MR. PUGH: Justice Souter's example suggested
4 that it did.

5 QUESTION: Was New Hampshire admitted yet?

6 (Laughter.)

7 QUESTION: If you have a State, and there are
8 many such States, where the statute of limitations is
9 tolled only upon service, and in your case, if the
10 defendant gets a -- in many cases they're filed right up
11 near the deadline. In your case, I take it, you would
12 require the defendant to remove even before he's served,
13 and the statute of limitations may later run. I suppose
14 he has waived the statute of limitations by removing.

15 MR. PUGH: I don't know of a case to cite for
16 the proposition, but I think that would be an incorrect
17 proposition, Justice Kennedy, to the same extent that one
18 does not waive Rule 12 defenses. The mere -- the act of
19 removing --

20 QUESTION: Isn't that an appearance in the case?
21 Is the removal an appearance, is it not?

22 MR. PUGH: Yes, for a limited purpose. In
23 essence, if I could use a colloquialism, it's reserving a
24 seat at the opera. It's saying, if I do -- if I do have
25 to proceed with a full defense on the merits in this case,

1 I am now asserting my right to proceed in the Federal
2 forum as opposed to the State forum. That's all that's
3 taking place. If service has not been achieved, the
4 proper procedure is to pursue -- file a motion under Rule
5 12.

6 QUESTION: All right. I mean, I don't know --
7 what you've done, which is very interesting, which I
8 hadn't quite taken in, is you've worked out a way both to
9 win your case and also deal with most of the practical
10 problem that they -- your opponents have raised.

11 MR. PUGH: Yes.

12 QUESTION: Because in your opinion, it can't
13 happen that you'd file these informal copies, throw them
14 through the window, whatever. I understand that. But now
15 I'm sort of at a loss to decide this case. That is to
16 say, what -- either way, we have to read quite a lot into
17 this statute, don't we, either way. And then I guess what
18 they have going for them is that their way seems more
19 commonly accepted than the way you've come up with.

20 MR. PUGH: To the extent that a court is
21 interpreting receipt, or initial pleading, the importation
22 of some meaning is a proper inquiry, we would suggest.

23 The importation of the phrase, service of
24 process, which was there expressly, and just as expressly
25 abandoned in 1949, is a much longer leap, if you will,

1 farther leap.

2 QUESTION: What they're thinking of, imagine a
3 big office with about 100 people in it, and they have to
4 run these offices, you know. It's a business. It's a big
5 business and so forth. And so once that process has been
6 filed people are on notice, and if they start getting
7 copies of complaints after that, they'd better take it
8 seriously, but the fourth assistant may not know the
9 significance of this time stamp.

10 MR. PUGH: Well, in the facts of our case, the
11 person who actually received it, whether under the Alabama
12 rules or the Federal rules, is a person upon whom service
13 could be effected.

14 We agree, as the Sixth Circuit, the first
15 circuit to address this, pronounced in its opinion, that
16 recognizing that a corporation is a legal entity that must
17 act through its human agents, they had to decide upon whom
18 this receipt determination could be evaluated, and they
19 suggested, it ought to be a person upon whom service could
20 be effected.

21 That's not offensive to our position, it's
22 consistent with our position, but that's an interpretation
23 of the word receipt, which is in the statute.

24 QUESTION: So in the case of the Government,
25 that was concerned because of the special service

1 requirements when you're suing the United States, would
2 you say the complaint then would have to be actually
3 received by all of the people who are entitled by statute
4 to be served?

5 MR. PUGH: We think so, and that's consistent
6 with our position.

7 QUESTION: It's consistent with your position,
8 but you recognize that you're doing a little construing of
9 the meaning of the word copy. It's got to be file-
10 stamped. And you're also construing the word receipt.
11 It's got to be received by a person authorized to take
12 service.

13 But you don't think there's any room for leeway
14 in defining the term defendant to include someone to say
15 you're not a defendant until you're served with process.

16 MR. PUGH: Well --

17 QUESTION: So your literal -- your -- you do a
18 little construing for two words, but not the third.

19 MR. PUGH: We think, in fact, the defendant, the
20 use of the word defendant in 1446 is consistent with the
21 broader meaning. As it was observed, defendant without
22 the qualifying language does appear in several other
23 instances, the removal act.

24 QUESTION: No, that's true, but in order -- one
25 might say that in order to make sense out of this statute

1 and solve all the problems, all you have to do is construe
2 the word defendant for purposes of this statute to mean, a
3 person who is both named in the complaint and has been
4 served with process. If you construe it that way, all the
5 problems are gone.

6 MR. PUGH: But Justice Stevens, those words
7 aren't there.

8 QUESTION: I understand that, but if we
9 construed it that way, just as we construe copy to include
10 the file stamp and receipt to be receipt by an officer, if
11 we did construe it that way, there'd be no problem.

