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The Trouble with Service by Mail

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The Trouble with Service by Mail

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All attorneys who practice in the federal courts come into contact with Rule 4 of the Federal Rules of Civil Procedure. They cannot escape it, because Rule 4 governs the service of a summons and complaint in federal civil actions. Effective February 26, 1983, Congress changed Rule 4 in significant ways,¹ causing new difficulties for the courts. Many of the difficulties were anticipated by commentators at the time of the amendment² and will continue to be problematic unless the Rule is clarified. This essay will examine one facet of the 1983 amendments—the addition of service by first-class mail—and some of its attendant problems. As will be seen, this discussion will require us to delve into other parts of the 1983 amendments of Rule 4, because the problems often stem from the interaction among other sections of the Rule.

A major goal of the 1983 amendments was to remove from United

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1. Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527 (1983).

2. See generally Siegel, *Practice Commentary on Amendment of Federal Rule 4 (Eff. Feb. 26, 1983) with Special Statute of Limitations Precautions*, 96 F.R.D. 81, 88 (1983).

States Marshals the primary responsibility for serving the summons and complaint on federal defendants.³ In its place, the amended Rule makes the litigants responsible for arranging service of the summons and complaint by allowing service to be made by any nonparty adult.⁴ To lower the expense of service for litigants, the Advisory Committee and the Supreme Court proposed to allow service by certified or registered mail.⁵ Congress, though endorsing the concept of mail service, altered the Supreme Court's proposal in favor of one modeled after California law that allows service by first-class mail with the person being served to return an acknowledgment form as evidence of service.⁶

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3. Under old Rule 4(c) process was to be served by a marshal, unless the court appointed someone to make service. According to the rule, "[s]pecial appointments . . . shall be made freely." FED. R. CIV. P. 4(c) (1982). In addition, anyone authorized by state law to serve process could serve federal process.
 4. FED. R. CIV. P. 4(c)(2)(A).
 5. Such service would be in addition to personal service or service on a responsible person residing at home. However, it would have supplanted any state mail service method.

Rule 4(d)(8) as proposed by the Supreme Court provided:

(8) Service of a summons and complaint upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule may be made by the plaintiff or by any person authorized to serve process pursuant to Rule 4(c), including a United States marshal or his deputy, by registered or certified mail, return receipt requested and delivery restricted to the addressee. Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing acceptance by the defendant or a returned envelope showing refusal of the process by the defendant. If delivery of the process is refused, the person serving the process, promptly upon the receipt of notice of such refusal, shall mail to the defendant by first class mail a copy of the summons and complaint and a notice that despite such refusal the case will proceed and that judgment by default will be rendered against him unless he appears to defend the suit. Any such default will be rendered against him unless he appears to defend the suit. Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed or delivery was refused by an unauthorized person.

93 F.R.D. 255, 256-57 (1982).

6. The path of the 1983 amendments was unusual. The Advisory Committee proposed amendments to the rule which were then promulgated by the Supreme Court. See Siegel, *supra* note 2, at 116-17 (Appendix A - Congressional Record, a reprint of the relevant legislative history of the amendment.) Usually, such amendments become law without action by Congress. However, these amendments aroused such criticism that Congress voted on August 2, 1982, to postpone the effective date of the amendments (originally August 1, 1982) until October 1, 1983, in order to take its own look at the Rule. Pub. L. No. 97-227, 96 Stat. 246 (1982). Actually, the postponement did not take effect until a day after the proposed amendments became effective. See Siegel, *supra* note 2, at 92. Following that review, Congress passed its own amendments to the rule, Pub. L. No. 97-462, 96 Stat. 2527, which became effective on February 26, 1983. For a complete discussion of the process of amending Rule 4, see generally Siegel, *supra* note 2;

Though the goal of an inexpensive and effective method of service is laudable, the lacunae of the amended Rule have led to numerous disputes in reported cases⁷ about the efficacy of mail service in particular circumstances.

The disputes range over almost all facets of the Rule.⁸ However, this essay will focus primarily on three issues that arise in most of the cases: (1) When is service deemed "made" by mail? (2) Can mail service be used if the defendant does not reside within the state in which the district court sits? (3) If mail service is used and the defendant fails to acknowledge service, what other procedures does the Rule allow a plaintiff to use to notify the defendant of the pending action?⁹

As noted already, these difficulties are not surprising. In a commentary written just after the amendments were passed, Professor David Siegel anticipated these very issues¹⁰ and has also authored practice commentaries on the Rule in the United States Code Annotated¹¹ which illustrate the continuing division of courts on these issues. The purpose of this essay is to develop these issues and suggest solutions, either by rational interpretation of the Rule or by amendment to the Rule.

I. WHEN SERVICE IS DEEMED MADE

This question is important in three situations, two of which are related. First, a defendant generally has twenty days to answer a complaint. The period begins to run "after the service of the summons and complaint upon that defendant."¹² Thus, when service is "made" governs the defendant's time to respond.

Sinclair, *Service of Process: Rethinking the Theory and Procedure of Serving Process Under Federal Rule 4(c)*, 73 VA. L. REV. 1183, 1197-1212 (1987); Jarvis & Mellman, *Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure: From Hapless to Hopeless*, 61 ST. JOHN'S L. REV. 1, 4-7 (1986); Walker, *The 1983 Amendments to Federal Rule of Civil Procedure 4—Process, Jurisdiction, and Erie Principles Revisited*, 19 WAKE FOREST L. REV. 957, 960-62 (1983); Note, *Service of Process by First-Class Mail Under Rule 4 of the Federal Rules of Civil Procedure*, 15 RUTGERS L.J. 993, 996-1001 (1984).

7. As of February 1988, a search in the WESTLAW database of "4(c)(2)(C)(ii)" produced over 150 cases. Many were unreported in the regular West reporter service.

8. See, e.g., Jarvis & Mellman, *supra* note 6.

9. The latter sometimes becomes entangled with the first problem, as will be seen. There is also a fourth issue that is not often raised, but is seen occasionally—the interaction of mail service with Rule 6(e), which allows three extra days to respond when any "paper" is served by mail. The California statute on which Rule 4 is modeled answers this issue for that state. It says that mail service does *not* extend the time to answer. CAL. CIV. PROC. CODE § 413.20 (West 1973).

10. Siegel, *supra* note 2.

11. Siegel, *Practice Commentaries on FRCP Rule 4*, Fed. R. Civ. P. 4, 28 U.S.C.A. 21 (West Supp. 1988) [hereinafter *Practice Commentaries*].

12. FED. R. CIV. P. 12(a).

Second, in New York, for example, the statute of limitations tolls when service is made on the defendant, not when the action is filed.¹³ Under the Supreme Court's ruling in *Walker v. Armco Steel Corp.*,¹⁴ a federal court in a diversity action is bound to follow state law on this issue.¹⁵ Thus, if service by mail is attempted near the end of the statute of limitations period, the plaintiff is at great risk, particularly if the defendant receives the notice but deliberately fails to acknowledge it.

Third, one of the 1983 amendments added Rule 4(j) which allows a plaintiff 120 days from filing to serve the summons and complaint. Thereafter, unless the plaintiff shows good cause to extend this time limit, the action "shall be dismissed" without prejudice.¹⁶ When is service deemed "made" for the purposes of this rule? The application of this rule can have serious consequences. If the statute of limitations was tolled on filing, but the limitations period runs out before service is "made," and the action is dismissed after the 120-day period allowed for service under Rule 4(j), the plaintiff may not be able to refile the suit.¹⁷

These issues have divided the courts, particularly the statute of limitations issues.¹⁸ Unfortunately, there is little in the legislative history to use as guidance in resolving them. At the time the amendments were considered by the House of Representatives, Congressman Edwards of California, the principal sponsor of the bill, made a lengthy statement setting forth his views on the intended operation of each section of the amended Rule.¹⁹ However, there appear to be no other significant statements by the legislators on the matter.²⁰ Furthermore, though modeled on the California statute, Rule 4 omits crucial features that would aid in the answer to these problems.

The California statute contains a provision that addresses many of these questions. The mail service provision of the California Code of

13. N.Y. CIV. PRAC. L. & R. 203(b)1 (McKinney 1972).

14. 446 U.S. 740 (1980). Oklahoma, the subject of *Walker*, has changed its statute and now tolls the statute of limitations on filing. OKLA. STAT. ANN. tit. 12, § 2003 (West 1988). Kansas, whose statute was construed in *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), amended its statute to provide that the limitations period tolls at the time of filing if service is obtained within a specified period of time. KAN. CIV. PROC. CODE ANN. § 60-203 (Vernon 1984).

15. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751-52 (1980).

16. FED. R. CIV. P. 4(j).

17. *Wei v. Hawaii*, 763 F.2d 370, 372 (9th Cir. 1985).

18. Compare *Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984) (service by mail effective on receipt) with *Stranahan Gear Co. v. NL Indus.*, 800 F.2d 53 (3d Cir. 1986) (service by mail not effective if not acknowledged, unless follow-up service is made); see also *Guth v. Andersen*, 118 F.R.D. 502, 503 (N.D. Cal. 1988) (collecting cases).

19. Reprinted in Siegel, *supra* note 2; see also Sinclair, *supra* note 6, at 1197-1212.

20. See Sinclair, *supra* note 6, at 1206-12.

Civil Procedure provides in part: "Service of a summons pursuant to this section [by mail, with an acknowledgment form to be returned by the defendant] is deemed complete on the date a written acknowledgment of receipt of summons is executed, if such acknowledgement thereafter is returned to the sender."²¹ The statute further provides that if the mail service is not acknowledged, the plaintiff must use another method of service and the defendant ordinarily must pay the costs.²²

Rule 4 does not have a provision that defines when service of a summons is deemed complete. Therefore, when presented with the issue, the federal courts must somehow divine the answer on their own. Not surprisingly, the cases in the district courts and courts of appeals are not united in an answer. Part of the difficulty may be the courts' assumption that the answer must be the same for all situations. Thus, a sympathetic decision in one area leads to unfortunate conclusions in another. Conversely, a reasonable result in one situation is unduly harsh in another. The better method is to examine each of the three situations separately. As will be shown, it is not inconsistent with the Rule or logic to have more than one answer to the question "when is service deemed made."

