

Rule 4: Service by Mail May Cost You More Than a Stamp

Three years have passed since Rule 4 of the Federal Rules of Civil Procedure authorized service of process by first-class mail,¹ allowing ample time to test this method's performance. The adoption of a general mail provision was designed to reduce the burden on the U.S. marshals, then the primary process servers, and to save costs to parties by encouraging service by mail.² The first-class mail provision, which seemed to be a clear, simple, and economical procedure, in practice has become confusing, complicated, and expensive. This outcome is due both to Congress' choice of first-class mail, and to the poorly drafted rule that Congress created to implement service by mail.³ Rule 4 affects all litigants because service of process, the means of notifying a defendant that he has been sued, is a basic step in initiating every civil action.⁴ Proper service is required to maintain every

1. Rule 4(c) of the Federal Rules of Civil Procedure was amended effective February 26, 1983 to authorize service of process by first-class mail. Rule 4(c)(2)(C)(ii) states:

(C) A summons and complaint may be served upon a defendant [by reference to paragraphs (1) and (3) of subdivision (d) the rule restricts the use of the first-class mail provision to competent adults and business organizations] —

....

(ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) [service by person 18 years or older] or (B) [service by federal marshal or person specially appointed by court] of this paragraph in the manner prescribed by subdivision (d)(1) [personal service or by leaving copies at the defendant's dwelling house or usual place of abode] or (d)(3) [delivering to an officer, managing or general agent, or other notarized agent of a business organization and, if required by statute, also mailing a copy to the defendant].

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

2. AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, 93 F.R.D. 255, 259-60 (1982) (Appendix A) [hereinafter cited as SUPREME COURT AMENDMENTS]. Appendix A explains: "The proposed amendments to Rule 4 are occasioned by the reduction in appropriations available to the Marshal's Service and pending legislation to relieve marshals of the duty to serve the summons and complaint in private civil litigation. Appropriations have already been reduced and it appears that the proposed legislation will soon be enacted into law. For these reasons it is important that Rule 4 be amended promptly." *Id.*

3. See, e.g., Gaines, *Rule 4: A Nightmare in Several Acts*, LITIGATION, Winter 1985, at 8; Siegel, *The Recent Amendments to Rule 4 Pose Problems for Practitioners*, Nat'l L.J., Aug. 1, 1983, at 48, col. 1; Vairo, *Amended Rule 4 of Civil Procedure and Its Effects on Process Serving*, Nat'l L.J., Dec. 17, 1984, at 32, col. 1.

4. 2 J. MOORE, J. LUCAS, H. FINK & C. THOMPSON, MOORE'S FEDERAL PRACTICE, ¶ 4.02[1] (2d ed. 1985) [hereinafter cited as MOORE'S FEDERAL PRACTICE].

action.⁵ Litigants need a clear rule that can be followed with confidence, which is exactly what they now lack.

This Note proposes that the rule must again be rewritten. The Note will survey the historical background of the 1983 amendments, describe how the first-class mail provision operates, detail the major problems and potential difficulties with that provision, and suggest measures which might be taken to make the rule more effective. The Note concludes that the potential effectiveness of any piecemeal measure is undermined by the inherent flaws in using first-class mail for service of process. The first-class mail method must be discarded and replaced with a more efficient and effective low-cost method with unambiguous, easy-to-follow procedures. The Note proposes a hybrid model, one that adopts the Supreme Court's recommendation of certified mail use, with certain variations designed to optimize that mode of service.

I. HISTORICAL BACKGROUND

Prior to February 1983, Rule 4 had no general provision for service by mail.⁶ The usual procedure was for a plaintiff to file suit with the clerk of the court and then wait for the federal marshal to serve the defendant personally with the summons and complaint.⁷ Personal service included residential service, meaning that the summons and complaint could be left with a person of suitable age and discretion who also resided at the defendant's dwelling house or usual place of abode.⁸ The federal marshals were not given the responsibility for serving every defendant. A court could appoint special persons to serve.⁹ Service could also be made by a person authorized to serve process in a state court of general jurisdiction.¹⁰ The primary burden for providing service, however, rested on the marshals.

5. *Id.*

6. *See generally* Fed. R. Civ. P. 4, 28 U.S.C. (1982). Parts of Rule 4, however, incorporated by reference federal or state standards. When one of these permitted mail, a summons could be mailed under such provision. The primary provision permitting service by mail was 4(d)(7), which allowed any defendant who was a competent adult or business organization to be served "in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held." *Id.* This meant then that a plaintiff might use mail service if his state permitted it. *See, e.g.,* ARK. R. CIV. P. 4(d)(8); IND. RULE TR. 4.1(A)(1); OHIO R. CIV. P. 4.1(1).

7. Prior to the 1983 amendments, Fed. R. Civ. P. 4(a) stated:

(a) Summons: Issuance. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to any other person authorized by Rule 4(c) to serve it.

Fed. R. Civ. P. 4(a), 28 U.S.C. (1982).

The marshal could also serve a defendant's agent. Fed. R. Civ. P. 4(d)(1), 28 U.S.C. (1982).

8. Fed. R. Civ. P. 4(d)(1), 28 U.S.C. (1982).

9. *See id.* 4(c).

10. *Id.*

This burden on the marshals became increasingly great as civil actions in federal courts swelled in number. The combination of overwork and a limited budget led to the recognition that something had to be done to alleviate the marshals' plight.¹¹ The marshals would eventually be relieved of their duty as the primary servers of summonses, and this responsibility would be shifted to plaintiffs or their counsels.¹² Before this would happen, however, Rule 4 would have to be revised, and that revision process would take a long and circuitous course.

The revision of Rule 4 began according to standard procedures.¹³ The Advisory Committee on Civil Rules of the Judicial Conference, which continuously studies the operation and effect of the rules of civil procedure, initiated changes in Rule 4.¹⁴ The Committee then distributed a tentative draft of proposed amendments to members of the bench and bar for comment.¹⁵ Public hearings were held to allow testimony and further comment on the proposal.¹⁶ After the hearings, the Committee revised the preliminary proposal.¹⁷ A final draft of the amendments was submitted for approval to the standing Committee on Rules of Practice and Procedure.¹⁸ After scrutiny, the proposed amendments were approved, submitted to the Supreme Court, and accepted. In April, 1982, the Supreme Court sent the proposed amendments to Congress.¹⁹ Under the Rules Enabling Act, Congress had 90 days to examine them before they became effective.²⁰ Congress did not allow the proposed changes to become law.²¹ Instead, citing complaints received about them,²² it enacted legislation to postpone the effective date of the amendments from August 1, 1982 until October 1, 1983, in order to study them further.²³

11. 128 CONG. REC. H9848, H9849 (daily ed. Dec. 15, 1982) (report on background and intent of amendments to Rule 4 by Rep. Edwards), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 4434, 4439-40.

12. FED. R. CIV. P. 4(a).

13. JUDICIAL CONFERENCE OF THE UNITED STATES, COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES 4 AND 45 OF THE FEDERAL RULES OF CIVIL PROCEDURE (1981), *reprinted in* 91 F.R.D. 139 (1982) [hereinafter cited as 1981 PRELIMINARY DRAFT]; *see generally*, Spaniol, *Making Federal Rules: The Inside Story*, 69 A.B.A. J. 1645 (1983).

14. *See* 1981 PRELIMINARY DRAFT, *supra* note 13. *See generally* Spaniol, *supra* note 13. *See infra* Appendix B.

15. *See* Spaniol, *supra* note 13, at 1645-47.

16. *See* SUPREME COURT AMENDMENTS, *supra* note 2, at 260.

17. *Id.* at 259-61.

18. *Id.*

19. *Id.* at 255-58.

20. 28 U.S.C. § 2072 (1982).

21. Act of Aug. 2, 1982, Pub. L. No. 97-227, 96 Stat. 246.

22. H.R. REP. NO. 662, 97th Cong., 2d Sess. 3 (1982). The complaints which specifically pertained to the mail service provision were about the use of registered and certified mail methods. The concern about these methods was that their use would result in the entry of unfair default judgments.

23. Act of Aug. 2, 1982, Pub. L. No. 97-227, 96 Stat. 246. The goal was to clarify ambiguities in the rule in order to prevent court battles over them, which would prove costly.

The Supreme Court's proposal had removed routine service from the marshals and placed that responsibility in the hands of the plaintiff or the plaintiff's counsel.²⁴ Congress feared, however, that the Court had left a loophole whereby the marshals might still be routinely called to serve summonses.²⁵ Critics of the amendments expressed a need to close this alleged loophole.²⁶

The Court's proposal contained a general mail provision that allowed a party the option to serve process by registered or certified mail with return receipt requested and delivery restricted to the addressee.²⁷ The proposal struck the existing rule's option which permitted a plaintiff to use state methods for mail service, if available.²⁸ The reasons given by Congress for rejecting registered and certified mail were that these methods provided a flawed mail service that might not provide a defendant actual notice of claims against him.²⁹ This was alleged to be so because a signature on a return receipt might be illegible, a name on a receipt might differ slightly from the name of the addressee, it might be difficult to determine whether the mail was refused or unclaimed, mail carriers might not be diligent enough to assure delivery to the correct person, and unfair default judgments would result from their use. Despite criticisms of registered and certified mail, Congress wanted state options for mailing preserved.³⁰

The Court had instituted a 120-day limit on service to encourage plaintiffs and their counsels to act with diligence.³¹ Congress criticized this provision for alleged ambiguities.³² The stated reasons were that it seemed uncertain whether a dismissal without prejudice would bar a plaintiff from reinstating an action if the statute of limitations had run during the 120 days and proper service had not been obtained.³³ The Court had also proposed that service would be deemed "made" with regard to the time provision on the

24. SUPREME COURT AMENDMENTS, *supra* note 2, at 255-58.

25. Under the Supreme Court's proposal, subsection (c)(2)(B) required that upon a party's request, the marshal, his deputy, or some person specially appointed by the court was required to serve process "pursuant to any statutory provision expressly providing for service by a United States marshal or his deputy." Congress noted that one such provision providing for service by a United States marshal or his deputy was 28 U.S.C. § 569(b), which compelled marshals to "execute all lawful writs, process and orders issued under authority of the United States, including those of the courts . . ." As a result, any party could rely on 28 U.S.C. § 569(b) to use a marshal for service and thwart the intent of the amendments to limit the use of marshals. H.R. REP. NO. 662, 97th Cong., 2d Sess. 2-3 (1982) (citing 28 U.S.C. § 569(b) (1983)).

26. *Id.*

27. SUPREME COURT AMENDMENTS, *supra* note 2, at 257.

28. *Id.* at 256.