12 MR. PUGH: And Congress could have opted for
13 that.

14 QUESTION: But that's not true. You would still
15 have to construe -- I mean, it's not whether you construe
16 defendant instead of construing the other two. It's
17 whether you construe defendant in addition to construing
18 the other two, because the problems as to whether this is
19 the genuine complaint or not would still exist even if
20 the -- even if summons without a copy of the complaint has
21 been received, and the problem whether you can serve it on
22 agents of the Federal Government, set forth in the Federal
23 statute, whether that would constitute receipt, those
24 problems would still exist even if a summons has issued
25 without the complaint, isn't that right?

1 MR. PUGH: That's correct.

2 QUESTION: So --

3 QUESTION: But they're not very difficult
4 problems.

5 MR. PUGH: And it hits upon what we believe
6 Congress thought was the primary reason for the changes.
7 Their inquiry was directed at communicating, conveying,
8 transferring to the defendant the notice that a removable
9 cause of action was pending against it, and that's when
10 they opted for this, as the Senate report said, a major
11 change in the previous methodology from the service of
12 process.

13 There has been much discussed with respect to
14 the perceived unfairness in some of the extreme
15 hypotheticals. The Eleventh Circuit recognized that the
16 unfairness, to the extent it was present, was --

17 QUESTION: Before we go to the unfairness, I'm
18 thinking back to 1949 and what lawyers and judges
19 understood about the State asserting its power over an
20 individual.

21 That required something official, like service,
22 so why shouldn't we think that that's implicit? It was
23 set so strongly in the common law tradition that the State
24 must assert its authority over you, otherwise you're not
25 subject to the State's power, and it wasn't left to your

1 adversary to assert that power. That was, I think, the
2 general understanding of lawyers and judges in 1949, and
3 isn't that part of what we should take into account?

4 MR. PUGH: That is a proper analysis of the need
5 for the mandate, in fact, for the service of process, but
6 that is not implicated in the removal scenario. All one
7 is doing is preserving, taking out that ticket, preserving
8 the right to proceed if in fact service is properly
9 effected subsequent to the actual removal, reserving the
10 right to proceed in the Federal forum.

11 The only thing that that defendant must do, and
12 there are cases holding this, that it can be waived if
13 this is not exercised, is going and challenging the
14 service or the process under Rule 12(b)(4) or (5).

15 If that defendant is right that he was not
16 served or was improperly served, that action is concluded
17 in all instances, and we can assume it would be without
18 prejudice, and it might be effected later.

19 If he's wrong, that action would then proceed,
20 but he's preserved his right to remove, and all is well.

21 QUESTION: And he would be able to challenge the
22 service immediately in Federal court, instead of having to
23 challenge it in State court.

24 MR. PUGH: That's correct.

25 QUESTION: May I just confirm one other -- you

1 agree the word defendant is a matter of Federal
2 definition, not State, so that even if there are State
3 statutes that said, you don't become a defendant until
4 you're served, we would ignore that State statute.

5 MR. PUGH: My inclination, without thinking
6 about all the possible ramifications, is that we are
7 talking about the Federal right of removal, a limited,
8 waivable right, and if we have to construe that word for
9 purposes of determining whether a receipt has occurred, I
10 would be inclined to go with the Federal definition.

11 QUESTION: If a lawyer for a prospective
12 defendant finds out a complaint's been filed and gets it
13 for his own client and sends it to him, I suppose he could
14 be in big trouble under your interpretation.

15 MR. PUGH: It would depend upon how far the
16 district courts would go in interpreting receipt. We
17 suggested in our brief that that implies an affirmative
18 act.

19 We had to address the hypotheticals. The facts
20 in our case do not involve that, but we suggest it implies
21 an affirmative act on the part of the plaintiff, not
22 unlike an attempt at service, but it's not necessary to
23 reach that.

24 QUESTION: So if you go down yourself, the
25 client defending himself, to the courthouse and gets a

1 certified copy of the complaint, that's not enough.

2 MR. PUGH: In fact, that's what happens in a
3 State like Kentucky. The -- it's incumbent upon the
4 defendant to go and see if the pleading states a removable
5 cause of action so that he may then exercise his removal
6 rights if they're proper.

7 Again, the import -- what Congress recognized in
8 1949 and has echoed in both the Senate and the House
9 report, is that we've got a parade of horrors with the
10 service of process hypotheticals just as you can imagine
11 under the receive analysis, but we're going to abandon
12 that service of process methodology, because that is
13 clearly tied to 50 different States' rules.

