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RULE 4(c)(2)(C)(ii) OF THE FEDERAL RULES OF CIVIL PROCEDURE: FROM HAPLESS TO HOPELESS*

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* The research for this article is current to June 10, 1986. Cases and commentaries appearing after that date are not included. Because of the rapidly expanding caselaw on Rule 4(c)(2)(C)(ii), this Article should be used by practitioners only in conjunction with more recent research. In the 12 months following the closing of the research for this article, more than 30 new cases involving Rule 4(c)(2)(C)(ii) were reported.

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I. INTRODUCTION

Since its enactment in 1983, Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure\(^1\) has become a subject of controversy in

more than sixty decisions and has been discussed in several articles. The Rule allows service of process to be effected by mail, subject to certain requirements and limitations. Although the Rule appears straightforward, it actually contains numerous hidden uncertainties. As the Rule is increasingly employed, its vagaries are surfacing with increasing frequency and with distressing consequences. In short, the Rule is adding to the very delay and expense which it was intended to cure.

Courts which have been called upon to interpret and apply the Rule have done little more than create a bewildering patchwork of decisions. In the process, these courts have often gutted the Rule, made it difficult to predict the outcome of future cases, and confused the practicing bar.

The courts, however, really are not to blame, for they are attempting to work with a poorly drafted Rule which, from the outset, could not have worked and in fact is not working. If order is to be restored, it cannot come from the courts, the bar, or the academic community. The Rule as written is such a hopeless quagmire that even minor statutory repairs, clever lawyering, and thoughtful judicial decisions cannot prevent the mounting chaos. The only an-
swer lies in replacing the Rule.

This Article will begin with a review of the events which led to the passage of Rule 4(c)(2)(C)(ii). The Article will then consider the text of the Rule as finally promulgated, and the issues raised by the language of the Rule. Next, the Article will discuss the cases which have construed the Rule. From there, the Article will examine the writings of other commentators since the Rule went into effect. Finally, the Article will justify the conclusion that the Rule should be abolished in order to promote the ends of justice, serve litigants, and ease the current court congestion which the Rule has engendered.

II. THE ENACTMENT OF RULE 4(c)(2)(C)(ii)

In 1983, following years of consideration by both the Supreme Court and Congress, Rule 4 of the Federal Rules of Civil Procedure, which governs the service of process in civil suits, was significantly amended.9 The amendment of this Rule was part of a package of changes made by Congress to various provisions of the Federal Rules.10

The impetus for changing Rule 4 in large part stemmed from a need to relieve the burden of the federal Marshal Service, which had been responsible for service of process under the previous version of the Rule.11 In the opinion of many, the Marshal Service had

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9 Prior to 1983, Rule 4 had provided in part as follows:
(c) By WHOM SERVED. Service of process shall be made by a United States Marshal, by his deputy, or by some person specially appointed by the court for that purpose, except that a subpoena may be served as provided in Rule 45. Special appointments to serve process shall be freely made. Service of process may also be made by a person authorized to serve process in an action brought in the courts of general jurisdiction of the state in which the district court is held or in which service is made.


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 legis-
become overwhelmed as the number of case filings grew to unmanageable proportions. 12

The first formal consideration given to amending Rule 4 was contained in a preliminary draft report prepared by the Supreme Court's Advisory Committee. 13 The draft, which was submitted in September, 1981 to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, urged the authorization of service by registered or certified mail, return receipt requested, with delivery restricted to the addressee. 14 The draft report further proposed that a defendant be adjudged in de-

12 The legislative history of Rule 4 makes clear that the primary motivation of Congress for amending the Rule in 1983 was its belief that the marshal service had become overburdened by the task of having to serve process. See Statement by a Member of the House Comm. on the Judiciary, 97th Cong., 2d Sess., 128 Cong. Rec. H9848-56 (daily ed. Dec. 15, 1982) (statement of Rep. Edwards), reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 4434, 4438 [hereinafter Statement by a Member]. It is interesting that in 1983, Congress still believed that the marshal service was overburdened notwithstanding the fact that in 1980 Congress had amended the Rule to allow courts to appoint persons other than the marshal to effect service. See supra note 9. Obviously, Congress did not feel that its 1980 change had gone far enough, and therefore made further changes in 1983. Some commentators, however, believe that Congress overestimated the problem. See, e.g., Note, supra note 6, at 1020-21 n.151.

13 See Judicial Conference of the United States, Comm. on Rules of Practice and Procedure, Preliminary Draft of Proposed Amendments to Rules 4 and 45 of the Federal Rules of Civil Procedure (Sept. 1981) [hereinafter Preliminary Draft], reprinted in 91 F.R.D. 139 (1982). The procedure by which amendments to the Federal Rules are made are set forth in 28 U.S.C. §§ 331, 2072 (1982 & Supp. 1986). Proposed amendments are initially considered by one of the four Advisory Committees (civil, criminal, appellate, and bankruptcy). Once a proposal has been passed upon by the appropriate Advisory Committee, which may schedule public hearings on the proposal, the proposal is forwarded to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. Once the Standing Committee has approved the proposal, it is sent to the full Judicial Conference. The Judicial Conference then submits the proposal to the United States Supreme Court. Finally, the Supreme Court sends the proposal to Congress. If Congress does nothing for 90 days, the proposal then becomes effective. For a further discussion, see generally Spaniol, Making Federal Rules: The Inside Story, 69 A.B.A. J. 1645 (1983) (discussing this procedural process); Weinstein, Reform of Federal Court Rulemaking Procedures, 76 COLUM. L. REV. 905, 938-64 (1976) (discussing changes in procedures used to enact a rule).

14 See Preliminary Draft, supra note 13, reprinted in 91 F.R.D. at 146-47.
fault if it failed to respond after signing the postal receipt card. If the defendant refused to accept delivery, a plaintiff could obtain a default judgment after notifying the defendant by ordinary mail that failure to respond to the mailing could lead to the entry of a default judgment.

In April, 1982, the Supreme Court adopted the suggestions contained in the preliminary report and announced on April 28, 1982 that Rule 4 would be amended effective August 1, 1982 unless Congress acted in a contrary fashion prior to that date. In quick response to the Supreme Court's announcement, however, disension was voiced by many practitioners and law professors. Some opponents took the amendments to task on the grounds that service by certified or registered mail was not an effective method for ensuring that actual notice would be given to the defendant. In particular, these opponents noted that even if the postal receipt card was returned, the signature on the card often would be illegible and at times might not match the defendant's name. Others expressed concern that the amendment would cause an explosion in litigation over the granting and subsequent vacating of default judgments. Finally, many critics argued that the speed with which the Supreme Court had acted failed to provide sufficient time for public review and comment.