A. When Service is Made for Statute of Limitations Purposes

The major jurisdiction where this is an issue is New York. New York law requires that service be made before the statute of limitations is tolled.²³ The Second Circuit addressed the problem of federal mail service and the statute of limitations in its much criticized decision, *Morse v. Elmira Country Club*.²⁴ In *Morse*, a diversity action, the plaintiff attempted to use mail service near the end of the statute of limitations period. Although the summons and complaint were received by the defendant prior to the end of the limitations period, the defendant never returned the acknowledgment form. Two months later, after the limitations time had run, the plaintiff served the defendant personally.²⁵ The defendant moved to dismiss, arguing that New York law required that service be effected prior to the end of the limitations period.²⁶ Because Rule 4(c)(2)(C)(ii) requires a follow-up service if the mail service is not acknowledged, the defendant argued

21. CAL. CIV. PROC. CODE § 415.30(c) (West 1973).

22. *Id.* § 415.30(d).

23. N.Y. CIV. PRAC. L. & R. 203(a) (McKinney 1972) requires that the claim be "interposed" before the time limit runs. Section 203(b) defines "interposed" in several ways, the most commonly applicable being by service of the summons. *Id.* 203(b)1.

24. 752 F.2d 35 (2d Cir. 1984).

25. The plaintiff apparently assumed that Rule 4(c)(2)(C)(ii) required such a follow-up if the acknowledgment form was not returned.

26. *Morse v. Elmira Country Club*, 752 F.2d 35, 36-37 (1984). See also *supra* note 24.

that the mail service was not effective. The Second Circuit agreed that "the running of the limitations . . . is governed by the New York rule that limitations is tolled only by service of process"²⁷ but stated that "the Federal Rules control the proper method of effecting service."²⁸ The court indicated that the issue of whether effective service had been made was an issue of federal law interpreting the federal Rule, not one of state law.²⁹ The court concluded that service was effective when received, even if further efforts were required to complete it.³⁰ Thus, it held that the statute of limitations had been tolled on receipt of the mailed process.

The *Morse* decision has been heavily criticized in subsequent cases and commentary.³¹ *Morse* forces a hearing on the issue of receipt, which is something the acknowledgment form was supposed to prevent. *Morse* arguably also makes the follow-up provisions of the rule superfluous.³² The former may be valid criticism; the latter may or may not be, depending on how the case is used in other situations. Notwithstanding, there are other issues of analysis in the case that generally are overlooked.

The *Morse* opinion did not attempt to ascertain whether New York state courts would deem this service sufficient to toll the statute of limitations. On the surface this may seem a strange omission, since it is the New York tolling law that raises the issue.³³ The Second Circuit relied on *Hanna v. Plumer*³⁴ to support its conclusion that federal law governs the effectiveness of service. In *Hanna*, the Supreme Court held that substituted service on the executor of an estate under the federal rules (by leaving the process at the executor's home with a responsible person) was sufficient despite a state statute requiring personal service on the executor to commence the action.³⁵ The Court found a direct conflict between the federal rules and the state statute and held the federal rule was applicable under the circumstances of

27. *Morse v. Elmira Country Club*, 752 F.2d 35, 38 (2d Cir. 1984).

28. *Id.*

29. *See id.* at 38-39.

30. *Id.* at 40.

31. *E.g.*, *Stranahan Gear Co. v. NL Indus.*, 800 F.2d 53, 57 (3d Cir. 1986); *Erickson v. Kiddie*, [1986-87 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,889 (N.D. Cal. 1986); *Sinclair*, *supra* note 6, at 1270-73; Comment, *Morse v. Elmira Country Club: Dealing with the Uncooperative Recipient of Mailed Service of Process under the 1983 Amendments to the Federal Rules of Civil Procedure*, 47 OHIO ST. L.J. 713 (1986); Note, *Rule 4: Service by Mail May Cost You More Than A Stamp*, 61 IND. L.J. 217, 231-32 (1986).

32. Comment, *supra* note 31, at 720-21; *Practice Commentaries*, *supra* note 11, at 76.

33. *See* N.Y. CIV. PRAC. L. & R. 203 (McKinney 1972). New York law is made applicable in a diversity case on this issue by *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980).

34. 380 U.S. 460 (1965).

35. *Id.* at 463-64.

the case.³⁶

Fifteen years later, in *Walker v. Armco Steel Corp.*,³⁷ the Supreme Court reaffirmed its long standing position that whether the statute of limitations was tolled by filing of the complaint or by service of process was controlled by state law.³⁸ In *Walker*, the Court found that Federal Rule 3, which provides that an action is commenced by filing, was not intended to be controlling on the issue of tolling.³⁹ Thus, there was no conflict between state law and federal rules, with the result that state law controlled. In the course of its decision, the Court also stated that the issue of how tolling is effected is an "integral" part of the statute of limitations.⁴⁰

Whether *Walker* or *Hanna* is more applicable to the *Morse* situation is not obvious.⁴¹ It is reasonable to say that under *Hanna*, if the federal rules allow a method of service not provided by state law, service can still be effective to toll the statute of limitations. Thus, the fact that New York does not allow service by mail in its courts does not prevent effective mail service in a federal court from tolling the applicable statute in a diversity case. Under that reasoning, if service by mail is effective (under federal law) on receipt, it would toll the statute of limitations. This appears to be the position of the court in *Morse*.

However, in *Hanna*, there was no question that the defendant had been served effectively under federal law. The only question was whether the successful use of Rule 4(d)(1) overrode state law.⁴² On the other hand, if the issue of service versus filing is so important a part of the statute of limitations that state law must apply, perhaps the *Morse* court should have examined New York cases to see whether deviations from the service rules would be considered fatal by New York courts. Moreover, *Walker* and *Hanna* can be read together to say that a state policy of giving notice to the defendant before tolling the limitations period should be respected, but only up to a point.

36. *Id.* at 463-64, 472.

37. 446 U.S. 740 (1980).

38. *See, e.g.*, *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949).

39. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750-51 (1980).

40. *Id.* at 752. That is a curious statement, considering that the state statute at issue in *Hanna* not only directed personal service be made but provided that the statute of limitations would not be tolled by other than personal service. Indeed, Justice Harlan, concurring in *Hanna*, suggested that *Hanna* overruled the *Ragan* decision. *Hanna v. Plumer*, 380 U.S. 460, 474-78 (1965) (Harlan, J., concurring). *See also* *Sylvestri v. Warner & Swasey Co.*, 398 F.2d 598, 604 (2d Cir. 1968) (agreeing with Justice Harlan).

41. The Second Circuit examined both decisions and concluded that *Hanna* was the applicable case. *Morse v. Elmira Country Club*, 752 F.2d 35, 37-39 (1984).

42. Indeed, to reconcile *Hanna* and *Walker* one must assume that *Hanna* was concerned only with the proper manner of service, not something "integral" to the state statute of limitations.

When it is clear the defendant received the notice *and* the procedure does not affect anything "integral" to the statute (as defined by state law),⁴³ the federal rule methods may be used. However, when the integrity of the state system is imperiled, use of the federal rule should be circumscribed by applicable processes of state law. Here, *Walker's* emphasis on a lack of conflict between federal and state rules is instructive. Adopting a state rule regarding the effectiveness of the statute of limitations does not impair the federal rule. Under this analysis, federal mail service can still be used, but its effectiveness for the statute of limitations may be tested under the principles of state law.

One case, *Lancaster v. Kindor*,⁴⁴ involved section 308 of the New York Civil Practice Law and Rules ("CPLR") which governs service "upon a natural person." Under section 308(4), if service is not made personally, or on an agent, then the plaintiff must, in addition to serving at the home or business of the defendant, mail a copy of the process to the defendant's home *and* file proof of having done both of those things. Moreover, service is not "complete" until ten days after the proof of service is filed.⁴⁵ Nevertheless, *Lancaster* held that a failure to file the proof of service did not render service untimely for statute of limitations purposes.⁴⁶ The court stated that the ten-day period and the filing requirement related only to the defendant's time to answer, not to tolling the statute of limitations.⁴⁷

By comparison, in *Furey v. Milgrom*,⁴⁸ the process server left the summons at the defendant's home, pursuant to CPLR 308, on the last day of the limitations period. However, he did not mail the process to the defendant until the next day. The court held that both were required for effective service and, therefore, the action was untimely.⁴⁹

In *Yarusso v. Arbotowicz*,⁵⁰ the plaintiff attempted to serve a defendant using a non-resident motorist statute.⁵¹ The statute allows service on the Secretary of State of New York as agent for the absent defendant and also requires the plaintiff to mail a copy of the process to the defendant by certified or registered mail.⁵² Although service

43. Which may be another way of saying that they do not "abridge, enlarge or modify . . . [a] substantive right." 28 U.S.C. § 2072 (1982).

44. 98 A.D.2d 300, 471 N.Y.S.2d 573 (1984), *aff'd mem.*, 65 N.Y.2d 804, 482 N.E.2d 923, 493 N.Y.S.2d 127 (1985).

45. N.Y. CIV. PRAC. L. & R. 308(4) (McKinney Supp. 1988).

46. *Lancaster v. Kindor*, 98 A.D.2d 300, 305, 471 N.Y.S.2d 573, 577 (1984).

47. *Id.* at 306, 471 N.Y.S.2d at 577-78. *See also* *Ward v. Kaufman*, 120 A.D.2d 929, 502 N.Y.S.2d 883 (1986).

48. 44 A.D.2d 91, 353 N.Y.S.2d 508 (1974).

49. *Id.* at 92, 353 N.Y.S.2d at 509-10.

50. 41 N.Y.2d 516, 362 N.E.2d 600, 393 N.Y.S.2d 968 (1977).