29. H.R. REP. NO. 662, 97th Cong., 2d Sess. 3 (1982). See *infra* Appendix C.

30. FED. R. CIV. P. 4(c)(2)(C)(i).

31. SUPREME COURT AMENDMENTS, *supra* note 2, at 258.

32. H.R. REP. NO. 662, 97th Cong., 2d Sess. 3-4 (1982).

33. *Id.*

date that the process was "accepted, refused, or returned as unclaimed."³⁴ The words "returned as unclaimed" bothered Congress because a defendant might have legitimate reasons for failing to claim mail, yet a plaintiff could nevertheless recover a default judgment.³⁵ Congress' concern over the possibility of unfair default judgments was one of the stated reasons for its insistence on further reviewing the amendments.³⁶

Representatives of the Judicial Conference and the Department of Justice, as well as others who had displayed concerns over the amendments, joined in consultations with members of Congress to reconsider them.³⁷ California Representative Edwards, whose state claimed to have a successful first-class mail service procedure, managed these proceedings.³⁸ The goal of this collaboration was to provide more effective procedures for mail service than those the Court had proposed.³⁹ This group also sought to clarify the proposed amendments' ambiguities in order to avoid costly court battles later to resolve them.⁴⁰ It was from this collaborative effort that Congress later offered its own revised version of the rule.⁴¹

Congress' version of the rule reinstated state-authorized mailing procedures.⁴² The rule also adopted a first-class mail method for service that was modeled after the California rule.⁴³ Congress discarded altogether the registered and certified mail procedures recommended by the Court.⁴⁴ The rule maintained the 120-day limit to effect service, but added a clause to save a

34. SUPREME COURT AMENDMENTS, *supra* note 2, at 258. See *infra* Appendix C.

35. H.R. REP. NO. 662, 97th Cong., 2d Sess. 3 (1982).

36. *Id.*

37. 2 MOORE'S FEDERAL PRACTICE, *supra* note 4, at ¶ 4.01[33.-1] to [33.-3].

38. *Id.*

39. See H.R. REP. NO. 662, 97th Cong., 2d Sess. 3-4 (1982).

40. *Id.*

41. Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, 96 Stat. 2527. See *infra* Appendix D.

42. Rule 4(c)(2)(C) states:

(C) A summons and complaint may be served upon a defendant of any class referred to in paragraph (1) or (3) of subdivision (d) of this rule—

(i) pursuant to the law of the State in which the district court is held for the service of summons or other like process upon such defendant in an action brought in the courts of general jurisdiction of that State, or

(ii) by mailing a copy of the summons

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

43. 128 CONG. REC. H9848, H9850 (daily ed. Dec. 15, 1982) (report on background and intent of amendments to Rule 4 by Rep. Edwards) (citing CAL. CODE CIV. P. § 415.30), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 4434, 4439-40. It should be noted that California law allows a plaintiff three years in which to serve a summons after filing the complaint. See Siegel, *Practice Commentary on Amendment of Federal Rule 4 With Special Statute of Limitations Precautions*, 96 F.R.D. 88, 103 (1983) [hereinafter cited as Siegel, *Practice Commentary*].

44. 128 CONG. REC. H9848, H9850 (daily ed. Dec. 15, 1982) (report on background and intent of amendments to Rule 4 by Rep. Edwards), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 4434, 4439-40.

case from dismissal if a plaintiff could show "good cause" for failing to serve process within the allotted time.⁴⁵ Congress rejected the Court's stipulation of a conclusive date on which service would be deemed "made" for purposes of the time provision, fearing that this language would lead to unjust default judgments.⁴⁶ Congress' choice to reject the Supreme Court proposal must be evaluated in terms of reaching its stated goals for more effective procedures and less ambiguous language.⁴⁷ If the rule fails to meet these goals, which current practice suggests it has,⁴⁸ other alternatives, including the Supreme Court's proposal, should be reconsidered.

II. OPERATION OF THE FIRST-CLASS MAIL PROVISION

The Federal Rules of Civil Procedures Amendments Act of 1982 became effective in February 1983⁴⁹ and set into motion drastic changes in the service of process in a federal civil action. Now, upon filing suit a plaintiff need not wait for the marshal to serve the defendant. Instead Rule 4(a) shifts responsibility for service directly to the plaintiff or his attorney.⁵⁰ The plaintiff may employ "any person who is not a party and is not less than 18 years of age" to make personal service on the defendant.⁵¹ Or, the plaintiff has the option to serve the defendant by first-class mail.⁵²

The procedure for using the first-class mail option is sequential. The plaintiff or plaintiff's attorney begins by filing suit with the clerk of the

45. See FED. R. CIV. P. 4(j). The Supreme Court proposal was very similar to the current rule except that it did not include the provision for "good cause." The current rule also provides that the request for dismissal may be on motion of a party, whereas the Supreme Court had not inserted those words in the time limit provision. See SUPREME COURT AMENDMENTS, *supra* note 2, at 258.

46. The Supreme Court proposal of 4(j) read:

(j) Summons: Time Limit for Service.

. . . If service is made by mail pursuant to Rule 4(d)(8), service shall be deemed to have been made for purposes of this provision as of the date on which the process was accepted, refused, or returned as unclaimed

See SUPREME COURT AMENDMENTS, *supra* note 2, at 258.

47. Congress stated that the goal of reducing the role of the marshals was the primary reason for changing the rule. Congress thought that the Supreme Court had not sufficiently reduced the marshals' work by its proposed amendments. Congress voiced concern about improper default judgments that might occur under the Court's proposal. The goal was to reduce ambiguities in the rule and to review all of the criticisms that had been voiced about employing registered and certified mail, the time provision, and other general concerns. H.R. REP. NO. 662, 97th Cong., 2d Sess. 2-4 (1982).

48. *E.g.*, Siegel, *supra* note 3.

49. Pub. L. No. 97-462, 96 Stat. 2527 (1982). The Act was adopted on January 12, 1983 and became effective on February 26, 1983.

50. FED. R. CIV. P. 4(a).

51. *Id.* 4(c)(2)(A).

52. *Id.* 4(c)(2)(C)(ii).

court.⁵³ The clerk issues the summons to the filing party.⁵⁴ The plaintiff or plaintiff's attorney must then mail to the defendant the summons and the complaint, a stamped, self-addressed return envelope, and two copies of a notice and acknowledgment form.⁵⁵ The purpose of the form is to provide verification that the defendant has been served and takes the place of the marshal's proof of service under the old rule.⁵⁶ Once mailed, the plaintiff simply waits for the defendant to sign and return the notice and acknowledgment form.⁵⁷ Once the plaintiff receives the executed form, the plaintiff knows that service was made.

Although the procedure seems beyond reproach given a mail system that is both economical and reliable, a closer examination reveals that this procedure is not always as clear, simple, and inexpensive as it might appear. For instance, since delivery of service is by first-class mail, the plaintiff receives no receipt verifying that the delivery has been completed.⁵⁸ The envelope could be lost, discarded with junk mail, or deliberately ignored by the defendant.⁵⁹ Even if the defendant reads the contents with good intentions, ambiguities in the model notice and acknowledgment form could cause misunderstandings, confusion, and failure to respond correctly or perhaps to respond at all.⁶⁰ In the event the defendant does not respond, a second service is required.⁶¹

For the second service the litigant may not resort to state-authorized methods, which might allow for use of registered or certified mail.⁶² Ac-

53. FED. R. CIV. P. 4(a) states:

(a) Summons: Issuance. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint.

54. *Id.*

55. *Id.* 4(c)(2)(C)(ii). See generally Notice and Acknowledgment for Service by Mail, Form 18-A, *infra* note 125.

56. FED. R. CIV. P. 4(c)(2)(C)(ii). Under the 1982 version of the rule, the marshal had to supply proof as required under Fed. R. Civ. P. 4(g), 28 U.S.C. (1982).

57. See FED. R. CIV. P. 4(c)(2)(C)(ii); see also *infra* Appendix D.

58. With first-class mail, a sender may pay an extra fee to receive a receipt of mailing, but not one of delivery. To receive notice of delivery, an additional fee would be necessary to have registered or certified delivery, which both provide verification of delivery and date of delivery. UNITED STATES POSTAL SERVICE NOTICE 59, POSTAGE RATE FEES AND INFORMATION (Feb. 1985).

59. See, e.g., *Billy v. Ashland Oil Inc.*, 102 F.R.D. 230, 232 (W.D. Pa. 1984). The defendants received the summons but did not return the acknowledgment. Instead, they said that it was not their policy to accept service under this provision. The defendants were notified a second time by certified mail and again ignored the acknowledgment, though their authorized agent had signed the receipt.

60. *Armco, Inc. v. Penrod-Stauffer Bldg. Sys.*, 733 F.2d 1087, 1089 (4th Cir. 1984). Judge Haynsworth stated that it was reasonable for defendants to misconstrue the words of the form and do nothing except wait and perhaps incur a penalty.

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

62. *Federal Deposit Ins. Corp. v. Sims*, 100 F.R.D. 792, 794 (N.D. Ala. 1984). Judge Acker said that if the plaintiff had even gone so far as to include the notice and acknowledgment

ording to the language of the rule and the court decisions enforcing it, a second service must be made personally.⁶³ Litigants are therefore returned to the original pre-amendment procedures, except that now there is no marshal to provide personal service. Instead, it is likely that a plaintiff will be forced to pay a private process server to do it.⁶⁴

What seemed a simple procedure on paper has in reality become a complicated, confusing and potentially expensive one. The only way the procedure works at all is if the defendant willingly opens and reads the materials, understands the procedure, and complies.⁶⁵ The uncertainty of this procedure leaves the plaintiff waiting and vulnerable.

Changes in the mail service provision of the rule are obviously necessary. If service of process is made improperly, the court's exercise of jurisdiction and its judgment or decree will be invalid unless the defendant waives the defective process.⁶⁶ The stakes for failing to effect proper service are high. Before changes are made, however, the rule should be closely scrutinized. Only then can a proper foundation be made for considering further revisions.

III. PROBLEMS WITH THE MAIL SERVICE PROVISION

A. *Two Standards for Mail Service*

As noted previously, the present version of Rule 4 is the one Congress adopted to overcome the deficiencies it perceived in the proposal put forth by the Supreme Court. Congress' version of Rule 4 creates a dichotomy in mail service standards.⁶⁷ The present rule permits a choice of mailing either by the federal method *or* by available state law methods.⁶⁸ The Court's proposal only allowed mail service if the litigant used the *federal* mail procedure.⁶⁹ The Court's proposed rule also called for use of registered and

form with the mailing, plaintiff was then "locked in to" completing service by the federal rule which requires personal delivery if a second service is required.

63. FED. R. CIV. P. 4(c)(2)(C)(ii). *Armco, Inc. v. Penrod-Stauffer Bldg. Sys.*, 733 F.2d 1087 (4th Cir. 1984); *Federal Deposit Ins. Corp. v. Sims*, 100 F.R.D. 792 (N.D. Ala. 1984); *Billy v. Ashland Oil Inc.*, 102 F.R.D. 230 (W.D. Pa. 1984); see *infra* Appendix D.

64. Although the rule permits any nonparty over the age of eighteen to serve process, a plaintiff's logical choices are now the plaintiff's attorney, a paralegal or other office employee of the attorney, or a private process server. If the attorney does not wish to serve process or to have process served by the attorney's office personnel, a plaintiff will probably have to hire a private process server to serve the defendant personally.