Due to the vehement protest surrounding the proposed amendments, Congress felt compelled to delay final action and postponed the effective date of the amendments from August 1, 1982 to October 1, 1983. In the interim, Congress invited further

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15 Id.
16 Id. at 147.
18 Order Amending the Federal Rules of Civil Procedure, 50 U.S.L.W. 4453 (U.S. May 4, 1982). The Supreme Court was acting pursuant to the Rule's Enabling Act. 28 U.S.C. § 2072 (1982). However, "[s]uch rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session." Id. The proposed rules with Advisory Committee notes are reprinted at 97 F.R.D. 165-244 (1983).
21 Id. at 4437.
22 See Siegel, Practice Commentary, supra note 1, at 91-92.
23 See Pub. L. No. 97-227, 96 Stat. 246 (1982). The postponement did not take effect until August 2, 1982. Id. Thus, the Supreme Court's amendments were in effect for one
comment and began its own study of the situation.24

Congress' review of the Supreme Court's amendments led to a number of significant changes. Seemingly satisfied with the comprehensiveness of its own review, Congress deemed the amendments complete several months before the October 1 extension; these changes became effective on February 26, 1983.25 The system upon which Congress finally settled was patterned to a large extent on the one which had been adopted some years earlier by the State of California.26

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(a) A summons may be served by mail as provided in this section. A copy of the summons and of the complaint shall be mailed (by first-class mail or airmail, postage prepaid) to the person to be served, together with two copies of the notice and acknowledgment provided for in subdivision (b) and a return envelope, postage prepaid, addressed to the sender.

(c) Service 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.

(d) If the person to whom a copy of the summons and of the complaint are mailed pursuant to this section fails to complete and return the acknowledgment form set forth in subdivision (b) within 20 days from the date of such mailing, the party to whom the summons was mailed shall be liable for reasonable expenses thereafter incurred in serving or attempting to serve the party by another method permitted by this chapter, and, except for good cause shown, the court in which the action is pending, upon motion, with or without notice, shall award the party such expenses whether or not he is otherwise entitled to recover his costs in the action.
III. The Text of Rule 4(c)(2)(C)(ii)

The most important change wrought by Congress was a switch from the earlier-proposed system of certified or registered mail, return receipt requested, to a system in which the summons and complaint are mailed via first class mail. The summons and complaint are to be accompanied by two copies of a notice and acknowledgement form, and a prepaid return envelope. If the defendant does not respond to the summons and complaint by signing and returning the acknowledgment form within 20 days, the serving party must then effect personal service.

As finally enacted, the text of Rule 4(c)(2)(C)(ii) provides:

(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 . . .

. . . .

(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 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) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).27

The heart of Rule 4(c)(2)(C)(ii) is the notice and acknowledgment form which the plaintiff must include with the summons and complaint and which the defendant is supposed to sign and return. The language of the form is set forth in Form 18-A in the Appendix of Forms, which follows the Federal Rules. The acknowledgment states, "I declare, under penalty of perjury, that I received a copy of the summons and complaint in the above-captioned matter

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at (insert address)."

Under the system established by Congress, if the defendant fails to sign and return the form, personal service must then be made pursuant to Rule 4(d)(1) or 4(d)(3). They state, respectively:

(1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

IV. Cases Which Have Considered Rule 4(c)(2)(C)(ii)

Despite nearly two years of consideration by numerous judicial and congressional committees and comments from the practicing and academic communities, the language of Rule 4(c)(2)(C)(ii) is at best difficult to understand, and at worst, hopelessly confusing. As a result, numerous issues have emerged.

The first group of issues focus on the circumstances in which service by Rule 4(c)(2)(C)(ii) is available to a plaintiff. Is the Rule applicable to all defendants or are there cases in which the Rule cannot be used, such as seamen, infants and incompetents or other traditionally favored defendants? Second, does the Rule apply regardless of the basis for federal jurisdiction, or are there different standards depending upon whether the basis for federal jurisdiction is diversity as opposed to a federal statute? Third, is the Rule

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28 FED. R. CIV. P. Form 18-A: Notice and Acknowledgment for Service by Mail. Forms appearing in the Appendix of Forms, although intended to be exemplary only, are considered "sufficient under the rules." See FED. R. CIV. P. 84.
29 FED. R. CIV. P. 4(d)(1), (d)(3).
30 Id.
self-contained, or should it be read in connection with the other provisions of the Federal Rules of Civil Procedure, and if so, which provisions and to what extent?

Furthermore, assuming that Rule 4(c)(2)(C)(ii) is available in a given case, do the summons and complaint have to be sent to the defendant's home and business, to the defendant's home or business, or to either location in particular? Is the Rule's command that the mailing be by first-class mail mandatory or merely suggestive, so that other forms of delivery, such as overnight express or by hand, are also acceptable? If such other forms of delivery are acceptable, would their use provide a basis for a plaintiff to argue that the defendant should be deemed to have received the summons and complaint if the defendant later fails to sign and return the acknowledgment form?

Regarding the acknowledgment form, how much of a deviation from the language contained in Form 18-A is permissible? Is an actual signature required, or will a stamp suffice? Does the defendant have to sign the form, or can its agent sign the form?

The form also states that it must be returned within twenty days of receipt, yet the Rule states that if the defendant's acknowledgment is not received within twenty days of mailing by the plaintiff, the plaintiff must effect personal service under one of the alternative provisions. What if the defendant acknowledges within twenty days of its receipt, but, due to the unpredictability of the postal system, the form does not reach the plaintiff within twenty days of the initial mailing?

Some, but by no means all, of these issues have been presented to the courts. In response, the courts have fallen over themselves in an attempt to make some sense out of the Rule. These cases can be discussed most usefully by grouping and presenting them in the same order in which they have been encountered in practice.

A. The Retroactive Use of Rule 4(c)(2)(C)(ii)

One of the first issues addressed by the courts was whether actions initiated before February 26, 1983, the date on which Rule 4(c)(2)(C)(ii) went into effect, could take advantage of the Rule. This issue was complicated by the fact that the law which enacted the Rule had been passed on January 12, 1983, but had delayed
implementation for 45 days.\textsuperscript{31} According to the Rule’s legislative history, “[t]he delayed effective date means that service of process issued before the effective date will be made in accordance with current Rule 4. Accordingly, all process in the hands of the Marshal’s Service prior to the effective date will be served by the Marshal’s Service under the current Rule.”\textsuperscript{32}

The first case to construe this legislative history was \textit{Prather v. Raymond Construction Co., Inc.},\textsuperscript{33} a Title VII race discrimination case. \textit{Prather} involved an unusual set of facts. The plaintiff had filed his action on February 7, 1983, and process had been issued on February 10, 1983. On February 25, 1983, the United States Marshal served an individual named William H. Raymond III with copies of the summons and complaint. In April 1983, however, the plaintiff was advised that the wrong defendant had been served, and on May 6, 1983, the court granted the plaintiff’s motion to amend the complaint to reflect the correct defendant. On May 10, 1983, the plaintiff then attempted to effect service on the correct defendant by mailing copies of the summons and complaint pursuant to Rule 4(c)(2)(C)(ii). The correct defendant received the summons and complaint. It then moved to have the purported service quashed on the grounds that service upon it had to be carried out pursuant to the terms of the old Rule because the original process was in the hands of the United States Marshal prior to February 26, 1983.