51. N.Y. VEH. & TRAF. LAW §§ 253-254 (McKinney 1986).

52. *Id.* § 253(2).

was made on the Secretary within the limitations period, the mailing was never completed because the plaintiff did not have a correct address for the defendant.⁵³ Service was therefore deemed incomplete and the action dismissed.⁵⁴ When the plaintiff later successfully served the defendant, the New York Court of Appeals held the action to be untimely and held the earlier service on the Secretary did not toll the statute of limitations.⁵⁵

What principles from these cases would be applicable to *Morse*? *Lancaster* is easily distinguished from *Morse*. In *Lancaster*, the defendant received all the notice to which he was entitled prior to the running of the statute. In *Morse*, the defendant was arguably entitled to additional notice. The *Yarusso* and *Furey* cases suggest that when the notice-giving functions of the rule have not been completed, the statute of limitations is not tolled. However, in *Yarusso*, service on a state official did not give actual notice to the defendant; the mail service in *Morse* gave actual notice. *Furey*, on the other hand, may be closest to the *Morse* set of facts. The defendant probably received actual notice by the service at his home before the statute had run. However, the court believed that the full complement of notice-giving was necessary to fulfill the legislature's intent regarding the statute of limitations. If *Furey* represents "the law" in New York,⁵⁶ one could say that New York requires strict adherence to the notice-giving requirements of substituted service in order to toll the statute. This would be "integral" (in the words of *Walker*) to the New York statute of limitations. Rule 4 was not intended to measure the time at which service is made for statute of limitations purposes; rather, Rule 4 speaks to methods of service.

If this analysis is correct, then *Morse* may be erroneous for reasons other than those generally cited. However, even if the court should

53. *Yarusso v. Arbotowicz*, 41 N.Y.2d 516, 517, 362 N.E.2d 600, 601, 393 N.Y.S.2d 968, 969-70 (1977).

54. *Id.* at 517, 362 N.E.2d at 601, 393 N.Y.S.2d at 970.

55. *Id.* at 519, 362 N.E.2d at 602, 393 N.Y.S.2d at 971. The court stated that prior cases allowing incomplete service to toll the statute were inapplicable because in those cases "following the 'incomplete' first step the defendant thereafter submit[ted] to the jurisdiction of the court, thereby foreclosing a claim that no jurisdiction was obtained because the 'service' within the statutory period was incomplete." *Id.*

Yarusso was followed in *Symonds v. Root*, 107 A.D.2d 1071, 486 N.Y.S.2d 554 (1985) in which the plaintiff also sued an out of state defendant for damages suffered in a traffic accident. Although service on the Secretary was accomplished within the limitations period, no mailing was ever made. *Id.* at 1072, 486 N.Y.S.2d at 554. The court held the action to be untimely. *Id.* at 1072, 486 N.Y.S.2d at 555. *Symonds* was decided after *Morse* and was not available to the court. However, the *Yarusso* decision of the court of appeals, discussed above, was available to the court.

56. Recall that *Furey* is only an intermediate appellate decision.

have looked to New York law, it could have reached the same result. *Furey* has not been widely adopted in New York, and has been criticized by the author of the Practice Commentary on the New York statute.⁵⁷ The Second Circuit did not attempt to conclude whether *Furey* was incorrectly decided, whether the New York Court of Appeals would reject it, or whether actual notice (rather than completed service) would be sufficient to toll the statute.⁵⁸

The result in *Morse* was perhaps a sympathetic one in which the defendant apparently manipulated the rule to prevent a decision on the merits of the case. However, the result in *Morse* was consistent with the intent of statutes of limitations which is to provide a time beyond which a defendant is entitled to repose if he or she has not been notified of a pending action.⁵⁹ If a defendant has been notified within the time limit, there is no logical reason to allow a technicality of service to prevent a plaintiff from having his or her day in court.

Morse also raises problems apart from the issue of the applicability of New York cases. As some courts and commentators have pointed out, the *Morse* approach leaves open the question of follow-up service which appears to be required by Rule 4.⁶⁰ One solution would allow

57. McLaughlin, *Supplementary Practice Commentaries*, N.Y. CIV. PRAC. L. & R. 203, at 77-78 (McKinney Supp. 1987).

58. The criticism by Professor McLaughlin noted that another case, *Chem-Trol Pollution Servs. v. Ingraham*, 42 A.D.2d 192, 345 N.Y.S.2d 714 (1973), had allowed incomplete service to toll the statute of limitations. McLaughlin, *supra* note 57, at 74. However, in *Ingraham* the state official against whom the action was brought had actually been served; the defect was the failure to serve the Attorney General within the statutory period. In view of the stricter approach taken by the court of appeals in *Yarusso*, the *Furey* result may be correct, if undesirable. Cf. *Upstate Milke Coops. v. State Dep't of Agric. & Mkts.*, 101 A.D.2d 940, 941-42, 475 N.Y.S.2d 633, 634-35 (1984) (timely service on Attorney General not sufficient when service on the Commissioner of Agriculture was required); see also *Keogh v. New York State Dep't of Health*, 128 A.D.2d 841, 513 N.Y.S.2d 761 (1987).

Several cases have held that the provision of N.Y. CIV. PRAC. L. & R. 203 (McKinney 1972) allowing a sixty-day extension of the time limit if the summons is delivered to the sheriff (or clerk in New York County) is effective when the summons is mailed, not received. *E.g.*, *Dowling v. Hillcrest Gen. Hosp.*, 89 A.D.2d 435, 439-40, 455 N.Y.S.2d 628, 631 (1982); *Sanford v. Garvey*, 81 A.D.2d 748, 438 N.Y.S.2d 410 (1981); *Tracy v. New York Magazine Co.*, N.Y.L.J. June 13, 1975, at 16, col. 7 (Sup. Ct. Bronx Co.), *aff'd*, 50 A.D.2d 775, 376 N.Y.S.2d 1015 (1975). These cases are not applicable to the situation at hand. When N.Y. CIV. PRAC. L. & R. 203(b)(5) (McKinney 1972) is involved, by definition the defendant does not receive the summons. Thus, it makes little difference in terms of a policy of completion of service or actual notice whether the extension was measured from mailing or receipt by the sheriff.

59. They do provide protection against stale claims, but this purpose is served when there are large distinctions in time; a day more or less does not affect many claims in terms of staleness.

60. *E.g.*, *Coldwell Banker & Co. v. Eyde*, 5 Fed. R. Serv. 3d (Callaghan) 1050 (N.D. Ill. 1986); *Erickson v. Kiddie*, [1986-1987 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,889 (N.D. Cal. 1986).

service to be effective for statute of limitations purposes on receipt, but require the plaintiff to complete the service by the follow-up procedure if no acknowledgment is received. The rule is very clear on the requirement of a follow-up if no acknowledgment is received. This solution allows the intent of Congress to be carried out and effectively deals with the statute of limitations issue.

This appears to be the position taken by Judge Weinstein in *Perkin Elmer v. Trans Mediterranean Airways, S.A.L.*⁶¹ in which the court denied a motion to dismiss on statute of limitations grounds and stated in dicta:

Service by mail under Rule 4(c)(2)(C)(ii) need not be acknowledged to be effective. Personal delivery of process, however, also must be made unless an 'acknowledgment of service' under this subdivision of this rule is received by the sender within twenty days after the date of mailing.⁶²

If service that is sufficient to toll the statute of limitations is not thereafter perfected, what is the result? One possible answer is the way New York courts deal with the need to perfect service by filing proof of service. If a follow-up is not made, the defendant's time to answer does not begin to run.⁶³ That would be a reasonable solution, except that Rule 4(j), also added by the 1983 amendments, requires a dismissal if service is not "made" within 120 days of the filing of the action. This section was added to speed the progress of cases.⁶⁴ It would be contradictory to allow mail service to satisfy Rule 4(j) on mailing or receipt while providing no effective limit on a plaintiff's time to complete service thereby forcing a defendant to answer. The appropriate solution requires a further examination of Rule 4(j) and mail service. As will be shown below, the solution poses potential problems for unwary plaintiffs.

B. The 120-Day Rule and the Effectiveness of Service

One of the changes made in the 1983 amendments was the addition of Rule 4(j). Rule 4(j) requires that service be made within 120 days of filing or the action must be dismissed.⁶⁵ Prior to 1983, there was no time limit on service, although a court could dismiss a case for lack of prosecution if an excessive period passed without service being

61. 107 F.R.D. 55 (E.D.N.Y. 1985).

62. *Id.* at 58 (citation omitted)(emphasis supplied). In the case, however, Judge Weinstein found that service had been acknowledged and the issue did not have to be decided.

63. *Cf. Lancaster v. Kindor*, 98 A.D.2d 300, 306, 471 N.Y.S.2d 573, 577-78 (1984), *aff'd mem.*, 65 N.Y.2d 804, 482 N.E.2d 923, 493 N.Y.S.2d 127 (1985)(requirement that plaintiff mail process to defendant's home and file with the clerk of the court after substituted service related only to defendant's time to answer).

64. *See Quann v. Whitegate-Edgewater*, 112 F.R.D. 649, 664 (D. Md. 1986) and cases cited therein.

65. The only exception is if plaintiff shows good cause for the failure to serve.

made.⁶⁶ The interplay between the 120-day rule and mail service tends to track the statute of limitations problem in *Morse*. Again, the key is the time when service is "made." In the absence of an acknowledgment, is service made only when the follow-up service is completed?

In the Second Circuit, even when no issue of service versus filing exists, courts have generally extended the reasoning of *Morse* by holding that service is effective on receipt for purposes of the 120-day rule.⁶⁷ However, almost all other courts have rejected *Morse* and require either that the acknowledgment be sent or that personal service be completed in order to satisfy the rule.⁶⁸

Failure to satisfy Rule 4(j) has an apparently innocuous penalty—dismissal without prejudice. There is naturally some embarrassment in having a case dismissed on this ground, and no lawyer wants to explain the extra fee to a client. The case can be refiled, but if the statute of limitations has run before the case can be refiled, then the Rule 4(j) dismissal will be tantamount to a dismissal with prejudice. This has the same potential for abuse by defendants as found in *Morse*. However, a major difference between this situation and *Morse* is that the legislative history points to a result.