65. *Stranahan Gear Co. v. NL Indus.*, 102 F.R.D. 250, 252 (E.D. Pa. 1984). Judge Broderick pointed out that the only means of enforcing the rule was the penalty provision against defendants who force the plaintiff to incur costs of personal service.

66. 2 MOORE'S FEDERAL PRACTICE, *supra* note 4, ¶ 4.09, at 4-110 to -112.

67. See *supra* notes 21-46 and accompanying text.

68. FED. R. CIV. P. 4(c)(2)(C).

69. The Supreme Court proposal for mail service stipulated that, whereas other state law methods could be used as alternatives for service, a litigant who chose to send a summons by mail had no choice but to use the procedures outlined in the federal rule. See SUPREME COURT AMENDMENTS, *supra* note 2, at 256.

certified mail.⁷⁰ Congress, however, rejected registered and certified mail because Congress thought that those methods lacked the requisite means of providing a defendant with actual notice.⁷¹ Since a number of states authorize registered and certified mail service,⁷² many litigants are now allowed to choose those methods in a federal action anyway.⁷³ This ironic situation occurs despite Congress' insistence that those very same methods were unfit for the federal rule.⁷⁴ By reinstating the choice of state law procedures,⁷⁵ Congress has defeated its own purpose.

Rule 4 has two standards for mail service: (1) the federal method, using first-class mail,⁷⁶ and (2) state methods, often including registered and certified mail.⁷⁷ Congress approved first-class mail because it thought the method was more capable of providing a defendant actual notice.⁷⁸ If the defendant executes and returns to the plaintiff the notice and acknowledgment form, the plaintiff can be reasonably assured that service was made. It would appear, however, that some of the same questions can exist with first-class mail service as were alleged to exist with registered or certified mail service. The defendant's signature on the notice and acknowledgment form can be illegible, or the signature may differ slightly from the name of the addressee, or the delivery may have gone to the wrong person. Still, if the notice and acknowledgment form comes back to the plaintiff, there may be a slightly greater chance than with registered and certified mail that actual notice was given.⁷⁹

70. *Id.* at 257.

71. See H.R. REP. No. 662, 97th Cong., 2d Sess. 3 (1982). The Supreme Court decision in *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950) established certain minimum constitutional standards for giving notice to parties. Although actual notice is not required, the method of service must be reasonably likely to inform the defendant, even if it actually fails to do so.

72. See, e.g., ARK. R. CIV. P. 4(d)(8); IND. RULE TR. 4.1; MD. RULE 2-121(a); MICH. C.R. 2.105(A)(2); OHIO R. CIV. P. 4.1(1); TENN. R. CIV. P. 4.04(12). Some states permit mail delivery, but do not specify the type of mail to be used, thereby allowing registered and certified mail. See, e.g., KY. R. CIV. P. 4.01; MASS. R. CIV. P. 5(b); S.C. CODE ANN. § 15-9-930 (Law. Co-op. 1977). States frequently allow mail service for in rem actions. See, e.g., COLO. R. CIV. P. 4(g); KAN. CODE CIV. P. 60-307; MO. ANN. STAT. § 506.160 (Vernon 1949). Some states allow resort to mail service if with reasonable diligence the defendant cannot be served by personal or residential service. See, e.g., WIS. STAT. ANN. § 801.11(1)(b) (West 1977).

73. 128 CONG. REC. H9848, H9850 (daily ed. Dec. 15, 1982) (report on background and intent of amendments to Rule 4 by Rep. Edwards), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 4434, 4440-42.

74. *Id.*

75. FED. R. CIV. P. 4(c)(2)(C)(i).

76. FED. R. CIV. P. 4(c)(2)(C).

77. See sources cited *supra* note 72.

78. H.R. REP. No. 662, 97th Cong., 2d Sess. 3 (1982).

79. A signed form may provide slightly greater assurance of service than the signed receipt one gets with certified mail.

Allowing the two standards for mail service can pose technical problems for a court.⁸⁰ One instance of these problems is when a plaintiff serves by mail according to either a state or the federal rule, but confusion later develops over which provision was actually employed.⁸¹ Regardless of any potential problems which can develop by having two standards, if actual notice was the goal and registered and certified mail were thought unfit to provide actual notice, state law methods should not have been allowed at all.

B. *The Unacknowledged Form*

If a plaintiff chooses to follow the federal procedure for mail service, and the defendant does not comply with the obligation to execute and return the acknowledgment of service,⁸² Rule 4 requires that a second service "shall be made" on the defendant.⁸³ Uncertainties exist, however, concerning whether there is one required method for a second service and also about the purpose of the second service.⁸⁴

1. Specific Method Required for Service

The current rule provides that if the acknowledgment of service is not received by the sender within twenty days of mailing, "service shall be made" by personal delivery.⁸⁵ The validity of substituting a second mail delivery has nevertheless been raised in several cases.⁸⁶ The courts have uniformly

80. *See, e.g.,* *Armco, Inc. v. Penrod-Stauffer Bldg. Sys.*, 733 F.2d 1087, 1088 (4th Cir. 1984). After sending the notice and acknowledgment form and receiving no acknowledgment, the plaintiff filed an affidavit stating that service had been made pursuant to the Maryland rules. The district court found that the plaintiff had served the defendant pursuant to the Maryland rules. However, Judge Haynsworth reversed the default judgment saying that plaintiff had clearly served according to the federal rules and therefore had to complete service by serving the defendant personally.

81. *Id.*

82. *See, e.g.,* *Federal Deposit Ins. Corp. v. Sims*, 100 F.R.D. 792 (N.D. Ala. 1984).

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

84. *See, e.g.,* *Federal Deposit Ins. Corp. v. Sims*, 100 F.R.D. 792, 794 (N.D. Ala. 1984). Although there seemed to be uncertainty on the part of the plaintiff about the methods appropriate for a second service, Judge Acker was adamant in stating that if the first service was made by the federal mail provision, personal service was the only manner of service allowed in the event a second service was required. However, in *Morse v. Elmira Country Club*, 752 F.2d 35, 40 (2d Cir. 1984), Judge Davis did not question the method of the second service, but he stated that its purpose was only to provide a foundation for the first mailed service. This opinion is contrary to that in *Billy v. Ashland Oil Inc.*, 102 F.R.D. 230, 234 (W.D. Pa. 1984), where the second service was viewed as necessary to having valid service.

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

86. *See, e.g.,* *Armco, Inc. v. Penrod-Stauffer Bldg. Sys.*, 733 F.2d 1087 (4th Cir. 1984); *Federal Deposit Ins. Corp. v. Sims*, 100 F.R.D. 792 (N.D. Ala. 1984); *Billy v. Ashland Oil Inc.*, 102 F.R.D. 230 (W.D. Pa. 1984).

adhered strictly to the language of the rule and have required personal service, even when the defendant had received actual notice.⁸⁷

One case in which the language of the rule was adhered to strictly was *Armco, Inc. v. Penrod-Stauffer Building Systems*.⁸⁸ The *Armco* court acknowledged that “[w]hen the process gives the defendant actual notice of the pendency of the action, the rules, in general, are entitled to a liberal construction.”⁸⁹ It further noted that not all technical violations may invalidate the service when actual notice was given.⁹⁰ The court still invalidated the second service, declaring that “the rules are there to be followed, and plain requirements for the means of effecting service of process may not be ignored.”⁹¹

Personal service has even been required in a case where the defendant previously received actual notice not once, but two times.⁹² In *Billy v. Ashland Oil Inc.*,⁹³ the defendants received the summons but did not return the acknowledgment.⁹⁴ Instead, they said that it was not their policy to accept service under this provision.⁹⁵ Plaintiff served process a second time using certified mail and received a returned receipt signed by defendants’ authorized agent.⁹⁶ Despite having given actual notice twice, the plaintiff was required to serve the defendants a third time personally.⁹⁷

One commentator has pointed out that the rule’s failure to allow the use of mail for a second service may have been an oversight in drafting rather than an intentional exclusion.⁹⁸ The legislative history lends support to this supposition.⁹⁹ The history states that if the form is not acknowledged, “another method of service authorized by law is required.”¹⁰⁰ In a different paragraph the history states that if the acknowledgment is not returned, “then service must be effected through some other means provided for in

87. See *Armco*, 733 F.2d 1087; *Federal Deposit Ins. Co.*, 100 F.R.D. 792; *Billy*, 102 F.R.D. 230.

88. 733 F.2d 1087, 1089 (4th Cir. 1984).

89. *Id.*

90. *Id.*

91. *Id.* at 1089. In this particular situation Judge Haynsworth found that because of the ambiguous wording in the notice and acknowledgment form, it was reasonable for defendants not to respond. Even though defendants had actual notice, he nevertheless insisted that the rule be strictly interpreted and applied. *Id.*

92. *Billy*, 102 F.R.D. 230.

93. 102 F.R.D. 230 (W.D. Pa. 1984).

94. *Id.* at 232.

95. *Id.*

96. *Id.*

97. *Id.*

98. See Vairo, *supra* note 3, at 33.

99. See 128 CONG. REC. H9848, H9849 (daily ed. Dec. 15, 1982) (report on background and intent of amendments to Rule 4 by Rep. Edwards), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 4434, 4440.

100. *Id.*

the Rules."¹⁰¹ The history therefore runs counter to the conclusion that the second service must be by personal delivery. No sound reasons support the rule that a second attempt at service should be restricted to personal delivery.¹⁰²

A plaintiff may be able to recover from a defendant costs of personal delivery,¹⁰³ provided the defendant cannot show good cause for failing to acknowledge the first service of process.¹⁰⁴ A plaintiff does, however, have to move to recover costs, perhaps entailing legal fees which could even exceed those costs.¹⁰⁵ If a plaintiff does win a judgment, he must collect on it. The mail service provision may therefore generate costs for litigants which far exceed the price of a stamp.

2. Two Views of the Purpose of the Second Delivery

Although courts have been consistent about requiring personal delivery of the summons and complaint following unacknowledged first-class mail delivery,¹⁰⁶ opinions diverge on the purpose of the second delivery.¹⁰⁷ The purpose of the second delivery is perceived either as effecting service of process following an unacknowledged and therefore invalid mail delivery,¹⁰⁸ or affirming a received and therefore effective service of process despite the fact that the service of process was not acknowledged.¹⁰⁹ The rule does not contain a clear statement of when service is legally effective.¹¹⁰ If one cannot tell when service is effective, the purpose behind the second delivery is open to question.¹¹¹

A correlation appears to exist between a court's position and the procedural posture of the case that is at stake.¹¹² An examination of cases involving

101. *Id.*

102. Vairo, *supra* note 3, at 33.

103. FED. R. CIV. P. 4(c)(2)(D) states:

Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons.

104. *Id.*

105. 28 U.S.C.A., FED. R. CIV. P. 4 practice commentaries on Rule 4, at 37 (West Supp. 1985).