The court refused to quash the service and stated, “[t]o stretch the legislative history to encompass the circumstances of this case is contrary to the clear intent of Congress and the court declines to accept defendant’s argument on this issue.”\textsuperscript{34}

Equally interesting facts were presented in \textit{United States v. Bluewater-Toltec Irrigation District}\textsuperscript{35} which involved a dispute over water rights in New Mexico. The complaint was filed on December 22, 1982, but service upon one of the nearly 1,400 defendants was not made until March 19, 1983. The court found that:

The date that the summons was issued, not the date it was actually served, controls in determining whether the old or new version of Rule 4 applies . . . . The summons in this case was

\textsuperscript{31} See supra note 25.
\textsuperscript{32} Siegel, \textit{Practice Commentary}, supra note 1, at 122-23.
\textsuperscript{34} Id. at 281.
\textsuperscript{35} 100 F.R.D. 687 (D.N.M. 1984).
issued on December 22, 1982, and was placed in the hands of the Marshals Service the next day, December 23, 1982. In view of the above, this summons should have been served according to Rule 4 prior to amendment by P.L. 97-462. Rule 4 prior to the amendment . . . did not contain a general allowance for service by mail. Therefore, service of process by mail on the defendant was not sufficient.38

The reasoning and result reached in Bluewater was agreed with in Ackermann v. Levine.37 In that case, a group of German plaintiffs attempted to argue that service on an American defendant in New York had been achieved by mailing pursuant to Rule 4(c)(2)(C)(ii). The court found that Rule 4(c)(2)(C)(ii) had “no effect” because the summons and complaint had been filed and served at various times in 1980.38

B. The Reach of Rule 4(c)(2)(C)(ii)

1. Service in States Other Than the Forum State

No issue concerning the use of Rule 4(c)(2)(C)(ii) has been more hotly debated, or received more judicial attention, than the issue of whether the Rule can be used to serve a defendant who is outside the state in which the action has been commenced. This issue arises from paragraph (f) of Rule 4 which is entitled, “Territorial Limits of Effective Service.”39 That paragraph states in part: All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state . . . .40 Rule 4(f), however, is tempered by Rule 4(e), which is entitled, “Summons: Service Upon Party Not Inhabitant of or Found Within State.”41 Rule 4(e) states:

Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or

38 Id. at 689. The court relied on the legislative history to the amendments for its decision. Id.
38 Id. at 644 (citing Bluewater-Toltec Irrigation Dist., 100 F.R.D. 687).
39 FED. R. CIV. P. 4(f).
40 Id.
41 FED. R. CIV. P. 4(e).
found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute, or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.42

Taken together, Rules 4(e) and 4(f) indicate that service of process cannot be made outside of the state in which the district court sits unless such service is authorized by a federal or state statute43 or the plaintiff convinces the district court to issue an order authorizing out-of-state service.44 The resulting issue is whether Rule 4(c)(2)(C)(ii) is subject to the territorial restrictions of Rule 4(f), and therefore can only be used to serve a defendant present within the state, or whether Rule 4(c)(2)(C)(ii) is a “statute of the United States” and can be used to serve process regardless of where the defendant is located.

The first case to confront the issue was William B. May Co., Inc. v. Hyatt.45 The plaintiff in May instituted an action in the Southern District of New York against defendants who were residents of California. After being served with process by certified mail at their home in San Francisco, the defendants signed and returned the notice of acknowledgment which the court found “substantially duplicate[d]” Form 18-A.46 The defendants later moved to have the service quashed on the grounds that service pursuant to Rule 4(c)(2)(C)(ii) was unavailable when the defend-

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42 Id.
43 See, e.g., Fed. R. Civ. P. 4(f). In certain limited circumstances, the party to be served can be served up to 100 miles outside the state in which the federal court hearing the action sits. Id. The “bulge” rule authorized by Rule 4(f) applies to service made in connection with Rules 14 (third party practice) and 19 (joinder of persons needed for just adjudication). See 2 J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE § 4.42 (2d ed. 1986) [hereinafter J. MOORE].
46 Id. at 570-71.
The plaintiff contended that the service was valid under Rule 4(c)(2)(C)(ii). It argued in the alternative that even if the service was initially invalid, the defendants had waived their right to object when they signed and returned the acknowledgment form. The court, in a short and fairly cryptic opinion, ruled that the service was invalid. The court stated that Rule 4(c)(2)(C)(ii) was subject to the territorial restrictions of Rule 4(f), relying on a statement made during one of the hearings held after Congress stayed the implementation of the Rule adopted by the Supreme Court.\(^4\) In deciding whether Rule 4(c)(2)(C)(ii) could be deemed to have authorized out-of-state service pursuant to Rule 4(e), the court ruled that it could not, because New York State service rules did not recognize service by mail.\(^4\)

Turning to plaintiff’s waiver argument, the court found that the language suggested by Form 18-A, and used in the form sent to the defendants by the plaintiff, was worded so strongly and was of such a compelling nature that a party receiving the form would feel obligated to sign and return the form regardless of whether it knew that there might be a basis for objecting to the method of service.\(^4\) As such, the court reasoned that to view the defendants’ signing and returning of the form as constituting a waiver of their right to object to the service would be “inappropriate.”\(^5\)

Four days after the decision in May, the same issue was considered by another district court in *San Miguel & Compañía, Inc. v. International Harvester Export Co.*\(^6\) The plaintiff, located in Puerto Rico, attempted to achieve service upon the defendant who was outside Puerto Rico by using Rule 4(c)(2)(C)(ii). After the plaintiff made service, the defendant moved to quash the service on the ground that Rule 4(c)(2)(C)(ii) could not be used to serve a defendant outside the state in which the district court sat unless a state rule authorized service by mail. Puerto Rican law did not authorize service by mail for non-resident foreign corporations; instead, it required that such defendants be served by publication.\(^6\)

The district court agreed with the defendant and noted that

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\(^4\) Id. at 570.
\(^5\) Id.
\(^6\) Id. at 571.
\(^9\) Id.
\(^52\) Id. at 573.
Rule 4(c)(2)(C)(ii) could not be read as having created a nationwide system of service of process by mail.\textsuperscript{53} The court explained that if Rule 4(c)(2)(C)(ii) was meant to provide nationwide mail service, it was incumbent upon the Congress to state so explicitly.\textsuperscript{54}