Congressman Edwards' statement when presenting the bill deals with this problem:

The problem would arise when a plaintiff files the complaint within the applicable statute of limitation period but does not effect service for 120 days. If the statute of limitation period expires during that period, and if the plaintiff's action is dismissed "without prejudice", can the plaintiff refile the complaint and maintain the action? The answer depends upon how the statute of limitation is tolled.

If the law provides that the statute of limitation is tolled by filing and service of the complaint, then a dismissal under H.R. 7154 for failure to serve within the 120 days would, by the terms of the law controlling the tolling, bar the plaintiff from later maintaining the cause of action. If the law provides that the statute of limitation is tolled by the filing alone, then the status of the plaintiff's cause of action turns upon the plaintiff's diligence. If the plaintiff has not been diligent, the court will dismiss the complaint for failure to serve

66. *E.g.*, *Richardson v. United White Shipping Co.*, 38 F.R.D. 494, 495-96 (N.D. Cal. 1965). In addition, if state law required service to toll the statute of limitations, then a plaintiff had to respect that limit or be dismissed. *See supra* notes 23-64 and accompanying text.

67. *E.g.*, *Benage v. Gibraltar Bldg. & Loan Ass'n*, 115 F.R.D. 20, 21 (D. Conn. 1987); *Schwartz v. All Credit Bureaus U.S.A.*, No. 85-6633-CSH (S.D.N.Y. Dec. 19, 1986); *Lee v. Carlson*, 645 F. Supp. 1430, 1432 (S.D.N.Y. 1986); *Deshmukh v. Cook*, 630 F. Supp. 956, 958 (S.D.N.Y. 1986). *See also* *United States v. Jack Cozza, Inc.*, 106 F.R.D. 264, 264-65 (S.D.N.Y. 1985) (court cited *Morse* in a federal question case where a failure to satisfy the 120-day rule would have allowed the statute of limitations to run).

68. Of course, in some cases the issue is not whether service has been completed, but whether the plaintiff has shown "good cause" for the failure to complete the service.

within 120 days, and the plaintiff will be barred from later maintaining the cause of action because the statute of limitations has run. A dismissal without prejudice does not confer upon the plaintiff any rights that the plaintiff does not otherwise possess and leaves a plaintiff whose action has been dismissed in the same position as if the action had never been filed.⁶⁹

It is clear that Congress understood that cases could be barred as a result of the 120-day rule. What is not clear from the discussion is what constitutes "effective" service under the rule.

In the previous discussion of *Morse*, it was suggested that courts could apply different standards for the effectiveness of service depending on the circumstance. Service could be deemed effective to toll the statute of limitations without being sufficient to force a defendant to litigate. However, Rule 4(j) and its legislative history indicate that Congress wanted to ensure timely service even if some cases were barred permanently.⁷⁰

There is also a problem with permitting service to be effective on receipt for purposes of Rule 4(j). Does the defendant's time to answer run from receipt? Probably not.⁷¹ If not, the plaintiff must follow-up to cause the suit to go forward. Is there a time limit for the follow-up? Under the present hypothesis, receipt by a defendant satisfies Rule 4(j) which effectively eliminates the 120-day rule as a limit. There is no other time limit in the rules.⁷² What is left is a situation equivalent to the pre-amendment rules—no time limit on moving the case forward. This was not Congress' intent when it enacted Rule 4(j).

In order to satisfy Rule 4(j), it seems that service *must* be acknowledged, or a follow-up made, within 120 days. One solution would allow the statute of limitations to be tolled on receipt, but only on the condition that Rule 4(j) is complied with. If Rule 4(j) is not satisfied, the action would be dismissed. Once the action is dismissed, state law would probably bar refiling because of the statute of limitations.⁷³ In jurisdictions where filing tolls the statute of limitations, the result would be similar; the statute would be tolled by filing, but the subsequent dismissal would wipe out the tolling effect. The legislative history quoted above shows that Congress was well aware of this possibility.

C. Effect on Defendant's Time to Answer

Another aspect of determining when mail service is "made" is its

69. See Siegel, *supra* note 2, at 119-20 (Appendix A - Congressional Record reprint of the relevant legislative history of the Amendment)(footnotes omitted).

70. See *id.* at 127-28 (Advisory Committee Note to proposed Rule 4(j)).

71. See *infra* notes 74-94 and accompanying text.

72. Presumably, the court would dismiss the case eventually for failure to prosecute as was the case prior to Rule 4(j).

73. See, e.g., *Markoff v. South Nassau Community Hosp.*, 61 N.Y.2d 283, 287-89, 461 N.E.2d 1253, 1254-55, 473 N.Y.S.2d 766, 767-68 (1984).

direct effect on the defendant's time to answer. Two problems must be addressed. The first involves the portion of Rule 12(a) that requires an answer to the complaint "within twenty days after the service of the summons and complaint upon [the] defendant."⁷⁴ In order to calculate the date the answer is due, the precise date when service was made on the defendant must be determined. The second problem deals with the interaction between Rule 6(e) and mail service and whether this extends the defendant's time to respond.

As to the first problem, personal service poses no ambiguity; service is made at the moment the process is handed to the defendant or the designated surrogate. With mail service, there are many possible points at which service might be made: 1) when process is mailed; 2) when process is received by the defendant; 3) when the return acknowledgment is executed; 4) when the return acknowledgment is mailed by the defendant; 5) when the acknowledgment is received by the plaintiff; or 6) when personal service is made if no acknowledgment is received. Each has its own problems.

In California, whose statute was the model for the federal rule, the answer is simple. Section 415.30(c) of the California Code of Civil Procedure provides that service is complete when the acknowledgment is executed. Unfortunately, no such section exists under the Federal Rules. The courts have been left to sort this out for themselves.

No federal court has used the time of mailing as the date at which service is made.⁷⁵ To do so would be contrary to the intent of the mail service provisions of the rule. Congress created safeguards to insure actual notice to the defendant. Allowing the time to answer to begin running before actual notice is received does not comport with the policy behind the rule.⁷⁶

As discussed above, there is a dispute in the courts about the effectiveness of mail service prior to the return of an acknowledgment. In the Second Circuit, courts generally cite *Morse* in support of the proposition that service is effective upon the receipt of process by the defendant.⁷⁷ This does not require that the time to answer begin to

74. FED. R. CIV. P. 12(a). The rule allows for a longer time when the defendant is in the United States or when service is made by a state long-arm statute (under Rule 4(e)) and state or federal law gives a defendant more than twenty days to respond. However, mail service cannot be used when serving the United States. FED. R. CIV. P. 4(c)(2)(C). Few courts allow extraterritorial mail service, so the issue has not arisen under Rule 4(e).

75. At least one district promulgated a local rule purporting to being the period to answer from the date of mailing. However, the rule was held invalid by a district court in *Madden v. Cleland*, 105 F.R.D. 520, 524-25 (N.D. Ga. 1985).

76. See *Green v. Humphrey Elevator & Truck Co.*, 816 F.2d 877, 881-82 (3d Cir. 1987)(construing Rule 4(j), the court rejected the argument that service was made on mailing).

77. *E.g.*, *Benage v. Gibraltar Bldg. & Loan Ass'n*, 115 F.R.D. 20, 21 (D. Conn. 1987); *Deshmukh v. Cook*, 630 F. Supp. 956, 959 (S.D.N.Y. 1986).

expire at that point, but this is the most logical position if service is deemed effective at that point.⁷⁸ In those jurisdictions that reject *Morse*, it would be strange to find a case holding that a defendant's time to answer begins to run from receipt of process when service is not yet effective to allow the court to have jurisdiction over the defendant. Moreover, if a follow-up is required to complete service (as suggested in *Perkin Elmer*), even *Morse* would be hard pressed to force the defendant to answer when the plaintiff is still required to do more to complete service.

Only a handful of cases have discussed the issue, and even those cases often leave ambiguities. For example, the court in *Red Elk v. Stotts*,⁷⁹ construing Rule 4(j), stated that "[t]he majority rule appears to be that service becomes effective upon the return of the acknowledgment forms."⁸⁰ Assuming the return of the acknowledgment form marks the beginning of the answer period, the majority rule is still ambiguous. Does it mean when the forms are executed, when they are mailed back to the plaintiff, or when they are received by the plaintiff?⁸¹

A more definite answer was given in *Rust v. City of Kansas City*.⁸² There the court held that the time to answer began to run when the acknowledgement was signed "so long as the acknowledgment is made within the requisite twenty days of mailing the process."⁸³ The Ninth Circuit recently came to the same conclusion and cited *Rust* with approval.⁸⁴

A more comprehensive analysis, again with the same conclusion, is found in *Madden v. Cleland*.⁸⁵ In *Madden*, the court noted the federal rule was modeled on the California statute and concluded that the federal rule on effectiveness of service should follow California.⁸⁶ The court also noted that Form 18-A, the acknowledgment form prescribed

78. Note that *Morse* does not require the conclusion that service is effective for all purposes upon receipt. *Morse* could be used to resolve the statute of limitations issue differently, but courts in the Second Circuit have not given *Morse* such a narrow interpretation.

79. 111 F.R.D. 87 (D. Mont. 1986).

80. *Id.* at 89.

81. In *Blair v. Zimmerman*, No. 86-7037, slip op. (E.D. Pa. Mar. 31, 1987) (WESTLAW, DCT database), the court was confronted with the twenty-day issue directly. As in *Red Elk*, the court used the ambiguous language of "returned" as the time to mark effective service without defining it. However, the court was able to avoid the issue because it was clear that under any definition of "returned," the plaintiff was not entitled to a default judgment. *Id.* at 4-6.

82. 107 F.R.D. 370 (W.D. Mo. 1985).