106. See Vairo, *supra* note 3.

107. Compare, e.g., *Armco, Inc. v. Penrod-Stauffer Bldg. Sys.*, 733 F.2d 1087 (4th Cir. 1984) with *Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984). See also *Bell v. London*, 580 F. Supp. 62 (S.D.N.Y. 1984).

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

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

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

111. Taggart, *Changing Federal Procedures in Serving Summonses and Complaints*, 29 PRAC. LAW. 23, 28-32 (1983).

112. See, e.g., *Armco, Inc. v. Penrod-Stauffer Bldg. Sys.*, 733 F.2d 1087 (4th Cir. 1984); *Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984).

judicially disfavored default judgments uncovers the fact that the first view, that a defendant can defeat the mail-delivered service of process simply by not acknowledging it, is consistently held.¹¹³ These courts have sometimes openly admitted their distaste for rewarding a defendant's complicity in spoiling the service by mail.¹¹⁴ Nevertheless, these courts have viewed an unacknowledged mail service as invalid.¹¹⁵ If the unacknowledged mail service is invalid, this then implies that the required personal delivery is necessary to make valid service of process.

Two courts, however, have taken a different view when confronted with the possibility of a dismissal after the statute of limitations had expired.¹¹⁶ These decisions arose in diversity actions, where state law governs the commencement of the action.¹¹⁷ In a state where the rule is that service of process rather than filing a complaint commences an action, a plaintiff could lose the opportunity to have a case tried unless the defendant is served prior to the tolling of the statute.¹¹⁸ When a plaintiff was faced with this likelihood, two courts held that service was complete when the mail service was *received*.¹¹⁹ The two courts held that the purpose of personal delivery is only to affirm the already completed, though unacknowledged, mail service.¹²⁰ One court explicitly stated that though personal service would provide a foundation for the mail service, personal service was nevertheless "irrelevant for valid and effective service."¹²¹ Under this view, the defendant who ignores the mail service in hopes that the statute of limitations will run before personal service can be made is out of luck.

Holding that personal delivery is necessary to complete service is the only fair construction of the rule's intent.¹²² The rule states that if service by mail is not acknowledged, "service shall be made."¹²³ It does not state "affirmation of service" shall be made. Nothing in the rule suggests that the second delivery is simply to inform a defendant that the case will proceed

113. *E.g.*, *Armco*, 733 F.2d at 1089; *Billy*, 102 F.R.D. at 234; *Federal Deposit Ins. Corp.*, 100 F.R.D. at 795.

114. *See, e.g.*, *Billy*, 102 F.R.D. at 234.

115. *Armco*, 733 F.2d at 1089; *Billy*, 102 F.R.D. at 234; *Federal Deposit Ins. Corp.*, 100 F.R.D. at 797.

116. *Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984); *Bell v. London*, 580 F. Supp. 62 (S.D.N.Y. 1984).

117. *See Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949).

118. *See Walker*, 446 U.S. 740; *Ragan*, 337 U.S. 530.

119. *Morse*, 752 F.2d at 41; *Bell*, 580 F. Supp. at 63-64.

120. *Morse*, 752 F.2d at 41. Judge Davis held that the second service is simply to ensure that the defendant receives actual notice, but that the second service is irrelevant if the mail service is received, even though unacknowledged. *See also Bell*, 580 F. Supp. at 63-64.

121. *Morse*, 752 F.2d at 40.

122. *See Taggart*, *supra* note 111, at 30.

123. FED. R. Crv. P. 4(c)(2)(C)(ii).

in spite of his failure to acknowledge.¹²⁴ The notice and acknowledgment form also instructs that a defendant need not answer the complaint if the form is not acknowledged.¹²⁵ The legislative history advises:

124. This was the construction of the rule proposed in the Advisory Committee's preliminary draft, rejected and not explicitly set out in the final draft. However, the Supreme Court proposal included a provision that when an envelope was returned "refused," then plaintiff was to follow with a first-class mailing informing the defendant of the action and that the case would proceed in spite of the refusal. *Compare, e.g.,* 1981 PRELIMINARY DRAFT, *supra* note 13 with SUPREME COURT AMENDMENTS, *supra* note 2. See *infra* Appendices B & C.

125.

Form 18-A

NOTICE AND ACKNOWLEDGMENT FOR SERVICE BY MAIL

United States District Court for Southern District of New York
Civil Action, File Number _____

A.B., Plaintiff

v.

C.D., Defendant

Notice and Acknowledgment of Receipt
of Summons and Complaint

NOTICE

To: (insert the name and address of the person to be served.)

The enclosed summons and complaint are served pursuant to Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 20 days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 20 days, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within 20 days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice and Acknowledgment of Receipt of Summons and Complaint will have been mailed on (insert date).

Signature

Date of Signature

ACKNOWLEDGMENT OF RECEIPT OF SUMMONS
AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the summons and of the complaint in the above-captioned matter at (insert address).

Signature

*Relationship to Entity/
Authority to Receive
Service of Process*

Date of Signature

If the proper person receives the notice and returns the acknowledgment, service is complete. If the proper person does not receive the mailed form, or if the proper person receives the notice but fails to return the acknowledgment form, another *method of service* authorized by law is required.¹²⁶

Despite these contrary expressions, the *rule's* silence on when service is complete has spawned the view that service is complete when the first-class mail delivery of service is received.¹²⁷

The reasoning behind this contrary view is explained by Judge Davis in the case of *Morse v. Elmira Country Club*.¹²⁸ Judge Davis emphasized that Congress included only a part of the California model rule in the federal rule.¹²⁹ A section of that model, *omitted* from the federal rule, reads: “[s]ervice of a summons pursuant to this section is deemed complete on the date a written acknowledgment of receipt of summons is executed, *if* such acknowledgment thereafter is returned to the sender.”¹³⁰ Since this section was not included in the federal rule, Judge Davis reasoned that Congress intended service to be complete when *received*, even if not acknowledged.¹³¹ Judge Davis is probably correct that Congress did not intend to include in the rule a stipulation of when service is completed.¹³² The reason which he attributes to Congress for this omission may not be the actual one, however. A close examination of the rule's history offers another, stronger possibility.¹³³

The Advisory Committee's preliminary draft contained a stipulation as to when registered or certified mail service was complete, stating: “[t]he return receipt or the returned envelope showing refusal or failure to claim shall constitute prima facie evidence of the service of process.”¹³⁴ The preliminary draft's time limit provision also stated: “[i]f service is made by mail pursuant to Rule 4(d)(8), service shall be deemed to have been obtained for the purposes of this provision as of the date on which the process was accepted, refused, or returned as unclaimed.”¹³⁵ The Court's final draft struck the stipulation from the mail provision, though the final draft retained the stipulation in the time provision.¹³⁶ Congress rejected even that one stipu-

126. See 128 CONG. REC. H9848, H9850 (daily ed. Dec. 15, 1982) (emphasis added) (report on background and intent of amendments to Rule 4 by Rep. Edwards), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 4434, 4440.

127. *Morse*, 752 F.2d at 41.

128. 752 F.2d 35 (2d Cir. 1984).

129. *Id.* at 40-41.

130. CAL. CODE CIV. P. § 415.30(c) (emphasis added).

131. *Morse*, 752 F.2d at 41.

132. See 128 CONG. REC. H9848, H9850 (daily ed. Dec. 15, 1982) (report on background and intent of amendments to Rule 4 by Rep. Edwards), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 4434, 4440.

133. See, e.g., 1981 PRELIMINARY DRAFT, *supra* note 13, at 146; SUPREME COURT AMENDMENTS, *supra* note 2, at 256-57; 128 CONG. REC. H9848, H9850 (daily ed. Dec. 15, 1982) (report on background and intent of amendments to Rule 4 by Rep. Edwards), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 4434, 4440.

134. See 1981 PRELIMINARY DRAFT, *supra* note 13, at 146.

135. *Id.* at 148.

136. See SUPREME COURT AMENDMENTS, *supra* note 2, at 256-58.

lation, reasoning that an unclaimed registered or certified mailing could result in a default judgment despite the fact that a defendant's reasons for allowing the mail to go unclaimed would be unknown.¹³⁷

When Congress rejected registered and certified mail in favor of first-class mail, Congress did not include a statement of when service would be deemed effective.¹³⁸ Congress probably recognized that the same possibility for unfair default judgments could occur with first-class mail as with registered or certified mail.¹³⁹ If the rule is construed to mean that service is complete when the mail is received, a plaintiff could secure a default judgment after testifying that a first-class mailing had occurred.¹⁴⁰ Lurking behind Judge Davis's position, therefore, is the possibility of exactly the kind of default judgments that the Congress tried to avoid.¹⁴¹

Two conflicting sets of standards now exist on the question of when service is obtained.¹⁴² Both views are being used to keep cases alive in the courts, but they rest on opposite premises.¹⁴³ If this divergence of opinions continues, the only thing that appears certain is more confusion concerning the Rule 4 first-class mail provision.

C. Technicalities May Foil Service

*Morse v. Elmira Country Club*¹⁴⁴ also broached the question of whether a plaintiff can use registered or certified mail when exercising the mail option under the federal provision. Rule 4 explicitly calls for first-class mail.¹⁴⁵ Although the plaintiff in *Morse* used certified rather than the required first-class mail, Judge Davis apparently found this diversion from the rule to be

137. See generally 128 CONG. REC. H9848 (daily ed. Dec. 15, 1982) (report on background and intent of amendments to Rule 4 by Rep. Edwards), reprinted in 1982 U.S. CODE CONG. & AD. NEWS. 4434.

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

139. See generally 128 CONG. REC. H9848 (daily ed. Dec. 15, 1982) (report on background and intent of amendments to Rule 4 by Rep. Edwards), reprinted in 1982 U.S. CODE CONG. & AD. NEWS. 4434.

140. Presumably a plaintiff could go into court 20 days after a mailing and claim a default judgment, provided the acknowledgment had not come back. See generally, Taggart, *supra* note 111. Of course, a reasonable time would be somewhat more than 20 days after mailing, due to allowing adequate time for mailing in each direction.

141. See generally 128 CONG. REC. H9848 (daily ed. Dec. 15, 1982) (report on background and intent of amendments to Rule 4 by Rep. Edwards), reprinted in 1982 U.S. CODE CONG. & AD. NEWS. 4434.

142. Compare, e.g., *Armco, Inc. v. Penrod-Stauffer Bldg. Sys.*, 733 F.2d 1087 (4th Cir. 1984) with *Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984).

143. Compare, e.g., *Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984) with *Armco, Inc. v. Penrod-Stauffer Bldg. Sys.*, 733 F.2d 1087 (4th Cir. 1984).

144. 752 F.2d 35 (2d Cir. 1984).