Two weeks after the May and San Miguel decisions were issued, another federal court, this time sitting in Chicago, held that Rule 4(c)(2)(C)(ii) could be used for extraterritorial service. In \textit{Chronister v. Sam Tanksley Trucking, Inc.},\textsuperscript{55} the plaintiff, an Illinois resident, sued a Missouri defendant and attempted to make service pursuant to Rule 4(c)(2)(C)(ii). The defendant moved for dismissal on the grounds of lack of personal jurisdiction and insufficient process. The court, either unaware of or unpersuaded by May and San Miguel, held that Rule 4(c)(2)(C)(ii) did create nationwide service by mail. The court wrote:

While Rule 4 previously allowed service by mail only when that method was specifically authorized by state statute, this is no longer true. Effective February 26, 1983, a new subdivision, (c)(2)(C)(ii), was added by Congress to the Rule, authorizing service of process by mail in federal courts. 4 C. Wright & A. Miller, Federal Practice and Procedure § 1137 (Supp. 1983). The federal courts are thus no longer dependent on the forum state’s rules regarding this matter.\textsuperscript{56}

However, several months later, the court reversed this position and held, in a short opinion, that Rule 4(c)(2)(C)(ii) did not permit extraterritorial service.\textsuperscript{57}

The next case to confront the issue was \textit{Jaffe v. Federal Reserve Bank of Chicago}.\textsuperscript{58} \textit{Jaffe} arose in the same district as \textit{Chronister} and involved a claim of improper termination of employment. The plaintiff used Rule 4(c)(2)(C)(ii) to attempt service on the defendants. The defendants received the mailed notice at their places of business and duly completed and returned the notices of acknowledgment. Thereafter, they sought to have the service quashed on the ground that service under Rule 4(c)(2)(C)(ii), by itself, was not sufficient.

The defendants argued that in addition to service at their of-

\textsuperscript{53} \textit{Id.}

\textsuperscript{54} \textit{Id.}


\textsuperscript{56} \textit{Id.} at 469 (footnote omitted).

\textsuperscript{57} \textit{Id.}

\textsuperscript{58} See \textit{Chronister v. Sam Tanksley Trucking, Inc.}, 109 F.R.D. 1, 1 (N.D. Ill. 1983).

\textsuperscript{59} 100 F.R.D. 443 (N.D. Ill. 1983).
ices, the plaintiff was obligated to make service at their homes. The defendants based their argument on Rule 4(d)(1), which states that service can be made "by leaving copies [of the summons and complaint] at [the defendant's] dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." The court summarily rejected the defendants' position. The court explained that while it was true that a plaintiff who chose to make service under Rule 4(d)(1) could make service at the defendant's dwelling place by leaving a copy of the summons and complaint with a person of suitable age and discretion, a plaintiff proceeding pursuant to Rule 4(c)(2)(C)(ii) was not required also to make service pursuant to Rule 4(d)(1).

In its opinion the court did not cite or discuss Chronister but did briefly discuss May and San Miguel. It wrote in part: "[b]oth those cases ... enforced the territorial restrictions on service appearing in Rules 4(e) and 4(f)." Moreover, "William B. May and San Miguel had no occasion to address the already-discussed fatal flaws in the [defendants'] arguments," and the court's opinion "does not undercut the rationale of those cases."

Swidereski v. Sperry Corp. was a diversity case which involved wrongful death claims in connection with the crash of a helicopter built by the defendants. The plaintiffs effected service pursuant to Rule 4(c)(2)(C)(ii). The defendants responded by making a motion to dismiss on the grounds that the suit was time-barred under the New York State statute of limitations. The court ruled that although the claim was not time-barred, service was improper because the scope of Rule 4(c)(2)(C)(ii) is limited by Rule 4(f) and New York State law does not authorize service by mail. The court stated:

Service of process on Raytheon was defective, however, because the summons was mailed to Raytheon's offices in Lexington, Massachusetts. Rule 4 authorizes service by mail, but only within the territorial limits of the state in which the District Court is held. F.R. Civ. P. 4(f), see William B. May Co. v. Hyatt, 98 F.R.D. 569.

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59 Id. at 444; see Fed. R. Civ. P. 4(a)(1).
60 Jaffe, 100 F.R.D. at 444.
61 Id. at 445.
62 Id. at 445 n.6.
64 See id.; N.Y. EST. POWERS & TRUSTS LAW § 5.4-1 (McKinney 1985). This section requires that wrongful death suits be brought within two years of the decedent's demise. Id.
Rule 4(c)(2)(C)(ii) would permit out-of-state mail service in which the Court sits but, as noted above, New York does not countenance such mail service on corporations.

Although service on Raytheon was faulty, the Court finds that Raytheon has waived its objections to improper service of process. Raytheon’s motion to dismiss was made only on the ground that the statute of limitations had expired. F.R. Civ. P. 12(h)(1) clearly states that an objection to the sufficiency of service of process is waived if not included in any Rule 12 motion to dismiss actually presented to the Court.65

The issue next appeared in Boggs v. Darr,66 a legal malpractice suit. Federal jurisdiction was founded on diversity, the defendant was a Colorado resident and the plaintiff was a Kansas resident. The plaintiff sought to make service by using Rule 4(c)(2)(C)(ii). At trial, it was agreed that Kansas law did not permit service by mail. The court noted that although the Rule had been in effect for only a little over a year, other federal courts had already split on the issue. In particular, the court cited and discussed the decisions in San Miguel and Chronister. The court then stated that it had decided to read Rule 4(c)(2)(C)(ii) as authorizing nationwide mail service.67

The court explained that the question of whether a defendant was amenable to service was to be distinguished from the question of what method of service a plaintiff could employ to serve the defendant. As to the former, the court ruled that the state long-arm statute would have to be applied in diversity cases because of Rule 4(e). As to the latter, however, the court held that federal law applied, and thus service by mail was authorized under Rule 4(c)(2)(C)(ii).68

Epstein v. Wilder,69 decided a few months after Boggs, discussed at length the issue of whether Rule 4(c)(2)(C)(ii) authorized extraterritorial service by mail. A diversity case, Epstein, involved a breach of contract claim between plaintiffs residing in Illinois and defendants residing in Tennessee. After acknowledging receipt of the summons and complaint, the defendants moved to quash

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67 Id. at 527.
68 Id.
service on the grounds that Rule 4(c)(2)(C)(ii) could not be used to make out-of-state service because such service was not permitted by Illinois state law.