83. *Id.* at 371. This is very similar to the California rule. CAL. CIV. PROC. CODE § 415.30(c) (West 1973). It is not clear why the *Rust* court required mailing within twenty days, unless it assumed that one cannot accept a late acknowledgment.

84. See *Worrell v. B.F. Goodrich Co.*, 845 F.2d 840 (9th Cir. 1988).

85. 105 F.R.D. 520 (N.D. Ga. 1985).

86. *Id.* at 525.

by the federal rules, indicated that an answer would be expected within twenty days if the defendant signed and returned the form. A defendant could conclude that failure to sign the form would not start the time to answer.⁸⁷ Thus, a reasonable expectation would be that the time to answer runs from the time of acknowledgment, if made, or from alternative service, if no acknowledgement is made.⁸⁸

The *Madden* approach is a sound one. Courts should not rush to default judgments when the rule is ambiguous. Using the date of execution comports with the reasonable expectations of the defendant and does not unduly delay a judgment if the defendant does not answer the complaint. The main problem is that the date the acknowledgment is signed is subject to manipulation by defendants. However, the plaintiff is rarely prejudiced by not knowing precisely when the defendant's time to answer is up.⁸⁹

The second problem affecting the defendant's time to answer involves Rule 6(e). That rule provides:

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three days shall be added to the prescribed period.⁹⁰

Does "other paper" include a summons and complaint? On the face of the rule, the answer appears to be yes. It is not an issue that has received much attention from the courts.

*Madden v. Cleland*⁹¹ appears to be the only case that has addressed this issue. *Madden* held that Rule 6(e) does not apply to mail service.⁹² This reasoning is logical because added time provided by Rule 6(e) was in response to the fact that mail often takes three days to arrive. Thus, it gives the recipient approximately the same amount of

87. See *Armco, Inc. v. Penrod-Stauffer Bldg. Sys.*, 733 F.2d 1087, 1089 (4th Cir. 1984).

88. *Madden v. Cleland*, 105 F.R.D. 520, 524 (N.D. Ga. 1985).

89. Curiously enough, this issue does not appear to have surfaced prior to the 1983 amendments. Although states allow various forms of substituted service, including mail service, which may be used under Rule 4(c)(2)(C)(i), state statutes tend to be more specific about when service is deemed complete. *E.g.*, CAL. CIVIL PRAC. CODE § 415.20 (West 1973)(substituted service at home or office complete ten days after a copy of the process is mailed to the defendant). State statutes may also require something to be filed with the court before the time to answer starts running. *E.g.*, N.Y. CIV. PRAC. L. & R. 308(2) (McKinney Supp. 1988). Thus, the litigants would have a clearer idea about their responsibilities.

90. FED. R. CIV. P. 6(e).

91. 105 F.R.D. 520 (N.D. Ga. 1985).

92. However, in *State ex rel. Baber v. Circuit Court*, 454 N.E.2d 399, 401 (Ind. 1983), the Indiana Supreme Court indicated that service by certified mail (see IND. CODE ANN. T.R. 4.11 (Burns 1976)) did extend the defendant's time to answer by three days. Indiana's rule extending time when service is made by mail is virtually the same as the federal rule. Compare IND. CODE ANN. T.R. 6(E) (Burns 1976) with FED. R. CIV. P. 6(e).

time from the point of actual notice to take action as if the papers were served personally. If the time to answer begins only after the acknowledgment is executed, the defendant has full control over the beginning of the period and has actual notice of the complaint when the time begins to run. Thus, there is no need to give an extra three days. The time it takes for the mail to arrive is irrelevant to the time allotted to answer.⁹³

It is refreshing that the *Madden* court was willing to interpret the rules to reach a reasonable result when so many courts are reading the mail service rule very literally, even if the results are illogical. Reading Rule 6(e) very literally, one would conclude that the extra three days should be added. The *Madden* result, however, makes more sense.⁹⁴

D. Deterring Defendants from Unjustified Failures to Acknowledge Service

A major difficulty with the harsh approach to the effective date of service taken by many courts is the incentive thereby given to defendants not to acknowledge service. The only sanction provided for in the rules is that defendants may be assessed the costs of personal service if they fail to acknowledge. Such costs are hardly a real sanction. In two reported cases, costs of under \$100 were awarded.⁹⁵ Furthermore, the cost of making a motion for personal service costs is greater than the sanction. Unless attorneys' fees for making the motion are included, there is no effective sanction. Courts generally have not allowed at-

93. Of course, if one uses the time of mailing to begin the answering period, Rule 6(e) makes sense and appears covered by the "other paper" language. In a court where service is deemed effective and time to answer runs from receipt of process, there is also no need to use Rule 6(e) because the mailing time is not subtracted from the time to answer, so no adjustment is necessary.

94. In *Blair v. Zimmerman*, No. 86-7037, slip op. (E.D. Pa. Mar. 31, 1987) (WESTLAW DCT database), the court used Rule 6(e) in a different way. Rule 4(c)(2)(C)(ii) requires the plaintiff to use an alternative method of service if no acknowledgment is received within twenty days. *Blair* held that when calculating the twenty days, the extra three days of Rule 6(e) is applicable. *Id.* at 5. This is reasonable because the mailing triggers the twenty-day period. However, the issue is of little practical significance. It appears that plaintiffs may accept a late acknowledgment. See *United States v. Gluklick*, 801 F.2d 834, 837 (6th Cir. 1986) (defendant's stipulation to accept service after 120-day period had run upheld); but see *Coldwell Banker & Co. v. Eyde*, 661 F. Supp. 657, 658-59 (N.D. Ill. 1986) (granting defendant's motion to dismiss where it was impossible to return acknowledgment form within twenty days of mailing). Furthermore, nothing prevents a plaintiff from using personal service prior to the running of the twenty-day period.

95. *United States ex. rel. Itri Brick & Concrete Corp. v. Union Indem. Ins. Co.*, 109 F.R.D. 153 (E.D.N.Y. 1986) (the court awarded costs of \$67.60 plus transcript fees); *Eden Foods, Inc. v. Eden's Own Prods., Inc.*, 101 F.R.D. 96 (E.D. Mich. 1984) (awarding a total of \$59.25 for service on two defendants).

torneys' fees,⁹⁶ so it is not surprising that there are so many cases of defendants refusing to acknowledge and plaintiffs taking chances with late mail services.

The solution is twofold. First, defendants who receive process but refuse to acknowledge should be assessed attorneys' fees as well as process server costs. One must assume that Congress meant to impose a real sanction when it passed the rule. If the rule is to become something other than a tactical game for defendants, a real sanction must be imposed. The difficulty with this is the wording of the rule. Unlike the situation with discovery sanctions⁹⁷ or sanctions for frivolous actions,⁹⁸ Congress did not expressly provide for attorneys' fees in Rule 4(c)(2)(D). This may be because the California statute, which was the model for the mail service rule, also does not provide for attorneys fees, allowing only for "expenses."⁹⁹ Notwithstanding, this should not stop a court from imposing such a sanction in a supervisory role. A possible statutory authority for attorneys' fees might be derived from the federal statute prohibiting one from "unreasonably and vexatiously" multiplying the necessary proceedings.¹⁰⁰ If not, a rules change is in order.

Second, in cases in which the statute of limitations would run if the rule is invoked, the defendant's refusal to acknowledge service should weigh strongly in favor of granting an extension of the 120-day period

96. The issue is almost never discussed. One case expressly rejected attorneys' fees. *Miele v. William Morrow & Co.*, No. 85-4333, slip op. (E.D. Pa. Aug. 5, 1986) (WESTLAW, DCT database). At least one case allowed attorneys' fees to be included in the award of costs, but without any discussion of the issue. *C.I.T. Leasing Corp. v. Manth Mach. & Tool Corp.*, No. 85-261C, slip op. (W.D.N.Y. Sept. 3, 1985). See also *Green v. Humphrey Elevator & Truck Co.*, 816 F.2d 877, 883 (3d Cir. 1987)(citing *C.I.T.* with apparent approval).

97. FED. R. CIV. P. 37(a)(4).

98. FED. R. CIV. P. 11.

99. There do not appear to be any reported cases under the California statute. It may be that CAL. CIV. PROC. CODE § 1021 (West Supp. 1988) and *Bauguess v. Paine*, 22 Cal. 3d 626, 586 P.2d 942, 150 Cal. Rptr. 461 (1978), which only allow attorneys' fees when agreed to or expressly provided in a statute, would preclude such recoveries.

100. 28 U.S.C. § 1927 (1982). This statute expressly allows attorneys' fees to be recovered. A more creative approach would use Rule 11, but only by implication. Rule 11 allows sanctions, including attorneys' fees, to be imposed on a party who interposes any paper "for any improper purpose." Willful frustration of the purpose of Rule 4 would seem to satisfy the "improper purpose" test. However, the sanction would not be imposed for "interposing" a paper; quite the contrary, it would be imposed for a failure to return a paper. On the other hand, a sanction is certainly within the spirit of the rule, and this may strengthen a court's argument that sanctions may be imposed under the court's supervisory powers. Another approach would be to impose sanctions by a local rule. Although such a rule would be consistent with Rule 11, it might be deemed inconsistent with the express terms of Rule 4(c)(2)(D), which does not provide for attorneys' fees. If so, the local rule would be invalid. See FED. R. CIV. P. 83.

under the "good cause" exception. This is particularly compelling when the plaintiff moves for an extension prior to the expiration of the time period.¹⁰¹

II. EXTRATERRITORIAL USE OF MAIL SERVICE¹⁰²

It would probably surprise many plaintiffs' lawyers to learn they cannot use a method of service specifically provided for by the federal rules in an action brought in a federal court. However, a clear majority of courts have held that the mail service provision of Federal Rule 4 cannot be used if the plaintiff uses the state long-arm statute to bring in an out-of-state defendant.¹⁰³ This seemingly anomalous result is