14 We're going to adopt a new methodology, and
15 that's going to be based upon receipt of an initial
16 pleading that sets forth a removable cause of action,
17 because our intent in 1446(b) is to get notice to that
18 defendant that it had better do something or risk waiving
19 its removal rights, and that, at least the 1949 Congress
20 thought was best achieved by requiring receipt, and moving
21 away from the service of process, a phrase that it dropped
22 entirely.

23 It had been the sole methodology in the statute
24 the year before, and it moved away. In fact, if all
25 Congress intended to do was to solve the New York/Kentucky

1 problem, a semicolon provided comma however clause at the
2 end of the 1948 statute would have been the best manner,
3 saying provided, however, that in those States in which a
4 complaint, an initial pleading setting forth the removable
5 cause of action, is not required to be filed or served
6 until later. Then the time will run when that is
7 received, or served, or whatever methodology they chose.

8 QUESTION: Maybe they did that.

9 MR. PUGH: There's no indication in the
10 legislative history. It's just -- it's erased, and they
11 started from scratch.

12 I was about to address the unfairness issue. We
13 think the Eleventh Circuit correctly pointed out that the
14 unfairness concerns are largely if not completely
15 addressed when the state of the law is settled. All it
16 will take is for this Court to adopt and enunciate the
17 receipt rule and the uncertainty that litigants have as to
18 what to do is then resolved.

19 QUESTION: Well, it's not resolved if the
20 defendant's lawyer goes -- as Justice Kennedy's example.
21 It's not resolved for my case of a copy mailed before the
22 case is filed at all. They're still open.

23 MR. PUGH: Again, we think the initial pleading,
24 Justice Stevens, the initial pleading only would require
25 that the action actually be commenced.

1 QUESTION: Thank you, Mr. Pugh.

2 Ms. Smith, you have 3 minutes remaining.

3 REBUTTAL ARGUMENT OF DEBORAH A. SMITH

4 ON BEHALF OF THE PETITIONER

5 QUESTION: How would you revise this statute if
6 you were rewriting it so that -- and incorporate your
7 client's position? I mean, that's in effect what you want
8 us to do.

9 MS. SMITH: Well, I certainly would not suggest
10 that I am a drafter of statutes. I think there certainly
11 are ways that this statute could have been better worded.

12 QUESTION: You want to say, after receipt by the
13 defendant, comma, after due service, comma --

14 MS. SMITH: I would have said, receipt or
15 service, whichever is later. That still wouldn't deal
16 with the Kentucky problem. The second phrase would still
17 have to be put in, but I think that would be better
18 language. But I don't think that Congress always uses
19 what we think to be the best language, and I don't think
20 that indicates that is necessarily not what they intended.

21 I think the respondent's suggestion that the
22 1949 amendment was intended to make a major change -- and
23 he's correct, there is a sentence in the legislative
24 history that says this makes a major change, but it made a
25 major change in the context of the bill in which the

1 statute was amended.

2 There were 174 changes made to the 1948
3 statutes, and in that context it was a major change
4 because about 170 of those were typographical errors and
5 clerical errors that were being corrected.

6 There's nothing -- what the legislative history
7 indicates is that Congress' concern was dealing with this
8 New York problem, dealing with the question of what
9 happens if the defendant doesn't have a copy of the
10 complaint from which to determine that his case is
11 removable. There's nothing to indicate that they wanted
12 to completely divorce the removal provisions from State
13 service of process rules.

14 I think in addressing the fundamental fairness
15 question, I think there are circumstances where the
16 process would be fundamentally unfair even under
17 Mr. Pugh's interpretation of the other terms within the
18 statute.

19 For example, a foreign corporation, a defendant
20 receives -- a foreign defendant corporation receives a
21 faxed copy of a file-stamped complaint. Well, they don't
22 necessarily -- they can't even necessarily read it. There
23 certainly is no reason that they should understand the
24 significance of it and know that they have to act
25 immediately to protect their interests.

1 Under the service rules, those kinds of issues
2 are taken care of. A foreign defendant is normally served
3 under the Hague Convention, or most of them are, and it
4 requires that the allegations of the complaint be
5 translated into their language, and that the complaint
6 be -- summons and complaint be sent to a central location,
7 which is usually the consulate, from which formal service
8 is made.

9 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Smith.

10 MS. SMITH: Thank you.

11 CHIEF JUSTICE REHNQUIST: The case is submitted.

12 (Whereupon, at 12:07 p.m., the case in the
13 above-entitled matter was submitted.)
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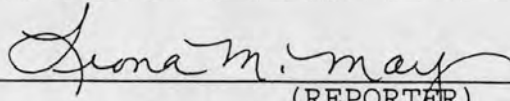
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MURPHY BROTHERS, INC., Petitioner v. MICHETTI PIPE STRINGING, INC.
CASE NO: 97-1909

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