The court, relying on May, San Miguel, and Chronister, stated:

[A]s 4(c)(2)(C)(ii) did not attempt to supercede 4(e), 4(e) controls and mail service not authorized by the forum state rules cannot be used for extraterritorial service [citing May and San Miguel]. Furthermore, a court in this circuit has found Illinois would not allow service pursuant to 4(c)(2)(C)(ii) on out of state defendants [citing Chronister]. Rule 4(f) does not independently authorize mail service on extraterritorial defendants . . . . Service was therefore improper . . . [and] service of the summons and complaint is therefore quashed.\(^6\)

The court's reliance on Chronister was erroneous, since, as will be recalled, Chronister had held that Rule 4(c)(2)(C)(ii) could be used to make extraterritorial service by mail even if the applicable state rules did not authorize such service.\(^7\)

In Daley v. Alia,\(^8\) a New York resident who had suffered injuries instituted a tort suit and attempted to make service on a California defendant by using Rule 4(c)(2)(C)(ii). The defendant moved to have the service quashed. The court agreed with the defendant that the service was improper, citing without discussion May.\(^9\)

The most thorough review of the issue of whether Rule 4(c)(2)(C)(ii) provides authority for nationwide service by mail is contained in Reno Distributors, Inc. v. West Texas Oil Field Equipment, Inc.\(^10\) Reno was a diversity case involving a Kansas plaintiff who had attempted to serve two Texas defendants by means of Rule 4(c)(2)(C)(ii). When the defendants refused to acknowledge the service, the plaintiff made personal service on the defendants and then moved for the costs of the personal service.\(^11\)

\(^6\) Id. at 797.

\(^7\) See supra note 56 and accompanying text. Of course, when the Chronister court reversed itself, the Epstein opinion became correct. It should be noted, however, that the Epstein opinion cites only to the first Chronister opinion and makes no mention of the second Chronister decision. See Epstein, 596 F. Supp. 793.

\(^8\) 105 F.R.D. 87 (E.D.N.Y. 1985).

\(^9\) Id. at 89.


\(^11\) See infra notes 255-57 and accompanying text; see also J. Moore, supra note 43, § 4.408.
The defendants contended that service by mail under Rule 4(c)(2)(C)(ii) was not available to the plaintiff because Kansas state law did not authorize service by mail outside the state. As such, the defendants contended that the plaintiff had been obligated to make personal service and could not recover the costs of such service.

The court agreed with the defendants. It noted that under Rule 4(c)(2)(D), a plaintiff was entitled to recover the cost of personal service if the defendant refused to acknowledge service under Rule 4(c)(2)(C)(ii). The court explained, however, that in order to recover costs, a plaintiff must demonstrate that service was authorized by Rule 4(c)(2)(C)(ii). Thus, the issue before the court was whether Rule 4(c)(2)(C)(ii) authorized service in the present case.

The court recognized that the issue before it had been before other judges in the district beginning with Collier v. Equipment Service Co. Because it was an unpublished opinion, Collier had received little notice prior to Reno. In Collier, the court relied heavily on May and San Miguel in holding that service by mail pursuant to Rule 4(c)(2)(C)(ii) was not available for parties who were neither inhabitants of nor found within the state. The Reno court decided, however, that “[i]n light of contrary authority in the district,” it would take the “opportunity” to re-examine the holding that service by mail cannot be used on out-of-state defendants.

The contrary authority which the court was referring to was Chronister, Boggs, and an unpublished decision entitled, Smith v. Bache Halsey Stuart Shields, Inc. Bache was written by the same judge who had written the Boggs opinion. Like Boggs, Bache held that Rule 4(c)(2)(C)(ii) did authorize out-of-state service. Thus, the Reno court was faced with having to decide whether to follow Collier, which by this time was squarely in line with the decisions reached by other federal courts, or whether to follow Boggs and Bache which represented binding opinions.

In order to resolve the conflict, the Reno court turned to the legislative history of Rule 4(c)(2)(C)(ii). It doing so it found that:

The intent of Congress in amending Rule 4 is clear . . . . There is

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70 Reno, 105 F.R.D. at 512.
79 Id.
79 Reno, 105 F.R.D. at 513.
nothing to indicate an intent on the part of Congress to make mail service under 4(c)(2)(C)(ii) available on an extraterritorial basis. In the absence of legislative intent to the contrary, we must conclude that 4(c)(2)(C)(ii) is subject to the territorial limits contained in 4(f). Because service by mail under 4(c)(2)(C)(ii) could not be used to serve defendants in this case, plaintiff is not entitled to costs for personal service pursuant to Rule 4(c)(2)(D).81

The day after the Reno court issued its opinion, another district court came to the same conclusion in Thermo-Cell Southeast, Inc. v. Technetic Industries, Inc.82 In that case, the court quashed the Rule 4(c)(2)(C)(ii) service because Georgia law did not authorize service by mail. The court came to this conclusion by relying on May and the legislative history of the Rule.83

The next court that was called upon to consider the scope of Rule 4(c)(2)(C)(ii) was a court sitting in the same district as the court which had decided May. In Union Carbide Corp. v. McKown Transportation Corp.,84 the plaintiff, a New York corporation, attempted to effect service on an Illinois corporation by using Rule 4(c)(2)(C)(ii). As in May, the defendant argued that service outside the state could not be made under Rule 4(c)(2)(C)(ii) because the New York state service rules did not permit such service.85 The plaintiff argued that the law regarding the scope of Rule 4(c)(2)(C)(ii) was unsettled, citing Chronister as support.

The court chose not to discuss Chronister, May or any of the other cases which previously had passed on the issue. Instead, it focused on the Second Circuit’s opinion in Davis v. Musler.86 Davis, which addressed the geographic limitations of Rule 4 when service occurred outside the forum state, held that state law, rather than federal law, was controlling.87 Davis, however, had involved

83 Id. at 1124.
84 No. 84 Civ. 3716 (MJL) (S.D.N.Y June 21, 1985) (LEXIS, Genfed Library, Dist file).
85 Id. The defendant based its argument on section 313 of New York’s Civil Practice Law, which provides that service outside the state upon a natural person (or his executor) who is either domiciled in the state or subject to the jurisdiction of the courts of the state is made in the same manner as service made upon such a person within the state. See N.Y. CIV. PRAC. LAW § 313 (McKinney 1985). Section 308 sets forth the various ways upon which service can be made on a natural person and service by mail, itself, is not included. See id.
86 713 F.2d 907 (2d Cir. 1983).
87 Id. at 913-14. Although the Second Circuit reached this conclusion by looking to New
Rule 4 (d)(1) rather than Rule 4 (c)(2)(C)(ii). Despite this fact, the court in *Union Carbide* held that the case before it was governed by *Davis* and could be changed only by the Second Circuit. The court stated:

Professor Siegel in his Practice Commentaries on Rule 4, opined that the 1983 amendments to Rule 4(e) granting federal litigants the right to use state longarm statutes for extraterritorial service, expressed a Congressional intention that the statutes govern amenability to service rather than method of service . . . . Therefore Siegel believes Rule 4(c)(2)(C)(ii) is an appropriate method of service for out of state defendants.