101. *But cf.*, *Lovlace v. Acme Mkts., Inc.*, 820 F.2d 81 (3d Cir. 1987)(time limits of Rule 4(j) are to be strictly enforced; reliance on the word of the process server that the defendant had been served is not sufficient).
102. This section does not discuss service by mail in a foreign state. There is a serious question whether Rule 4(c)(2)(C)(ii) is applicable to that situation. *See Jarvis & Mellman, supra* note 6, at 23-27; *Practice Commentaries, supra* note 11, at 68-69. The wording of Rule 4(i) suggests that Rules 4(e) and (i) provide the only methods of service in foreign countries. If Rule 4(e) does not encompass mail service under Rule 4(c)(2)(C)(ii), *see infra* note 103, then mail service may not apply. Furthermore, Rule 4(i) may itself be superseded by the Hague Convention Agreement on Service Abroad of Judicial and Extrajudicial Documents, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163. Although Rule 4(c)(2)(C)(ii) was enacted after the Hague Convention, it is not clear that Congress intended it to supersede the Convention's provisions. The Supreme Court has suggested somewhat indirectly that the Convention's procedures may be mandatory for American courts. *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 107 S. Ct. 2542, 2550 n.15 (1987); *see Cooper v. Makita, U.S.A., Inc.*, 117 F.R.D. 16, 17-18 (D. Me. 1987); *see also Ackermann v. Levine*, 788 F.2d 830, 840 (2d Cir. 1986).
103. *E.g.*, *Poulos v. Wilson*, 116 F.R.D. 326, 328 n.1 (D. Vt. 1987); *Cavaness v. Kreutz*, 7 Fed. R. Serv. 3d (Callaghan) 215, 216 (W.D. Mo. 1987); *Grosser v. Commodity Exch., Inc.*, 639 F. Supp. 1293, 1315-16 (S.D.N.Y. 1986); *Catalyst Energy Dev. Corp. v. Iron Mountain Mines, Inc.*, 108 F.R.D. 427, 428 (S.D.N.Y. 1985); *Antrim v. Jefferson-Pilot Corp.*, No. 85-0599 slip op. (E.D. Pa. Dec. 30, 1985) (WESTLAW DCT database); *Olympus Corp. v. Dealer Sales & Serv., Inc.* 107 F.R.D. 300, 303-04 (E.D.N.Y. 1985); *Korkala v. National Sec. Agency*, 107 F.R.D. 229, 230 (E.D.N.Y. 1985); *Daley v. ALIA*, 105 F.R.D. 87, 89 (E.D.N.Y. 1985); *Thermo-Cell Southeast, Inc. v. Technetic Indus.*, 605 F. Supp. 1122, 1124 (N.D. Ga. 1985); *Reno Distribs., Inc. v. West Texas Oil Field Equip., Inc.*, 105 F.R.D. 511, 512-13 (D. Kan. 1985); *Padovani v. Spectacor, Inc.*, 112 F.R.D. 1, 2 (D. Del. 1985); *Fogleman v. Aramco*, 623 F. Supp. 908, 910 (W.D. La. 1985); *Akzona, Inc. v. E.I. DuPont de Nemours & Co.*, 607 F. Supp. 227, 240 (D. Del. 1984); *Epstein v. Wilder*, 596 F. Supp. 793, 797 (N.D. Ill. 1984); *Chronister v. Sam Tanksley Trucking, Inc.*, 109 F.R.D. 1, 1 (N.D. Ill. 1984); *San Miguel & Compania, Inc., v. International Harvester Export Co.*, 98 F.R.D. 572, 573 (D.P.R. 1983); *William B. May Co. v. Hyatt*, 98 F.R.D. 569, 570 (S.D.N.Y. 1983). *See Kumar v. Ford*, 111 F.R.D. 34, 38 n.3 (S.D.N.Y. 1986). *Contra* *Federal Land Bank v. Federal Land Bank of Texas*, No. 87-0085, slip op. (D.D.C. Aug. 31, 1987); *McDougald v. Jenson*, 786 F.2d 1465, 1487 (11th Cir. 1986); *A.I.M. Int'l, Inc. v. Battenfeld Extrusions Sys.*, 116 F.R.D. 633, 637 (M.D. Ga. 1987); *Boggs v. Darr*, 103 F.R.D. 526, 527-28 (D. Kan. 1987). *Cf.* *FDIC v. Mount Vernon Ranch*,

the subject of this section.

A. The Competing Case Law

The most cited argument against using mail service out of state was set forth in *William B. May Co. v. Hyatt*.¹⁰⁴ Briefly, the argument of *Hyatt* and the courts following it is as follows. Rule 4(c)(2)(C)(ii)—the mail service provision—is subject to the limitations of Rule 4(f) in the absence of any congressional indication to the contrary. Rule 4(f) limits the territorial reach of process to the borders of the state in which the court sits.¹⁰⁵ The only way around Rule 4(f) is Rule 4(e). Rule 4(e) permits extraterritorial service in two sets of circumstances: (1) when a federal statute or order allows it, in which case service is made in the manner provided in the statute or order, “or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule”;¹⁰⁶ or (2) if the state in which the district court sits has a statute allowing for extraterritorial service, “service . . . may be made under the circumstances and in the manner prescribed in the statute.”¹⁰⁷ Thus, when a federal statute prescribes the standard of amenability, mail service may be used no matter where the defendant resides. However, when the federal court relies on the state long-arm statute for authority to assert jurisdiction over non-residents, the court is limited to the “circumstances” and “manner” of service set out in the state statute. Thus, service by mail, when not authorized by state law, is not permitted when state amenability standards are the basis for personal jurisdiction.¹⁰⁸

Although this was not an issue before mail service was expressly authorized, there is support for the *Hyatt* position in a handful of cases decided before the recent amendments. It is not surprising that few cases discussed the issue before 1983. Until then, the only methods expressly provided for in Rule 4 were personal service and service on a person of “suitable age and discretion” at the defendant’s home.¹⁰⁹ A plaintiff using a state long-arm statute was far more likely to use the easier methods set out in a state statute. Alternatively, the methods set forth in Rule 4 usually satisfied state law as well.

Inc., 118 F.R.D. 496, 498-500 (W.D. Mo. 1988) (noting the split but declining to decide the issue because subsequent personal service was held valid).

104. 98 F.R.D. 569 (S.D.N.Y. 1983).

105. Except for the “100 mile bulge” provision allowing service on parties joined pursuant to Rules 14 and 19 who are within 100 miles of the courthouse.

106. FED. R. CIV. P. 4(e).

107. *Id.*

108. It is worth noting that under Rule 4(c)(2)(C)(i) and its predecessor, Rule 4(d)(7), even when service is to be made within the state, one can serve competent adults and corporations using any method provided by the forum state’s law.

109. *See* FED. R. CIV. P. 4(d)(1), (3).

In *Davis v. Musler*,¹¹⁰ an action brought in a New York federal court, process was served on certain defendants in Florida by serving at their houses under Rule 4(d)(1). The Second Circuit determined that "Rule 4(d)(1) applies only when a complaint is served within the territorial limits of the state in which the district court where the action is pending sits."¹¹¹ New York law, which did not allow service in the manner prescribed by Rule 4(d)(1), was said to apply.¹¹²

A similar result based on similar facts was reached in *Zarcone v. Condie*,¹¹³ which was cited with approval by the court in *Davis*.¹¹⁴ Indeed, post-1983 amendment cases have felt constrained to apply the holding of *Davis*, a pre-amendment case, to the federal mail service provision.¹¹⁵ Although these cases are part of a clear majority, their reasoning is not persuasive. There are some courts that have held the opposite and allowed mail service to be used with state long-arm statutes. Unfortunately, the few courts taking the opposite view do not undertake a rigorous analysis to support their view.

For example, in *A.I.M. International, Inc. v. Battenfeld Extrusions Systems*,¹¹⁶ the court, after discussing *Hyatt* as the leading case against using mail service, cited *Morse*¹¹⁷ as support for a contrary position. In *Morse*, however, the defendant was the Elmira Country Club, which is presumably found in or near Elmira, New York. The action was brought in the Western District of New York. No out of state service was required. Further, the court cited language in *Morse* that "plaintiffs may serve process in the manner specifically provided by the Federal Rules even if state law mandates a contrary method of service."¹¹⁸ This sounds supportive but is taken out of context. The passage from *Morse* was discussing the holding of *Hanna v. Plumer*.¹¹⁹ In *Hanna* there was no question about extraterritorial service and the

110. 713 F.2d 907 (2d Cir. 1983).

111. *Id.* at 913.

112. *Id.* at 914. New York law required a mailing as well as delivery to the residence. N.Y. CIV. PRAC. L. & R. 308(2) (McKinney 1972).

113. 62 F.R.D. 563 (S.D.N.Y. 1974).

114. *Davis v. Musler*, 713 F.2d 907, 913 (2d Cir. 1983). *See also* *Schwind v. Gordon*, 93 F.R.D. 517, 519 (N.D. Ga. 1982); *Merz v. Hemmerle*, 90 F.R.D. 566, 568 n.4 (E.D.N.Y. 1981).

115. *See Poulos v. Wilson*, 116 F.R.D. 326, 328 n.1 (D. Vt. 1987); *Catalyst Energy Dev. Corp. v. Iron Mountain Mines, Inc.*, 108 F.R.D. 427, 428 n.1 (S.D.N.Y. 1985); *Olympus Corp. v. Dealer Sales & Serv., Inc.*, 107 F.R.D. 300, 303 (E.D.N.Y. 1985); *Union Carbide Corp. v. McKeown Transp. Corp.*, No. 84 Civ. 3716 (MJL) (S.D.N.Y. June 21, 1985) (WESTLAW DCT database); *Reno Distribs., Inc. v. West Texas Oil Field Equip., Inc.*, 105 F.R.D. 511, 512-13 (D. Kan. 1985); *but see Boggs v. Darr*, 103 F.R.D. 526, 527 (D. Kan. 1984).

116. 116 F.R.D. 633 (M.D. Ga. 1987).