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

permissible.¹⁴⁶ In *Arroyo v. Wheat*,¹⁴⁷ however, defendants moved to quash service when it was made by certified rather than by first-class mail.¹⁴⁸ District Court Judge Reed pointed out correctly that Congress, in adopting the amendments to Rule 4, rejected the Supreme Court proposal for a mail provision which called for registered and certified mail.¹⁴⁹ Judge Reed therefore granted the plaintiffs a time extension in which to effect service by personal delivery in order to overcome the technical defect of using certified, rather than first-class, mail.¹⁵⁰ No sound reasons exist or were articulated by Judge Reed why registered or certified mail could not be used in lieu of first-class mail.¹⁵¹ After *Wheat*, however, plaintiffs should be aware that use of a type of mail other than first-class may be drawn into question.¹⁵²

Other technical questions about the mail provision open further possibilities for foiling service. One concern is whether a technical failure, such as a typographical error on the notice and acknowledgment form, will void the service.¹⁵³ In *Morse*, Judge Davis found that a minor error which did not have any significant impact on the defendant's behavior did not merit voiding the mail service.¹⁵⁴ Another unresolved issue is whether a plaintiff may recover costs of personal service when the plaintiff failed to include a stamped, self-addressed envelope with the mailed service.¹⁵⁵ Since the rule requires that the envelope be enclosed, a defendant who did not receive one could foil the service and perhaps escape the costs of personal service as well.¹⁵⁶

These questions point out important lessons about the new rule. Service of process by mail requires technical correctness. Requiring an affirmative act by a defendant also increases the likelihood of technical failures.¹⁵⁷ These openings for failure provide plaintiffs with more incentives to simply avoid the mail option.

D. Form 18-A, Notice and Acknowledgment for Service by Mail

A plaintiff who chooses to serve process by mail is likely to worry about whether the defendant will acknowledge the service. The plaintiff may not understand, however, that the notice and acknowledgment form itself may

146. Judge Davis said that the certified mailing was "unnecessary," but he did not elaborate on whether or not it was correct. *Morse*, 752 F.2d at 36 n.2.

147. 102 F.R.D. 516 (D. Nev. 1984).

148. *Id.* at 517.

149. *Id.*

150. *Id.*

151. *Id.*; Siegel, *supra* note 3, at 49.

152. *Wheat*, 102 F.R.D. at 517.

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

154. *Id.* at 42.

155. *Armco, Inc. v. Penrod-Stauffer Bldg. Sys.*, 733 F.2d 1087, 1089 n.1 (1984).

156. *See id.*

157. *See id.*

be an obstacle to a well-meaning defendant's attempt to comply.¹⁵⁸ A defendant's first hurdle in comprehending the ambiguous form is to determine how much time he has in which to execute and return the form. The form states "return one copy of the completed form to the sender within 20 days."¹⁵⁹ The form does not explain when the twenty days begin to run. The relevant date could be: (1) twenty days from the plaintiff's attested mailing date provided on the form, (2) twenty days from the date on the postmark, provided there is one, (3) twenty days from the day the mail carrier delivers the mailing, or (4) twenty days from the time defendant opens the envelope and reads its contents.¹⁶⁰ Although the rule is ambiguous, the language "20 days after the [plaintiff's] date of mailing" probably means that a defendant should follow the plaintiff's attested date of mailing rather than one of the other three possibilities. Even though the *form* instructs that the defendant has twenty days,¹⁶¹ the *rule* states that the plaintiff should receive the returned form within twenty days of plaintiff's date of mailing.¹⁶² The form and rule are inconsistent on this important time factor.

The requirement that the plaintiff provide two dates on the form creates more confusion about time parameters.¹⁶³ This obligation may even imply a fifth possibility of when a defendant's time to respond to the form begins to run. The defendant sees both the signature date and the mailing date.¹⁶⁴ These may be different since a plaintiff may sign the form on one date, but plan to mail it on another. The defendant may therefore become confused about which, if either, of the two dates controls his time to respond.

Another source of possible confusion is that the form does not show a clear need to respond.¹⁶⁵ The form states, "If you do complete and return this form, you . . . must answer the complaint within 20 days."¹⁶⁶ As Judge Haynsworth of the Fourth Circuit Court of Appeals pointed out in *Armco, Inc. v. Penrod-Stauffer Building Systems*, "the notice explicitly told [the 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."¹⁶⁷ Judge Haynsworth found that it was reasonable for defend-

158. Siegel, *supra* note 3, at 49.

159. Form 18-A, *supra* note 125.

160. Siegel, *supra* note 3, at 49; *see* Form 18-A, *supra* note 125.

161. Form 18-A, *supra* note 125.

162. FED. R. CIV. P. 4(c)(2)(C)(ii). The rule is still unclear since plaintiff's date of mailing could be construed to mean the date of actual posting or the attested date of mailing provided on the form.

163. Taggart, *supra* note 111, at 25-27.

164. Form 18-A, *supra* note 125. At the end of the final paragraph under "Notice," the plaintiff must declare that the Summons and Complaint "will have been mailed on" a specific date. *Id.*

165. *See* Form 18-A, *supra* note 125; *Armco, Inc. v. Penrod-Stauffer Bldg. Sys.*, 733 F.2d 1087, 1089 (4th Cir. 1984).

166. Form 18-A, *supra* note 125 (emphasis added).

167. 733 F.2d 1087, 1089 (4th Cir. 1984).

ants to choose to do nothing and simply incur a penalty.¹⁶⁸ Yet as one commentator has pointed out, that penalty may only amount to a mere “wrist slap” in some cases.¹⁶⁹

If the defendant does plan to return the form, the defendant will find that the sender’s address is not on the form itself,¹⁷⁰ but on the return envelope only.¹⁷¹ If the envelope was accidentally not enclosed, or if the defendant has misplaced it, the defendant may not be able to acknowledge service. Although the address of the plaintiff’s attorney should be on the summons,¹⁷² the attorney and the sender may be two different people since the rule allows any nonparty over eighteen years of age to be the sender.¹⁷³ Therefore, simply returning the form to the correct person may even pose a problem. One commentator has suggested that a defendant would be wise not to use the provided envelope with its prepaid postage at all, but should resort to personal delivery or registered or certified mail.¹⁷⁴ These alternatives are more appropriate means for delivering the form back to the sender because they at least provide a defendant with a record of his acknowledgment.

The form instructs the defendant: “If you do complete and return this form, you . . . must answer the complaint within 20 days.”¹⁷⁵ The question again, however, is twenty days from when?¹⁷⁶ Rule 12(a) instructs that “[a] defendant shall serve his answer within 20 days after the service of the summons and complaint upon him” but it says nothing about a mailing.¹⁷⁷ Being unable to determine exactly when a defendant is served is problematic both to a defendant and to a plaintiff.¹⁷⁸

Because a plaintiff can only guess the date when process will be delivered by first-class mail, he also will have to speculate about when to expect an answer and when he will be entitled to a default judgment if there is no answer. The legislative history states that the defendant must provide on the

168. *Id.*

169. Vairo, *supra* note 3, at 34. See also *Eden Foods, Inc. v. Eden’s Own Prods., Inc.*, 101 F.R.D. 96 (E.D. Mich. 1984), where plaintiff was awarded \$59.25.

170. See Form 18-A, *supra* note 125.

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

172. Taggart, *supra* note 111, at 29.

173. FED. R. CIV. P. 4(c)(2)(A). In the following circumstances, service can be by a marshal, or by a person specially appointed by the court: when a party is proceeding *in forma pauperis*, or is a seaman, or an office or agency of the U.S., or in the event a court has some other reason for ensuring that service is properly effected. *Id.* 4(c)(2)(B).

174. Taggart, *supra* note 111, at 27.

175. Form 18-A, *supra* note 125.

176. See Siegel, *supra* note 3, at 49.

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

178. There are other possibilities for when a person might be deemed served with first-class mail service of process. A construction might be that it is the day when the mail carrier delivers the mail, the day the mail is picked up by the defendant, or the day the defendant opens the mail. See Taggart, *supra* note 111, at 28.

acknowledgment the date and place of service,¹⁷⁹ but the form only calls for place of service.¹⁸⁰ Although the form provides the defendant a place for the signature date,¹⁸¹ the signature date need not be the same as the service date—assuming the defendant could know the service date. Therefore, even if the form is acknowledged, the plaintiff may never know the exact date on which the defendant was served. The practical result of this uncertainty is that the plaintiff will not be able to have a default judgment entered until twenty days after the form comes back, rather than twenty days after it was sent.¹⁸²

A plaintiff is required only to send a notice and acknowledgment form which conforms “substantially” to the model provided with the rule.¹⁸³ A plaintiff could conceivably draft a similar form, correcting many of these ambiguities in advance. Most plaintiffs are, however, likely to rely on the model and thus fall prey to its pitfalls. High stakes are attached to the form’s proper execution and return.¹⁸⁴ Litigants, therefore, need a form that is designed to facilitate, rather than to hinder, the form’s use.

E. *How the Time Limit Affects Mail Service*

In order to understand the effects of the new time limit provision on mail service, one must know the reasons for its existence and how it works. The time limit was enacted because courts needed some means to insure that plaintiffs would be diligent once responsibility for service to process shifted from the marshals to the plaintiffs.¹⁸⁵ A plaintiff’s prompt service is important for moving litigation efficiently through the courts.¹⁸⁶ To meet this need, Rule 4 was amended to require a plaintiff to serve process within 120 days of filing an action.¹⁸⁷ The new provision requires dismissal if a plaintiff cannot show “good cause” for this failure.¹⁸⁸ Since a dismissal for not

179. 128 CONG. REC. H9848, H9851 (daily ed. Dec. 15, 1982) (report on background and intent of amendments to Rule 4 by Rep. Edwards), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 4434, 4446.

180. *See* Form 18-A, *supra* note 125. Under the section entitled “Acknowledgment of Receipt of Summons and Complaint,” the defendant must declare that he received a copy of the summons and complaint, but the form then requests only that the defendant “insert address.”

181. *See* Form 18-A, *supra* note 125.

182. Taggart, *supra* note 111, at 29.

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

184. If the form is not returned, the plaintiff will have to pay to have defendant served personally. *Id.* Further, with the divergence among courts as to when service is complete, a plaintiff could conceivably lose his right to sue, e.g., if he misses the deadline for the statute of limitations.

185. 128 CONG. REC. H9848, H9850 (daily ed. Dec. 15, 1982) (report on background and intent of amendments to Rule 4 by Rep. Edwards), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 4434, 4439-40.

186. *See id.*

187. *Id.*

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

meeting the time limit is without prejudice, a plaintiff has the option to refile the action.¹⁸⁹ If, however, the statute of limitations has run prior to the dismissal, the plaintiff is barred from bringing the action again.¹⁹⁰

Rule 4 states that the case can be dismissed on the court's own initiative after notice to a party.¹⁹¹ Although the rule is ambiguous,¹⁹² the plaintiff will presumably be given an opportunity for a hearing and to respond.¹⁹³ The rule does not specify what constitutes a "good cause" defense for failing to serve within the time limit. One example, however, would be the defendant's evasion of service.¹⁹⁴ The legislative history instructs that "reasonable" efforts to effect service are required.¹⁹⁵ The plaintiff who can demonstrate his reasonable efforts is entitled to seek an enlargement of time under Rule 6(b),¹⁹⁶ or to oppose a dismissal.