Although Professor Siegel's interpretation certainly has merit, this Court is of the opinion that departure from the holding of this Circuit in *Davis*, if made at all, should be made by the Circuit. Therefore, based on the present law of this Circuit, defendant's motion to quash service made pursuant to Fed. R. Civ. P. 4(c)(2)(C)(ii) is granted. Service on a foreign corporation under 4(e) must be made under the circumstances and in the manner provided by state law.\(^8\)

The next case to raise the issue was *Olympus Corp. v. Dealer Sales & Service, Inc.*\(^8\) Like the court in *Union Carbide*, the court in *Olympus* felt constrained by *Davis* to hold that extraterritorial service could not be made under Rule 4(c)(2)(C)(ii). Unlike *Union Carbide*, however, the court in *Olympus* also relied on *May* and on the legislative history of Rule 4(c)(2)(C)(ii) to reach its conclusion.\(^9\)

*Fogleman v. Aramco*\(^1\) involved an attempt by a plaintiff in Louisiana to serve a defendant in Texas by means of Rule 4(c)(2)(C)(ii). The court held that the Rule's provision could not be used in the case *sub judice*:

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\(^8\) *Union Carbide*, No. 84 Civ. 3716 (MJL) (S.D.N.Y. June 21, 1985) (LEXIS, Genfed Library, Dist file).


\(^1\) Id. at 304 n.2.

The rule was drafted to allow service by mail where personal service could otherwise be made under Rule 4(d)(1) [on individuals] or 4(d)(3) [on corporations]. As to corporations, such as ARAMCO, Rule 4(c)(2)(C)(ii) only allows service by mail where service could be made under 4(d)(3); that is, personally on the corporation's officer or agent within the state. Rule 4(f) sets forth the territorial limits of service under Rule 4(d) and thus also limits Rule 4(c)(2)(C)(ii) service to the territory of the state in which the district court is found or within 100 miles of the place in which the action is brought. Thus Rule 4(c)(2)(C)(ii) can only be used to serve a defendant who is amenable to personal service of process within the state where the Court is located. [citing San Miguel] . . . There is no evidence that defendant, ARAMCO, has an agent for service of process in Louisiana; therefore, Rule 4(c)(2)(C)(ii) cannot be used to serve ARAMCO.92

More recently, the issue was considered in Catalyst Energy Development Corp. v. Iron Mountain Mines, Inc.93 Like May and Union Carbide, which were also decided in the Southern District of New York, Catalyst held that under Rule 4(c)(2)(C)(ii), process may be served pursuant only to state law. Since New York State law did not authorize service by mail, the court found that service "whether personally or by mail, [had to be made] within the territorial limits of the state in which the district court is held."94

The scope of the Rule continued to be an issue in Antrim v. Jefferson-Pilot Corp.95 In that case, a plaintiff in Pennsylvania attempted to make service on a defendant in North Carolina by utilizing Rule 4(c)(2)(C)(ii). The defendant's associate general counsel signed and returned the acknowledgment form. Later, however, the defendant moved to quash the service pursuant to Rule 4(f). The court, relying on Olympus, Reno, and Daly, agreed with the defendant that service outside the forum state was not authorized by the Federal Rules. The court nevertheless found the plaintiff's proffered service proper because service by mail was authorized by Pennsylvania's long-arm statute.96

93 Id. at 428.
94 Id. at 428.
96 Id. (relying on Bromhall v. Rorvik, 478 F. Supp. 361, 364 (E.D. Pa. 1979)).
Finally, in *Kuehl v. Gasway Corp.*, one of the defendants moved to have the suit against it dismissed on the grounds that its predecessor had not been served properly and that service could not now be made because the statute of limitations had run.

The plaintiffs had begun their suit on October 15, 1984, one week prior to the running of the statute of limitations. On January 21, 1985, a copy of the summons and the complaint was received in Michigan by Thomas A. Jeffers, a person thought by the plaintiffs to have been the defendant's registered agent. Because Jeffers was not the defendant's agent, he did not sign and return the acknowledgment form.

The court granted the defendant's motion to dismiss. Noting that the plaintiffs had attempted to serve Jeffers pursuant to Rule 4(c)(2)(C)(ii), the court explained that there was doubt whether such service was available, since the suit was initiated in Wisconsin but the summons and complaint had been mailed to Jeffers in Michigan. In a footnote, the court cited the *Reno* case for the proposition that service under Rule 4(c)(2)(C)(ii) is not permitted outside the forum state.

The result in *Kuehl* is troubling. On the one hand, the issue of extraterritorial service was not squarely before the court. On the other hand, however, by suggesting that there was a question as to whether extraterritorial service could be made pursuant to Rule 4(c)(2)(C)(ii), the court was resurrecting an issue which had appeared to have been put to rest finally in *Reno*. As a result of *Kuehl*, however, the door to extra-territorial service may have been re-opened.

2. Using Rule 4(c)(2)(C)(ii) to Make International Service

The question of whether Rule 4(c)(2)(C)(ii) can be used to make service outside of the forum state has not stopped at the borders of the United States. Rather, in several cases, plaintiff's attorneys have attempted to use Rule 4(c)(2)(C)(ii) to make service abroad.

The Federal Rules of Civil Procedure address the problem of serving foreign parties in two different provisions of Rule 4. Rule 4(e), which as previously discussed, provides methods for serving

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98 Id. at 659.
99 Id. at 661 n.2.
parties who are not found in or are not residents of the forum state, was at one time the provision which governed foreign service. In 1963, however, the Supreme Court approved a new paragraph 4(i). Entitled, "Alternative Provisions for Service in a Foreign Country," it provides five methods of service in addition to the ones listed in 4(e). These methods are: (A) In such manner as prescribed by the law of the country in which service is made; (B) As directed by a foreign authority in response to a letter rogatory; (C) By making personal service; (D) By any form of mail requiring a signed receipt which has been sent by the clerk of the court in which the action is proceeding; or (E) As directed by the court.

Following the adoption of Rule 4(i), there occurred an important change in the law of internal service of process. On February 10, 1969, the Hague Convention became effective and further complicated extraterritorial service of process. Known officially as the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the Convention is now adhered to by 24 countries.

Article 10 of the Convention provides that service on a foreign national may be made in a variety of ways, including by mail. Many of the countries which have ratified the Convention, how-

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100 See Fed. R. Civ. P. 4(e).
103 20 U.S.T. 361; T.I.A.S. No. 6638; 658 U.N.T.S. 163. The Convention was done at the Hague on November 15, 1965. Id.
104 See id. Countries which are parties to the Convention include: Barbados, Belgium, Botswana, Cyprus, Czechoslovakia, Denmark, Egypt, Finland, France, Greece, Israel, Italy, Japan, Luxembourg, Malawi, the Netherlands, Norway, Portugal, Seychelles, Sweden, Turkey, the United Kingdom, the United States, and West Germany.