117. *Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984).

118. *A.I.M. Int'l. Inc. v. Battenfeld Extrusions Sys.*, 116 F.R.D. 633, 636 (citing *Morse v. Elmira Country Club*, 752 F.2d 35, 38 (2d Cir. 1984)).

119. 380 U.S. 460 (1965).

interplay of Rules 4(d) and 4(e). Instead, *Hanna* dealt with a situation in which the federal rule clearly provided for service in the manner performed. The question was whether a state rule on how a statute of limitations would be tolled by service should be followed. There was no question about the use of state long-arm amenability statutes and their interaction with the methods of service; the mail service cases are purely interpretations of Rule 4 which were not at issue in *Hanna*.

The Court in *A.I.M.* also cited what it termed "clear" legislative history in support of using mail service.¹²⁰ Although the court cited portions of the legislative history in support of mail service, particularly the portion stating that the new rule "authorizes four methods of serving a summons and complaint,"¹²¹ (one being mail service without any qualifications about long-arm), the history as a whole is far from "clear." For one thing, the language cited by the court states that the new rule "carries forward the policy of the current rule" by permitting service in accordance with the law of the forum state.¹²² As discussed above, several courts held under the old rule that the policy of the rule did not permit using federal methods not authorized by state law when serving out of state individuals under a state long-arm statute.

Second, as originally proposed by the Supreme Court, Rule 4(e) was to be amended specifically to allow for mail service out of state. Congress deleted that provision in its amendments. One could therefore conclude that Congress did not intend to authorize mail service, except where service is made pursuant to a federal long-arm statute.

However weak the *A.I.M.* court's reasoning, it is submitted that extraterritorial service by mail can be upheld under Rule 4. Thus, the next section analyzes why the *A.I.M.* court was correct in result, but wrong in reasoning.

B. Analysis—Extraterritorial Service Supported

Proponents of the use of mail service often look to the wording of Rule 4(e) for support. They note that the rule states that if a state has a long-arm statute, then service "may . . . be . . . made in the manner prescribed in . . . [that] statute."¹²³ A question asked by the proponents is why make the use of state methods discretionary if it was meant to be mandatory?

There is an explanation for the wording of the rule. The first sentence of Rule 4(e) allows out of state service using any applicable fed-

120. *A.I.M. Int'l. Inc. v. Battenfield Extrusions Sys.*, 116 F.R.D. 633, 637 (M.D. Ga. 1987).

121. *Id.*

122. *Id.*

123. *Practice Commentaries*, *supra* note 11, at 51 (emphasis added).

eral statute. If the second sentence of Rule 4(e) (relating to state statutes) was made mandatory, it would make the first sentence superfluous. On the other hand, it would have been a simple matter for Congress or the Advisory Committee to have drafted the rule to allow discretion in using state or federal statutes but mandating state methods where state amenability standards are used.

Rule 4(e) contains another peculiarity. The first sentence expressly authorizes use of the methods in Rule 4 when a federal statute fails to mandate a method. The second sentence states that one may serve "under the circumstances *and* in the manner prescribed" by state law.¹²⁴ The connector "and" could suggest that the two—amenability and mechanics of service—are intended to go hand in hand. However, it could be that the Advisory Committee simply wanted to insure that when state long-arm statutes allowed extraterritorial service by methods not otherwise authorized by state law, those methods were permitted.

It is certainly unfortunate that Congress chose not to redraft the rule to clarify this point. Rule 4(c)(2)(C)(ii) (and former Rule 4(d)(7)) already allowed resort to state methods of service. This situation existed even before Rule 4(e) was amended in 1963 to allow the use of state long-arm statutes. When Rule 4(e) was originally amended in 1963, the point could have been clarified, but at that time the methods of service prescribed by Rule 4 were so limited that no one foresaw the problem.¹²⁵ The paucity of cases prior to 1983 supports this and may have prevented Congress from seeing the problem and the need to clarify Rule 4.

Several aspects of the rule point in favor of using mail service. First, a major impetus for the 1983 amendment was to eliminate the use of marshals as process servers in most instances.¹²⁶ This shifts the burden and cost of the service to the plaintiff. Mail service provides an efficient and inexpensive method of service. If Rule 4 is interpreted to exclude such service, then, in states that do not sanction mail service, costs will be shifted to plaintiffs in ways that were probably unintended. Any diversity case filed in a state other than where the defendant lives requires out-of-state service using state long-arm statutes. Many federal statutes allow private remedies but do not contain long-arm provisions. In those situations, resort is made to state long-arm statutes when the defendant is a non-resident of the state.¹²⁷ This represents a large number of cases. It would be strange to assume that

124. FED. R. CIV. P. 4(e) (emphasis added).

125. *Practice Commentaries*, *supra* note 11, at 51.

126. Letter from Robert A. McConnell, Assistant Attorney General, to Peter W. Rodino, Jr., Chairman, Committee on the Judiciary, *reprinted in* 96 F.R.D. 123; Statement of Congressman Edwards, *reprinted in* 96 F.R.D. 116.

127. *See* *Omni Capital, Int'l v. Rudolf Wolff & Co.*, 108 S. Ct. 404 (1987).

Congress meant to exclude such cases from the new inexpensive alternative and relegate them to whatever state law provided.

Second, the 1963 amendment to Rule 4(e) allowing use of state long-arm statutes was seen as a way of broadening avenues of service. The Advisory Committee Notes indicate that the intent was to insure that plaintiffs were no worse off in federal court than in state court.¹²⁸

Third, the 1963 amendment to Rule 4(f) added the so-called "100-mile bulge" provision. Parties joined pursuant to Rules 14 and 19 are amenable to federal process, state amenability statutes notwithstanding, as long as they live within 100-miles of the courthouse. Under Rule 4(e), the existence of a federal amenability standard for such parties should permit use of federal methods of service. However, many such cases will be diversity cases in which, for example, courts are ruling that the original defendant cannot be served by mail under Rule 4(c)(2)(C)(ii). One suspects that, if pushed, courts might say that Rule 4(f) reflects the desire to have entire controversies determined together, provided that the case is properly in the court to begin with. It is easy to see how a plaintiff might manipulate the parties to eliminate some defendants with the expectation that they would be brought in later via Rule 19 or Rule 14. The "entire controversy" argument also does not provide a satisfactory explanation of why mail service can be used for some parties but not for others. It is likely that Congress did not see this anomaly when it passed the mail service provision.

Thus, as with other parts of Rule 4, both the rule and its legislative history are ambiguous. Until the rule is amended, however, ambiguities should be "construed to secure the just, speedy, and inexpensive determination of every action."¹²⁹ With that approach, mail service ought to be allowed in any federal action.

III. OPTIONS IF NO ACKNOWLEDGMENT OF SERVICE IS RETURNED

Congress did not rely on the infallibility of the mails when it enacted the mail service rule. To insure actual notice, the rule provides that if the acknowledgment is not returned within twenty days of mailing, "service of [the] summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3)."¹³⁰ Basically, this requires either personal service or substituted service by delivery to a responsible person

128. FED. R. CIV. P. 4 advisory committee notes to 1963 Amendments, 28 U.S.C.A. 94 ("[T]here appears to be no reason for denying plaintiffs means of commencing actions in Federal courts which are generally available in the State courts.").

129. FED. R. CIV. P. 1.

130. FED. R. CIV. P. 4(c)(2)(C)(ii).

living at the defendant's home.¹³¹

The statutory language seems very clear and does not appear to give the plaintiff other options. Nevertheless, this provision has engendered numerous court opinions. Many plaintiffs have argued that when no acknowledgment is received they are free to revert to Rule 4(c)(2)(C)(i) which allows service by any method provided for by state law.¹³² They reason that it would have been proper to use such methods in lieu of mail service, and there is no reason to prevent them from doing so now. In short, plaintiffs can urge that the mail service effectively be ignored and the later service be used to obtain jurisdiction.

Although courts tend not to view it this way, the issue actually involves two steps and requires the answering of two questions. First, is service effective even if no follow-up service is performed? If so, one need not decide the question of what sort of follow-up is required. Second, if service is not effective merely by receipt of process (i.e. actual notice), what is required for proper service?

Those courts answering the first question in the affirmative generally rely on *Morse* for support.¹³³ They require a showing that the defendant actually received the summons and complaint. Although this position is equitable, it is an incorrect reading of the rule. Congress obviously inserted the follow-up provision to insure the best possible notice to the defendant.¹³⁴ The provision for paying plaintiffs' service costs in Rule 4(c)(2)(D) makes clear that Congress anticipated that some defendants with actual notice would fail to return the acknowledgment. The costs provision was not enacted merely to ease the plaintiffs' mind should they follow-up just to make sure that service was received. The only reasonable conclusion is that service without a follow-up is not effective service. However, as discussed previously, one can allow service to toll the statute of limitations upon receipt, while still requiring follow-up service to forestall a Rule 12(b)(5) motion.

Assuming some sort of follow-up is necessary, how may it be accomplished?¹³⁵

131. See FED. R. CIV. P. 4(d)(1), (3).

132. See *infra* note 140.

133. *E.g.*, *Benage v. Gibraltar Bldg. & Loan Ass'n*, 115 F.R.D. 20, 21 (D. Conn. 1987) (denying defendant's motion to dismiss where no follow-up had been made); *Deshmukh v. Cook*, 630 F. Supp. 956, 959 (S.D.N.Y. 1986) (same). See *Lee v. Carlson*, 645 F. Supp. 1430, 1432 (S.D.N.Y. 1986).

134. See 96 F.R.D. 118 (statement of Congressman Edwards) (citing criticism of the original proposal for service by certified mail and stating that under Congress' proposal "the defendant will receive actual notice of the claim").