The time limit has special implications for plaintiffs who use first-class mail to serve the summons. Rule 4(c)(2)(C)(ii) instructs that if a defendant does not acknowledge service of process by mail within twenty days, a plaintiff "shall" serve the defendant personally.¹⁹⁷ A plaintiff must therefore spend at least twenty days of the allotted 120 under the time limit provision just waiting for the return acknowledgment to assure that service was made.¹⁹⁸ The mail could simply be delayed in either getting to or returning from the defendant, thus forcing the plaintiff to wait even longer to be sure the defendant was served. The ambiguities about time deadlines found in the notice and acknowledgment form may add to the plaintiff's waiting time.¹⁹⁹

A plaintiff may be wise to be patient well beyond twenty days in the event the defendant is only late in acknowledging rather than not acknowledging

189. *Id.*

190. See Siegel, *Practice Commentary*, *supra* note 43, at 114.

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

192. *Id.*

193. Taggart, *supra* note 111, at 32.

194. *Id.*

195. 128 CONG. REC. H9848, H9851 (daily ed. Dec. 15, 1982) (report on background and intent of amendments to Rule 4 by Rep. Edwards), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 4434, 4442.

196. Rule 6(b) states:

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them.

FED. R. CIV. P. 6(b).

197. *Id.* 4(c)(2)(C)(ii).

198. Siegel, *Practice Commentary*, *supra* note 43, at 113-14.

199. Taggart, *supra* note 111, at 27.

at all. A hasty move to make personal service could prove wasteful. If, however, the mail service is never acknowledged, the plaintiff has relinquished an important block of time during which preparations for personal service could have been begun. Assuming that a plaintiff mailed the summons immediately after filing the complaint, and that a plaintiff allows the defendant reasonable leeway to acknowledge, about ninety days remain to serve personally a defendant who does not acknowledge the mail service. This amount of time should be sufficient to complete personal service. If ninety days is not enough time in which to serve a defendant, the time limit could be fatal to the plaintiff's case.²⁰⁰ The plaintiff may avoid such a fatality by requesting a time extension in advance of the expiration of the period.²⁰¹

A plaintiff needs to carefully document all attempts to serve in the event the plaintiff has to ask for a time extension or defend a dismissal.²⁰² A district court judge is likely to be the final authority in determining whether plaintiff's efforts to complete service were reasonable.²⁰³ District court judges may have varying perceptions of what constitutes reasonableness under the rule.²⁰⁴ If the plaintiff engages a private process server to personally deliver a second service, a judge may not find that person as credible as a United States marshal.²⁰⁵ Proof of action taken may now more than ever be required. A plaintiff should therefore act promptly and request a time extension well in advance of the expiration of the 120 days if it becomes evident that additional time to complete service will be required.

The time provision assumes that it is possible to determine when service was made. If mail service is attempted, not acknowledged, and the plaintiff is forced to serve the defendant personally, the rule again breaks down if it is impossible to tell when service is effected. If service is effected when the personal delivery is completed, then it must be accomplished in what remains of the 120-day period. If, however, service is effected when the mail service is received, then plaintiff could serve the defendant personally beyond the 120-day time limit without penalty, allowing the plaintiff a significant amount of additional latitude.²⁰⁶ The two interpretations of when service is effected therefore leave open to question the actual deadline for service.²⁰⁷

200. Siegel, *Practice Commentary*, *supra* note 43, at 114-15.

201. FED. R. CIV. P. 6(b).

202. *See* Siegel, *Practice Commentary*, *supra* note 43, at 111-13.

203. *Id.* at 102.

204. *Id.*

205. *Id.* at 109-13.

206. *See* *Morse v. Elmira Country Club*, 752 F.2d 35, 39-41 (2d Cir. 1984); *see also* Taggart, *supra* note 111, at 30-32.

207. The *Morse* case, 752 F.2d 35, is very recent and is the first Court of Appeals decision to express this view, so it is too early to tell how widespread the use of this reasoning will become.

The need for a definitive answer on when service is obtained is clear.²⁰⁸ Until litigants receive further guidance from the courts or Congress, the plaintiff must be very careful initially in selecting the manner of service. If time deadlines are a big concern in a particular case, plaintiffs may bypass the mail service provision. This ambiguity provides yet another incentive for the mail provision's disuse.

IV. TO CORRECT OR TO REJECT THE MAIL PROVISION

Failings in the rule are easy to point out;²⁰⁹ proposing corrective measures is another matter.²¹⁰ For any one service procedure to be simple and economical, and at the same time failsafe for achieving actual notice, is ultimately impossible.²¹¹ In fact, these are basically conflicting policy interests. When a proposal is suggested to alleviate one problem, it only creates another. Despite these inherent dilemmas, the current first-class mail provision must be made more useful to litigants or discarded entirely. If procedures are not made more effective, the provision will either continue to cause problems for those involved in lawsuits or it will fall into disuse.²¹² If litigants do not use mail service, they will be deprived of the choice of a low-cost, convenient federal procedure for serving summonses. Resort to state-authorized procedures, having the attributes of economy and convenience, may be possible, where they exist.²¹³ Citizens may otherwise be forced into paying the cost of personal service, or not bringing suit.

To prevent the need for a choice between such extremes, the first-class mail provision can either be made more useful by implementing certain corrective measures, or it can be discarded in favor of other, possibly more acceptable, methods.²¹⁴ Assuming that the first-class mail provision remains in force, certain measures which could make the method work more effectively deserve further study. One of the primary measures that could be taken is to allow the use of state-authorized mail procedures as an alternative means of serving a defendant the second time following an unacknowledged

208. See Taggart, *supra* note 111, at 30-32.

209. See, e.g., Siegel, *Practice Commentary, supra* note 43; Taggart, *supra* note 111; Vairo, *supra* note 3.

210. See, e.g., Siegel, *supra* note 3; Siegel, *Practice Commentary, supra* note 43.

211. 128 CONG. REC. H9848, H9848-50 (daily ed. Dec. 15, 1982) (report on background and intent of amendments to Rule 4 by Rep. Edwards), reprinted in 1982 U.S. CODE CONG. & AD. NEWS 4434, 4435, 4438-39.

212. Admonitions by various commentators about using the rule seem to suggest that litigants could become skeptical of it. See, e.g., Siegel, *supra* note 3, at 49.

213. See, e.g., OHIO R. CIV. P. 4.1. Ohio authorizes the use of certified mail which is sent out by the clerk of the court.

214. The methods of registered and certified mail were recommended by the Supreme Court. See SUPREME COURT AMENDMENTS, *supra* note 2, at 256-57.

first-class mail service.²¹⁵ Many litigants already use state methods such as registered and certified mail for the first service. Allowing a second service by other than personal delivery would result in less waste of both money and energy than forcing plaintiffs to serve personally.

For the rule to state when service is complete would increase certainty surrounding service procedures. A direct statement that service is complete only if the acknowledgment is returned by the defendant and received by the plaintiff would help implement Congress' goal of providing actual notice.²¹⁶ To include such a provision, however, does not resolve the question of when a defendant is served for timing purposes. To clarify timing concerns, separate provisions will be required to instruct when a plaintiff can obtain a default judgment,²¹⁷ and how problems should be handled regarding the interaction of service of process and statutes of limitation.²¹⁸

Further corrective measures would also require complete revision of the notice and acknowledgment form. The form needs a stronger tone to make defendants aware of the need to respond. Each of the ambiguities and inconsistencies previously discussed would need to be corrected. Measures should be taken in advance of a revised form's distribution to ensure that the rule, the form, and the procedures interact properly.

The suggestions for corrective measures, if studied and further developed, might prove helpful. Other recommendations on how to improve the rule will no doubt be forthcoming.²¹⁹ Both the Supreme Court and Congress likely will receive pressure to address the mail provision's shortcomings.²²⁰ Since revisions take time, money and energy to study and to implement, any suggested revisions would have to have great potential for success.

Further revision of the first-class mail provision would, however, be unwise. The first-class mail provision for service of process engages a mail method fraught with problems and ambiguities regardless of how many times the rule is further amended.²²¹ Plaintiffs need a procedure that will be likely to get a defendant's attention initially and one that will not depend

215. The present rule allows only a resort to personal service after an acknowledgment is not returned. FED. R. CIV. P. 4(c)(2)(C)(ii). The state law alternative could be added to provide a choice for the second service.

216. If service is deemed completed only upon the return of the acknowledgment, rather than upon the receipt of the mailing, this would be evidence of defendant's actual notice of the service of process. See 128 CONG. REC. H9848, H9850 (daily ed. Dec. 15, 1982) (report on background and intent of amendments to Rule 4 by Rep. Edwards), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 4434, 4439-40.

217. See Vairo, *supra* note 3, at 33.

218. *Id.*

219. See, e.g., *Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir. 1984) (revealing problems with the rule which will likely come to the attention of the Advisory Committee); *Armco, Inc. v. Penrod-Stauffer Bldg. Sys.*, 733 F.2d 1087 (4th Cir. 1984) (same).

220. *Billy v. Ashland Oil Inc.*, 120 F.R.D. 230, 234 (W.D. Pa. 1984); Taggart, *supra* note 111, at 33-34; Vairo, *supra* note 3, at 33.

221. The questions such as when service is complete and when plaintiff's answering time begins cannot really be known with first-class mail delivery. See Siegel, *supra* note 3, at 49.

on the defendant's willingness to comply.²²² Plaintiffs need to have verification that the defendant received service of process.²²³ Plaintiffs also need to be sure of the date on which the summons was delivered in order to know the beginning date of defendant's answering time.²²⁴ The first-class mail method cannot meet these needs. Other methods should therefore again be investigated.²²⁵

V. SUGGESTIONS FOR A HYBRID MODEL

Rule 4 requires a more suitable alternative than first-class mail service for providing defendants actual notice and plaintiffs a low-cost, convenient means of obtaining actual notice. A proposal to finance reinstating the marshals to their former positions as the primary process servers would probably be unsuccessful. Private process servers now offer a substitute for the marshals. The cost of engaging a private process server, however, is great compared to that of mailing a first-class letter. A compromise method using certified mail could form the basis of a new hybrid model provision to help overcome problems in the current rule.²²⁶

Using the mails for serving process has many attractive features, especially now that a plaintiff or a plaintiff's attorney has both the authority and responsibility to make service of process. Mail is simple, economical, and highly reliable. Mail provides a way of keeping control of service of process in the hands of the plaintiff, rather than a private process server who may or may not be reliable and trustworthy. Mailing a summons also eliminates the possibility of embarrassing encounters between process servers and defendants.²²⁷ Certified mail has proven acceptable in many states as a fair way to provide reasonable assurance that a defendant will have notice of

222. See, e.g., *Billy*, 102 F.R.D. 230.

223. Taggart, *supra* note 111, at 28.

224. *Id.*

225. The original drafts of the amendments sent to Congress would be a good place to start in looking for other methods. See SUPREME COURT AMENDMENTS, *supra* note 2; 1981 PRELIMINARY DRAFT, *supra* note 13; *infra* Appendices B & C.