105 Id. Article 10 of the Convention states: Provided the State of destination does not object, the present Convention shall not interfere with—
(a) the freedom to send judicial documents, by postal channels, directly to persons abroad,
(b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,
(c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

Id.
ever, have objected to Article 10. Validity of the service is questioned when a plaintiff in a United States court seeks to make service on a foreign national by having the clerk of the court mail the summons and complaint to the defendant in accordance with Rule 4(i), and the defendant is a citizen or resident of a country which has ratified the Hague Convention but has objected to Article 10.

In Vorhees v. Fischer & Krecke, the Fourth Circuit Court of Appeals affirmed the district court's holding that such service was invalid. The court held that Rule 4(i) had been superseded by the Convention since the Rule came into effect in 1963 and the Convention had entered into force in 1969. In doing so, of course, court had done no more than apply the well-known statutory interpretation principle of “last-in-time.” Following this logic, Rule 4(c)(2)(C)(ii) would supersede the Convention, since the Rule was passed in 1983, fourteen years after the Convention came into force.

In Akzona Inc. v. E.I. Du Pont de Nemours & Co., Du Pont sought to bring a counterclaim against the plaintiff and its parent company, both of which were located in Holland. Du Pont made service in three different ways: by serving Akzona’s registered

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106 Id. Countries which have objected to all or part of Article 10 include: Botswana, Czechoslovakia, Denmark, Egypt, Finland, Israel, Japan, Luxembourg, Norway, Seychelles, Sweden, Turkey, the United Kingdom, and West Germany.
107 697 F.2d 574 (4th Cir. 1983).
108 See id. at 576.
109 See id. at 575-76. The court relied on the principle that the latter act of the sovereign controls if there is a conflict between two statutes or a statute and a treaty. See id. (citing Cook v. United States, 288 U.S. 102, 118-19 (1933) (subsequent treaty given effect over a prior, inconsistent federal law) and Whitney v. Robertson, 124 U.S. 190, 193-94 (1888) (later Congressional act upheld against earlier conflicting treaty)).
110 Two cases suggest that the answer is no. In Monroy v. Citibank, N.A., No. 84 Civ. 1040 (MJL) (S.D.N.Y. June 21, 1985) (LEXIS, Genfed Library, Dist file), the court indicated that whether Rule 4(c)(2)(C)(ii) could be used to make international service depended upon whether the law of the state in which the court was sitting permitted extraterritorial mail service. Thus, the court held that mail service was not available in the case before it because New York state law does not permit mail service. See id. The court did not discuss any 4(c)(2)(C)(ii) cases, and Monroy is not dispositive because the plaintiff effected personal service on the defendant in Venezuela at approximately the same time that it mailed service and the defendant admitted that personal service had been made. Similarly, in Harris v. Browning-Ferris Industries Chemical Services, Inc., 100 F.R.D. 775 (M.D. La. 1984), the court held that Rule 4(c)(2)(C)(i), which permits plaintiffs to serve process pursuant to any applicable state rule, did not supersede the Hague Convention. The court explained that although Rule 4(c)(2)(C)(i) was enacted after the Hague Convention, the general nature of Rule 4(c)(2)(C)(i) had to yield to the specific regime set up by the Hague Convention. Harris, 100 F.R.D. at 777-78.
agent in Delaware, by effecting service on the Delaware Secretary of State, and by mailing process under Rule 4(c)(2)(C)(ii). The district court chose not to address the question of whether Rule 4(c)(2)(C)(ii) could be used to make service abroad. Instead, the court held that the adequacy of the service was governed by Delaware state law, and therefore 4(c)(2)(C)(ii) was inapplicable.\textsuperscript{112}

In \textit{CeCom Inc. v. Micro Tempus, Inc.},\textsuperscript{113} the plaintiff sought to serve Micro Tempus, Inc. (MTI), a Canadian defendant, by mailing a copy of the summons and the complaint by registered mail. MTI received the mailing but did not respond to it. Instead, it sought \textit{inter alia} to have the case dismissed on the ground of insufficient service. The district court denied the motion to dismiss and held, \textit{sub silentio}, that Rule 4(c)(2)(C)(ii) could be used to serve parties in a foreign country. The court explained that after MTI failed to return the acknowledgment form, the plaintiff was obligated to make personal service pursuant to Rule 4(c)(2)(C)(ii).\textsuperscript{114} Thus, the court implicitly assumed that the Rule could be used to make foreign service.

A similar result was reached in \textit{Ackermann v. Levine}.\textsuperscript{115} In that case, a group of German plaintiffs attempted to make service in the United States on a New York defendant in order to acquire personal jurisdiction in a suit brought in West Germany. When the New Yorker refused to appear in the West German suit, the plaintiffs took a default judgment and then attempted to enforce that judgment in New York. In determining whether the default judgment could be enforced, the New York court focused on the Hague Convention. The court also discussed Rule 4(c)(2)(C)(ii), but held that the Rule was not applicable because the summons and complaint had been served prior to the effective date of the new rule. As authority, the court cited several domestic cases.\textsuperscript{116} Although the court did not resolve the question of whether Rule 4(c)(2)(C)(ii) could be used to make service abroad, the court's decision apparently supports the use of the Rule in international litigation.

\textsuperscript{112} \textit{Id.}
\textsuperscript{113} No. 4-84-608 (D. Minn. Nov. 5, 1984) (LEXIS, Genfed library, Dist file).
\textsuperscript{114} \textit{Id.}
\textsuperscript{116} \textit{Id.} at 644.
Finally, in Zisman v. Seiger, the court extensively discussed the interplay between Rule 4(c)(2)(C)(ii) and the Hague Convention. In that case, the defendant sought to implead a party in Japan by effecting service on the party's wholly-owned subsidiary located in Illinois. The Japanese party contended that service pursuant to Rule 4(c)(2)(C)(ii) was contrary to the Hague Convention. The court rejected this argument and concluded that the Convention was not applicable to attempts at service made within the United States. Having decided that the Convention did not apply, the court went on to analyze whether service had been properly made under Rule 4(c)(2)(C)(ii). Since the defendant had made personal service on the Japanese company by making service on a long-time employee of the subsidiary, the court found that service on the Japanese company complied with Rule 4(c)(2)(C)(ii).