135. Some cases, although cited by courts as support on this issue, do not really get to this step. They often deal with the situation in which the plaintiff has not attempted any follow-up and is now trying to defend either a motion to reopen a default judgment, a motion to dismiss based on statute of limitations grounds, or the 120-day provision of Rule 4(j). See, *e.g.*, *Stranahan Gear Co. v. NL Indus.*, 800

Some plaintiffs have argued that when service by mail is permitted by state law, the failed federal mail service should be deemed proper service under state law via Rule 4(c)(2)(C)(i).¹³⁶ An appropriate response is contained in *Armco, Inc. v. Prenrod-Stauffer Building Systems*.¹³⁷ In *Armco*, the plaintiff mailed the appropriate federal forms but never received an acknowledgment. A default was eventually entered, and when the defendant's motion to reopen was denied, the defendant appealed to the Fourth Circuit. The plaintiff argued that Maryland allowed mail service, and that the original service (which the plaintiff conceded did not satisfy Rule 4(c)(2)(C)(ii)) should be deemed to have effected valid service under Maryland law. The Fourth Circuit disagreed, noting that the acknowledgment "explicitly told [defendants] that they need do nothing if they did not accept and acknowledge service, though they might be required to pay the cost of service by some other means."¹³⁸

However, the language in *Armco* has been used in support of a more far-reaching proposition; once a plaintiff attempts service under Rule 4(c)(2)(C)(ii), he or she is thereafter precluded from using state law methods to serve process.¹³⁹ This is an issue on which the courts are divided.¹⁴⁰

F.2d 53 (3d Cir. 1986) (motion to reopen default); *In re Alexander Grant & Co. Litigation*, 110 F.R.D. 544 (S.D. Fla. 1986); *Coldwell Banker & Co. v. Eyde*, 5 Fed. R. Serv. 3d (Callaghan) 1050 (N.D. Ill. 1986) (motion to quash service). Once a court rejects the *Morse* approach, it is clear that service without a follow-up will be ineffective. However, in these cases it was not necessary to determine whether resort to state law methods of service was proper because no such attempt had been made.

136. *E.g.*, *Combs v. Nick Garin Trucking*, 825 F.2d 437, 440 (D.C. Cir. 1987); *Armco, Inc. v. Penrod-Stauffer Bldg. Sys.*, 733 F.2d 1087, 1089 (4th Cir. 1984).

137. 733 F.2d 1087 (4th Cir. 1984).

138. *Id.* at 1089 (footnote omitted). The District of Columbia Circuit came to the same conclusion on very similar facts. *Combs v. Nick Garin Trucking*, 825 F.2d 437, 447-48 (D.C. Cir. 1987). However, in *Picon v. Sutar Beach Condominiums No. 1 Homeowners Ass'n*, CIV 1987/29 (D.V.I. April 14, 1988), the court held that unacknowledged mail service under Rule 4(c)(2)(C)(ii) still could be effective service on a non-inhabitant under Virgin Islands law pursuant to Rule 4(e). The court distinguished *Armco* on the grounds that in *Armco* the alternative was to use Rule 4(c)(2)(C)(i). However, the *Picon* court's analysis overlooks the unfairness to defendants that prompted the *Armco* decision. In *Picon*, the plaintiff also sent Form 18-A which could mislead a defendant into believing that nothing is required regardless of whether the defendant is an inhabitant of the state or not. The result in *Picon* is justifiable only because the defendants moved to quash service and thus were not misled.

139. *E.g.*, *Scarton v. Charles*, 115 F.R.D. 567, 570 (E.D. Mich. 1987); *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 110 F.R.D. 4, 7 (S.D.W. Va. 1985).

140. *Compare* *Scarton v. Charles*, 115 F.R.D. 567, 570 (E.D. Mich. 1987) (election of service under federal rules precludes switch to state law); *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 110 F.R.D. 4, 7 (S.D.W. Va. 1985) (same); *Billy v. Ashland Oil Inc.*, 102 F.R.D. 230, 233-34 (W.D. Pa. 1984) (same) and *FDIC v. Sims*, 100 F.R.D. 792, 794 (N.D. Ala. 1984) (same) with *Humana, Inc. v. Jacobson*, 804

It is easy to see how courts requiring personal service came to their conclusions. The statutory language seems clear on its face, even if the result is somewhat strange. However, this conclusion is illogical and not required by the rule.

As noted above, most courts have taken the position that mailing without a return of the acknowledgment does not constitute effective service—even for statute of limitations purposes. If that is so, then such service should be treated as a nullity. At that point, the plaintiff should be free to use any other method of service allowed by Rule 4, including state law. This will not contravene Congressional intent. Congress was concerned that mail service alone would not provide adequate guarantees of notice. Thus, it required a follow-up.

On the other hand, Congress did not eliminate former Rule 4(d)(7) (now renumbered as Rule 4(c)(2)(C)(i)) which allows the use of any state law method of service including certified mail. Congress evidently believed that state methods, even if more liberal than the federal mail service provisions, provided sufficient assurances of notice. Notably, Congress rejected the Supreme Court's proposed amendment which would have allowed mail service *only* in accordance with federal procedures. It is reasonable to conclude that allowing subsequent state law service does not damage the statutory scheme.

Moreover, the problem addressed in *Armco* is not present in these cases. In *Armco*, the court was concerned that the federal acknowledgment form gave the defendants reason to believe that if the acknowledgment was not signed there would be no penalty other than payment of the cost of alternative service. If such alternative service is made by means other than personal service, defendants cannot claim they were misled. The acknowledgment form does not indicate what kind of alternative service will be forthcoming, only that something more is required before a default judgment can be entered. Service pursuant to state law satisfies this requirement.

It must be noted, however, that the use of state law forces the court to treat unacknowledged mail service as ineffective, at least for Rule 12(b)(5) purposes.¹⁴¹ State law methods are not permissible follow-

F.2d 1390, 1393 (5th Cir. 1986) (service pursuant to state law still permissible) and *Pascalides v. Irwin Yacht Sales N., Inc.*, 118 F.R.D. 298, 301 (D.R.I. 1988) (same). Cf. *Picon v. Sutar Beach Condominiums No. 1 Homeowners Ass'n*, CIV 1987/29 (D.V.I. April 14, 1988) (allowing improper service under Rule 4(c)(2)(C)(ii) to be deemed proper service under Virgin Islands law).

141. Rule 12(b)(5) deals with motions for improper service of process. FED. R. CIV. P. 12(b)(5). It may be reasonable to treat unacknowledged mail service as sufficient to toll the statute of limitations in states that require service to toll the statute as long as they do not require *proper* service to toll. See *supra* text accompanying notes 60-64. If "proper" service is required to toll the limitations period, then a proper follow-up service using Rule 4(d)(1) or (3) should suffice to make the mail service proper. Rule 4(c)(2)(C)(ii) should read as a whole, making the follow-up

ups to mail service as a substitute for the acknowledgment because the rule is very specific on the allowable modes of follow-up; only the methods provided by Rules 4(d)(1) and (d)(3) are permitted. State law only provides an alternative method of service once it is clear that service by mail will not be effective.¹⁴²

A contrary conclusion can lead to absurd results as illustrated by *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*¹⁴³ In this case the plaintiff (from Pennsylvania) sued several Virginia residents in a West Virginia federal court.¹⁴⁴ When service by mail was not acknowledged, the plaintiffs served the Secretary of State of West Virginia pursuant to state law.¹⁴⁵ However, the court found the federal mail service ineffective because the acknowledgment forms were never returned.¹⁴⁶ Furthermore, the court held that once mail service was attempted, resort to state methods was not allowed.¹⁴⁷ Finally, the court stated that the plaintiffs could not serve the defendants personally to complete the service because extraterritorial service by mail was not valid.¹⁴⁸ Thus, the plaintiffs were left without a valid method of serving process, a fact recognized by the court.¹⁴⁹ Clearly, such a situation is not rational and should not be fostered by a technical interpretation of the rules.¹⁵⁰

IV. CONCLUSION

Rule 4 should be amended to eliminate the confusion and litigation that has surfaced to date.¹⁵¹ Such amendments should clarify when service is deemed "made" under the Rule. Any amendments should expressly permit extraterritorial use of mail service. Furthermore, the follow-up procedures should be amended; if state law methods are allowed to begin with, they should be permissible follow-up procedures as well. The availability of attorneys' fees, including those for making a motion for costs, should be written into an amended follow-up procedure.

service a part of "proper" service under the rule just as a returned acknowledgment would be.

142. *Pascalides v. Irwin Yacht Sales N., Inc.*, 118 F.R.D. 298 (D.R.I. 1988).

143. 110 F.R.D. 4 (S.D.W. Va. 1985).

144. The circumstances leading to the suit are not explained in the opinion.

145. 110 F.R.D. 4, 5 (S.D.W. Va. 1985)(citing W. VA. CODE § 56-3-33 (Cum. Supp. 1985)).

146. *Id.* at 5.

147. *Id.* at 7 (citing *Armco, Inc. v. Penrod-Stauffer Bldg. Sys.*, 733 F.2d 1087, 1089 (4th Cir. 1984)).

148. *Id.* at 7-8; see generally *supra* text accompanying notes 103-131.

149. 110 F.R.D. 4, 8 (S.D.W. Va. 1985).

150. Indeed, in *Scarton v. Charles*, 115 F.R.D. 567 (E.D. Mich. 1987), the court faced a similar situation and came to the opposite conclusion. *Id.* at 571. *Accord* *FDIC v. Mount Vernon Ranch, Inc.*, 118 F.R.D. 496 (W.D. Mo. 1988); *Southern Pride, Inc. v. Turbo Tek Enters.*, 117 F.R.D. 566 (M.D.N. Car. 1987).

151. Some useful suggestions are made in Sinclair, *supra* note 6.

In the meantime, the suggestions made here for interpreting the current rule can alleviate some of the inequities while carrying out the intent of Congress in passing these amendments. Though it is not wise to ignore the clear language of the Rule as was done in *Morse*, neither is it wise to be simplistic in interpreting the Rule under the guise of "clear language." When more than one interpretation is reasonably available, courts should opt for the interpretation that fosters substantial justice without interfering with the overall scheme of the Rule.