226. The basic cost for first-class mail is \$.22. In contrast, personal service by a private process server is likely to cost a minimum of \$20. In one California case, the plaintiff expended \$307.32 for personal service. *Sally Beauty Co. v. Nexus Prod. Co.*, 578 F. Supp. 178 (N.D. Ill. 1984). If a compromise method of service utilizing certified mail were adopted, the ordinary cost of service would be about \$1.70.

227. In *Bell v. London*, 580 F. Supp. 62 (S.D.N.Y. 1984), the plaintiff had served a former husband who was an attorney. Judge Brieant commented on the man's failure to respond to the mailed summons. He stated: "One may wonder whether, if some burly or scruffy professional process server had intruded in the presence of defendant's clients or law partners to slap him with timely process, the complaint then would have been that recourse should have been had to mail service. Service by mail avoids such confrontations and humiliations . . ." *Id.* at 63.

claims against him.²²⁸ For these reasons, the alternative of using mail is worth retaining. Certified mail, one means proposed by the Supreme Court, deserves further consideration for a hybrid model provision.

Understanding the mechanics of using certified mail is important to appreciate the method's strengths and weaknesses for the purpose of service of process. The purpose of certified mail is to provide a sender proof of delivery. The Supreme Court proposed certified *and* registered mail with return receipt requested and delivery restricted to the addressee.²²⁹ Certified mail is the least expensive of these two methods.²³⁰ Registered mail's purpose is to insure the value of an envelope's contents. Certified mail is therefore more suitable than registered mail for sending a summons. The two methods operate similarly. Because certified mail better serves the purpose of mailing a summons and is also less expensive, certified mail alone is sufficient to consider.

The sender of process by certified mail must take the envelope containing the summons and complaint to a post office to have it stamped and to obtain a receipt of mailing.²³¹ A receipt of mailing contains the date of mailing and the name of the addressee. The current charge for sending mail certified is the amount of first-class postage plus \$.75 for certifying delivery. The sender may pay an additional \$.70 to receive a return receipt showing to whom and when the envelope was delivered. Another \$.20 will enable the sender to know where the envelope was delivered.²³² Once the sender has given instructions and paid the required fees, the mail is sent on its way and the sender goes home bearing the receipt of mailing. The sender knows that soon either a return receipt or the returned envelope will come back. Either way, a plaintiff has the assurance of knowing within three weeks that the defendant was or was not served notice of the action.

The sender may also pay an additional \$1.25 to have the delivery restricted to the addressee. The mail carrier then personally delivers the envelope only to the addressee, who is required to sign a receipt to claim it. The Postal Service does not guarantee that delivery will be to the addressee, but restricted delivery is reasonably assured. The mail carrier usually knows who lives at an address. The carrier is also required to ask for the specific individual whose name is on the envelope. If the carrier is suspicious that the person claiming to be the addressee may be someone else, the carrier may insist

228. 128 CONG. REC. H9848, H9849 (daily ed. Dec. 15, 1982) (report on background and intent of amendments to Rule 4 by Rep. Edwards), *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 4434, 4440.

229. SUPREME COURT AMENDMENTS, *supra* note 2, at 257.

230. The difference in cost is about \$2.00.

231. Offices which regularly send letters by certified mail handle mailing procedures internally, thus avoiding trips to the post office.

232. Rate information is contained in UNITED STATES POSTAL SERVICE, NOTICE 59, POSTAGE RATES, FEES, AND INFORMATION (Feb. 1985).

that the person come to the post office to collect the mail. If, however, the delivery goes smoothly—which in most cases it will—the carrier simply returns the signed receipt to the sender.²³³

This sequence of events occurs provided that the addressee is at home and will accept the delivery. If the addressee is not at home when the delivery is attempted, the carrier will leave a notice indicating the need to claim the mail at the post office.²³⁴ The notice will show that the mail was sent certified, restricted delivery, and will also show the zip code where the envelope originated. If no one is at home, the addressee may upon receipt of the notice authorize directly on the notice another person to go to the post office to collect the mail. If the mail is not claimed within five days, a second notice is left. If mail is not claimed within fifteen days of the first delivery, it is returned to the sender marked “unclaimed.” Mail can also be refused, in which event the envelope is returned to the sender marked “refused” and with the date of refusal. If an addressee has moved and failed to leave a forwarding address with the post office, the sender is so informed on the face of the returned envelope.

When certified mail with return receipt requested is sent without delivery restricted to the addressee, the delivery procedure is slightly altered. If the addressee is not at home, the carrier has the discretion to allow someone else of suitable age to sign for and accept the mail. If no one is at home, the addressee may, upon receipt of the notice, authorize directly on the notice another person to go to the post office to collect the mail. Even without such written authorization the Postal Service may use discretion to allow someone other than the addressee to collect the mail. Otherwise, the two procedures are the same.

Although no method of service will assure actual notice in every case, certified mail offers the most certainty to the plaintiff without subjecting him to potentially burdensome costs. The use of certified mail to effect service of process offers: (1) a low-cost method of serving summonses; (2) a method likely to gain defendant’s attention; (3) reliable delivery procedures reasonably capable of reaching the named defendant; (4) verification of receipt of mailing; (5) verification of the date and place received; and (6) efficiency in terms of time needed to determine whether the method actually provided notice. While no method of service will be perfect, certified mail service represents the best tradeoff between the dual goals of actual notice and a simple, easy, low-cost method of service.

Delivery of process by certified mail should not, however, be restricted to the addressee as the Supreme Court proposed.²³⁵ The restriction is im-

233. If the mail carrier cannot effect delivery, the Postal Service allows 15 days for a letter to be claimed. Then, it returns the letter to the sender.

234. For a copy of the claim receipt, see *infra* Appendix A.

235. SUPREME COURT AMENDMENTS, *supra* note 2, at 257.

practical and may even prove a hindrance to service. Restricted delivery forces a mail carrier to find the defendant at home, or otherwise to require the defendant to go personally to the post office to collect the mail after receiving notice of it, or to require the defendant's written authorization for someone else to go to the post office to claim the mail for him. Without this restriction, the carrier has discretion to permit someone other than the defendant to claim the mail, allowing greater ease in delivery. The importance normally attached to certified mail increases the likelihood that the person who actually receives the mail will give it to the intended receiver. Restricted delivery is therefore an unnecessary hurdle for a plaintiff when he can accomplish delivery without it, and even at a slightly lower cost.

As noted previously, the major drawback to certified mail expressed by Congress is the worry that it will result in inappropriate default judgments.²³⁶ Although this concern has considerable merit, it should be noted that the federal rules contain a procedure for remedying default judgments which result from lack of notice. Rule 60 grants to the court wide discretion to relieve a party from a final judgment for any reason justifying relief. The rules therefore already provide the courts with power to rectify this problem.²³⁷

Adopting certified mail service, however, does not provide a complete solution; additional modifications will be required. First, any amendment to Rule 4 must explicitly identify a date upon which service of process is effected. Since three eventualities may occur with certified mail, the date need not be the same in each case. When certified mail is actually received, the date of receipt—stated on the return form—seems the appropriate date for effecting service. If the certified mail is refused, then upon receipt of the refused envelope, the sender could be required to mail to the defendant again—this time by first-class mail—a copy of the summons and complaint and a notice of the consequences of default. Provided the plaintiff obtains a certificate of mailing, the defendant could be deemed to have been served, for example, ten days from the date of the certificate of mailing.²³⁸ Finally, if the certified mail goes unclaimed, then the plaintiff should have the option of continuing to seek service by certified mail, or resort to personal service. Under such a proposal the number of cases where personal service was required would be limited. Whenever resort to personal service would be necessary because a defendant did not claim mail, the rule could include a penalty provision to enable a plaintiff to collect for the cost of personal service.²³⁹

236. H.R. REP. NO. 662, 97th Cong., 2d Sess. 3 (1982).

237. FED. R. CIV. P. 60(b).

238. See OHIO R. CIV. P. 4.6(C), which has a similar provision for mail that is refused.

239. A penalty provision would discourage defendants from avoiding service merely by failing

The current Rule 4 should be modified further to make certified mail the exclusive method of mail service. If there is to be a federal mail provision, the introduction of alternative mail methods is confusing and unnecessary. Further, the majority of states which authorize service by mail utilize certified mail, so the impact of the change in the rule should be minimal. The policy behind the federal rules is to create uniformity throughout the federal courts. This policy can be no better furthered than by establishing a single method of service of process.

CONCLUSION

The responsibility of the plaintiff or plaintiff's attorney to notify the defendant of a pending action in federal court is still a relatively new phenomenon. Congress' goal of providing plaintiffs with an effective, low-cost method to fulfill this responsibility has not been achieved. Instead, Congress' institution of the first-class mail provision in Rule 4 has often returned plaintiffs to their pre-amendment position of having to serve a defendant personally. Indeed, the costs of a private process server will likely exceed that paid for service by a federal marshal under the old rule.

In order to alleviate this situation and prevent the disuse of mail service, corrective measures should be taken to further amend Rule 4. Because of the basic flaws in the first-class mail method, any corrections retaining first-class service are likely to be futile. For the purpose of service of process, certified mail provides a preferable alternative to first-class mail. If a certified mail service proposal contains the modifications as outlined above, it offers the best chance both to give actual notice to the defendant, and yet not burden the plaintiff unduly.

ANN VARNON CROWLEY

to claim mail. A penalty provision would also equalize the burden on plaintiffs who receive refused mail and would then only be required to send follow-up process by first-class mail. A penalty provision would, therefore, make service by certified mail even more effective.

One way in which a plaintiff might try to prove that a defendant was avoiding service would be to send the unclaimed process a second time by first-class mail. If the plaintiff obtained a certificate of mailing as proof of sending the first-class mail, and if the mail did not come back because the defendant had moved away, the plaintiff and courts could be reasonably assured that the defendant had been avoiding the certified mail service. Ohio has a provision which allows a recipient of unclaimed mail to send process by first-class mail. See OHIO R. Crv. P. 4.6(D). Personal service is not required, however, unless on the second occasion of mailing the letter comes back. The proposal for the federal rule would require personal service following unclaimed mail so as to assure actual notice.

Appendix A

U.S. Postal Service Certified Mail Form

CLAIM CHECK NO. 772609	ARTICLE NO.	
● IMPORTANT: Present this form to obtain your mail. ID required. Signature may be required.		
<input type="checkbox"/> HOLD	You may notify your carrier or Post Office for redelivery or pick up your mail after _____ M. (Date)	
DATE	<input type="checkbox"/> REGISTERED <input type="checkbox"/> NUMBERED INSURED <input type="checkbox"/> CUSTOM (Omit Number) <input type="checkbox"/> CERTIFIED <input type="checkbox"/> COD <input type="checkbox"/> EXPRESS MAIL <input type="checkbox"/> POSTAGE DUE	MAIL IS AT <input type="checkbox"/> LETTER <input type="checkbox"/> FLAT <input type="checkbox"/> PARCEL <input type="checkbox"/> HOLD
1ST NOTICE	<input type="checkbox"/> International mail subject to storage charges after (Date) _____	LEFT WITH RESIDENTIAL UNIT MANAGER
2ND NOTICE	<input type="checkbox"/> SPECIAL DELIVERY } For special deliveries: Article <input type="checkbox"/> PLACED UNDER YOUR DOOR <input type="checkbox"/> PLACED IN YOUR LETTER BOX	
RETURN	<input type="checkbox"/> If not picked up at Post Office before carrier begins his next regular trip he will deliver it to you.	RESTRICTED DELIVERY ZIP OF ORIGIN
Detached from PS Form 3849—A Oct. 1980	CUSTOMER (Please describe any visible damage)	CLAIM CHECK NO. 772609 AMOUNT DUE
	ADDRESSEE NAME (Print)	
	ADDRESS	
	DELIVERED BY AND DATE	RECEIVED BY

PS Form 3849—A Oct. 1980 DELIVERY NOTICE OR RECEIPT

(front)

DELIVER ARTICLE TO	ENTER NAME OF PERSON YOU AUTHORIZE TO RECEIVE THE MAIL	
FORWARD TO ADDRESSEE AT	ENTER FULL ADDRESS TO WHICH MAIL IS TO BE SENT	
SIGNATURE OF ADDRESSEE OR AGENT		DATE
OFFICE RECORD OF DISPOSITION WHEN DELIVERY CANNOT BE MADE		
<input type="checkbox"/> FORWARDED TO ADDRESSEE <input type="checkbox"/> RETURNED TO SENDER (Name and Address)		
<input type="checkbox"/> UNCLAIMED	<input type="checkbox"/> UNKNOWN	<input type="checkbox"/> REFUSED
<input type="checkbox"/> OTHER (Specify)	DATE	BY (Signature)

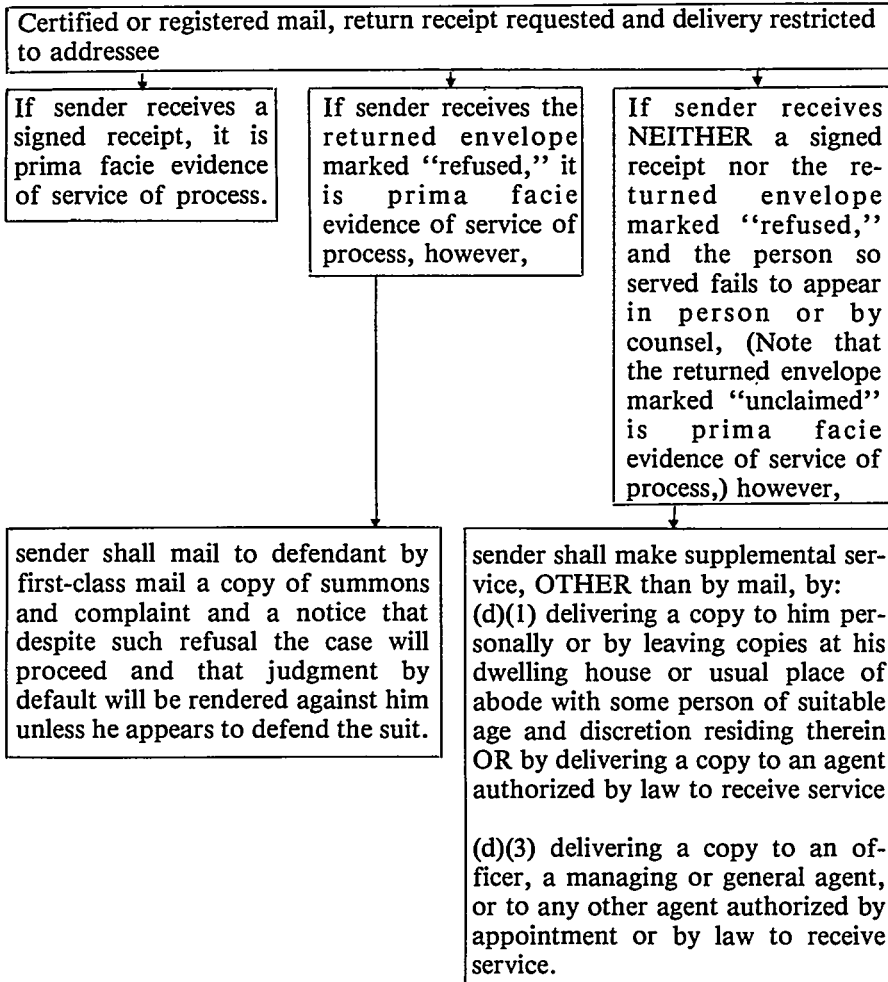
★ U.S.G.P.O.: -1983-405-516

(back)

Appendix B

PRELIMINARY DRAFT OF SUPREME COURT'S PROPOSALS

*Plaintiff may serve by any manner prescribed by any statute of the U.S. or in the manner prescribed by state law except that *mail service* may ONLY be made in the following manner:



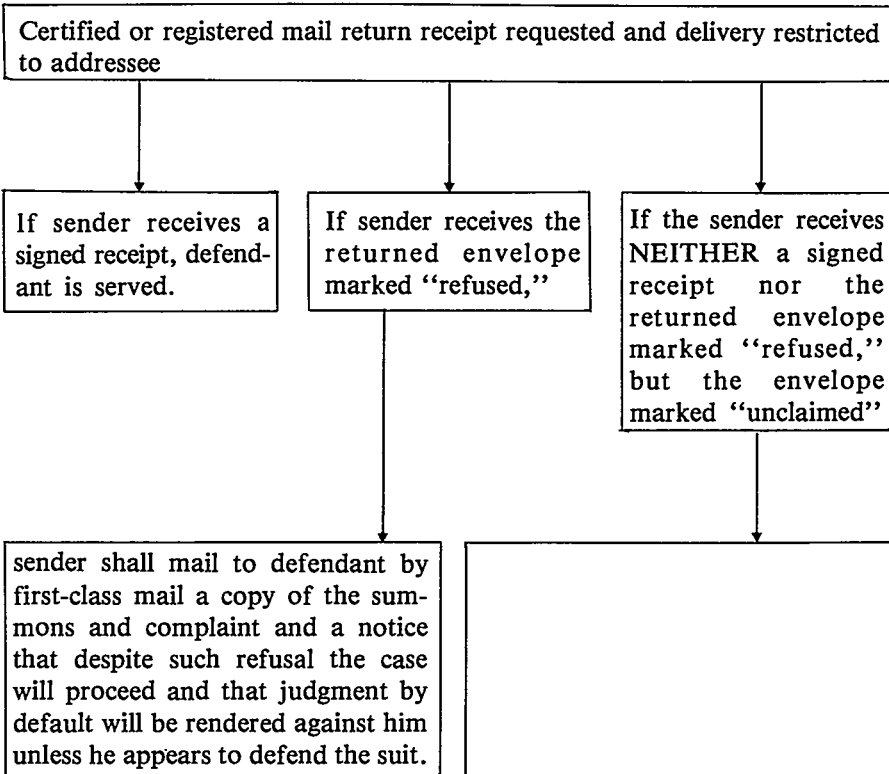
* Service shall not be the basis for the entry of a default or a default judgment unless the record contains a returned receipt showing acceptance or a returned envelope showing refusal of process. Any such default or judgment by default shall be set aside if the defendant demonstrates to the court that the returned receipt was signed or delivery was refused by unauthorized person.

For the purposes of provision 4 (j), if service is made by mail, service shall be deemed to have been obtained as of the date on which the process was accepted, refused, or returned as unclaimed. The proposal contained a 30-day time limit in which to effect service.

Appendix C

FINAL DRAFT OF SUPREME COURT'S PROPOSAL

*Plaintiff may serve process by any manner prescribed by any statute of the U.S. or state law except that *mail service* may ONLY be made in the following manner:



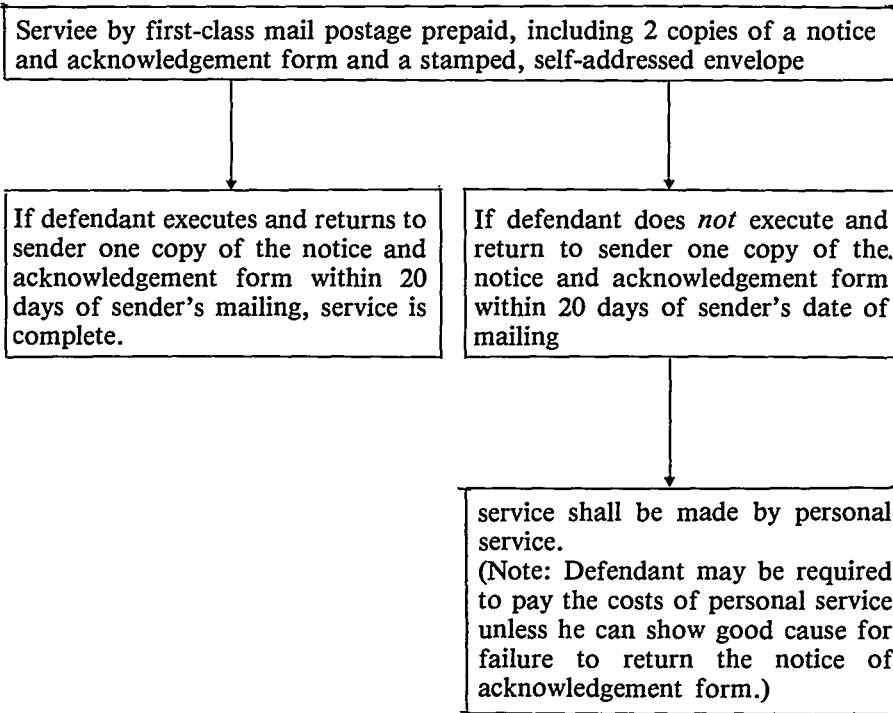
* Service shall not be the basis for the entry of a default or a judgment by default unless the record contains a returned receipt showing acceptance by the defendant or a returned envelope showing refusal of the process by the defendant. Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the returned receipt was signed or delivery was refused by an unauthorized person.

For the purpose of provision 4(j), if service is made by mail, service shall be deemed to have been made as of the date on which the process was accepted, refused, or returned as unclaimed.

Appendix D

RULE 4 AS AMENDED (CONGRESS) 1983

*Plaintiff may follow state law procedures of *any kind* authorized, OR follow federal procedures by:



* If service is not made within 120 days of filing a complaint, and plaintiff cannot show good cause why service was not made, the action shall be dismissed without prejudice upon a court's own initiative or upon motion.