C. The Need to Follow the Enclosure Requirements

As previously noted, a party that wishes to use Rule 4(c)(2)(C)(ii) is required to send the defendant a copy of the summons, a copy of the complaint, two copies of a notice and acknowledgment form which substantially conforms to Form 18-A, and a postage-paid return envelope. In some instances, however, plaintiff's counsel has neglected to include one or more of these items. Such oversights have led some defendants to argue that, even if service pursuant to the Rule is otherwise proper, the failure to enclose the required item voids the service.

This argument was first addressed in Morse v. Elmira Country Club. In Morse, the plaintiff's attorney had incorrectly transcribed the contents of Form 18-A. The form was supposed to state: "if you do complete and return this form, you . . . must answer the complaint within 20 days." Due to a transcription error, the form the defendant received said: "if you do not complete and return this form, you . . . must answer the complaint within 20 days." The defendant contended that the mistake made the form incorrect and confusing. The Second Circuit disagreed:

We are very reluctant to nonsuit a plaintiff for so minor and obvi-

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118 See id. at 199-200 (relying on Lamb v. Volkswagonwerk Aktiengesellschaft, 104 F.R.D. 95, 97 (S.D. Fla. 1985)).
119 106 F.R.D. at 200-01.
120 752 F.2d 35 (2d Cir. 1984).
ously incorrect a deviation. Rule 4(c)(2)(C)(ii) supports this conclusion, since it requires only substantial compliance with the form, and not an absolutely perfect rendering. Moreover, plaintiff's error should have made defendant more alert than would the version contained in the form; this is not a case in which a deviation from the form lulled the recipient into inaction. This single, minor, apparently unintentional deviation, which had no significant impact on defendant's conduct, is not ground for voiding the mail service.\[1\]

_Madden v. Cleland\[2\]_ was a section 1983 suit in which the plaintiff alleged that he had been deprived of his right to vote.\[3\] The plaintiff attempted to make service by mail on the defendants by using Rule 4(c)(2)(C)(ii). In the course of its decision, the court noted that:

The attempt under that provision was defective from the start since the plaintiff's attorney erroneously enclosed a "civil process return," a form to be used for personal service by a process server, instead of Form 18-A, the "Notice and Acknowledgement of Service by Mail." The plaintiff's attorney signed the inapplicable forms in the space for the process server's signature and dated them July 3, 1984. The governor and the assistant secretary of state signed and dated the lower portion of the civil process returns as acknowledgment of their receipt of the summons and complaint by mail.\[4\]

Because of the plaintiff's error, the court should have been forced into deciding whether to quash the service or not. However, the court found that it did not have to face the issue because:

In sum, the parties managed to press the wrong form into the right function. At any rate, the use of the wrong form no longer jeopardizes the effectiveness of service in the case _sub judice_, since the defendants waived any defect in service by filing a motion to dismiss under Federal Rule of Procedure 12(b)(6) without raising the defenses of insufficiency of the form of process or the service of process. See Federal Rule of Civil Procedure 12(h)(1).\[5\]

\[1\] _Id._ at 42 (citation omitted).
\[3\] _Id._ at 523.
\[4\] _Id._
\[5\] _Id._ Rule 12(h)(1) provides, _inter alia_, that defenses of insufficiency of process or insufficiency of service are waived if not raised at the appropriate time. See _Fed. R. Civ. P._ 12(h)(1).
The next case to deal with the enclosure requirements of the Rule was Griffin v. Argonne National Laboratory. Griffin was an employment discrimination case brought under Title VII and the Age Discrimination Act. Each time service was attempted by mail, the plaintiff's attorney failed to enclose the acknowledgment forms and return envelope as required by the Rule. The court, without much explanation, held that this failure meant that all of the plaintiff's efforts to effect service by mail were improper.

A slightly different set of facts emerged in Perkin Elmer (Computer Systems Division) v. Trans Mediterranean Airways, S.A.L. In Perkin Elmer, a case involving a claim for cargo damage in connection with an air shipment of goods from the United States to Saudi Arabia, the defendant did not return a signed Form 18-A. Instead, it sent a copy of a letter which the court described as follows:

On March 7, 1985, plaintiff's counsel received a copy of a letter dated March 5, 1985 addressed to defendant's attorneys. The letter was on defendant's letterhead and was signed “Betty Romeo, Claims/NY.” It stated in part: “Enclosed will [sic] find the Summons that we at Trans Mediterranean Airways received on March 04, 1985.” The Jamaica, New York address given for defendant was the same as that to which the plaintiff mailed process. The copy was sent by defendant’s claims clerk to plaintiff’s counsel in the postage prepaid envelope the latter had enclosed in its mailing of process. Defendant, however, has never returned the acknowledgment form that was provided by plaintiff . . . .

The defendant moved to have the service quashed on the ground that the letter did not conform substantially with Form 18-A, as required by the Rule. The court, however, found that the letter was an adequate substitute for the Form because:

On its face, the Rule does not require that the “acknowledgment of service” be the Form 18-A acknowledgment enclosed by plaintiff with the summons and complaint . . . . Form 18-A itself is intended to be illustrative only and need not be slavishly followed. Although the forms provided in the Appendix of Forms of the Federal Rules of Civil Procedure "are sufficient under the

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127 Id.
129 Id. at 57.
rules,” . . . , it is clear that they need not be used in *haec verba*. 1

The court in *Perkin Elmer* was wrong in its holding regarding Form 18-A for two significant reasons. First, Form 18-A requires the signer of the form to “declare, under penalty of perjury” that a copy of the summons and complaint have been received. The letter sent by the defendant’s employee apparently contained no such statement. The court did not discuss this omission, although it is possible that the court did not feel the omission critical because the letter was written in the normal course of business.

The second reason why the court’s decision was wrong is that the signer of a Form 18-A acknowledges receipt of both the summons and the complaint. The letter written by the defendant’s employee, however, only acknowledged receipt of the summons. Again, the court did not discuss this omission, possibly because it chose to read the term “summons” in the letter to include both the summons and complaint.

In *Norlock v. City of Garland*, 1 a civil rights action, the plaintiff attempted to make service in accordance with Rule 4(c)(2)(C)(ii). The plaintiff’s attorney, however, failed to enclose with the summons and complaint two copies of Form 18-A and a stamped, self-addressed envelope. Instead, the plaintiff’s attorney enclosed a cover letter. The court held that:

The cover letter enclosed by Norlock’s attorney makes no mention of the need to return a sworn acknowledgment. Therefore, it cannot be seriously contended that this letter “conform[ed] substantially to form 18-A.” This is not an instance of a single error in the acknowledgment form, “minor and obviously incorrect” such as the addition of a single word on the form that might be insubstantial and overlooked, nor the omission of only the return envelope. No fault is attributable to the defendant as it might be had he received the notice and acknowledgment form and refused to return the acknowledgment.1

*United States Automobile Association v. Cregor* 13 was a declaratory judgment action. The plaintiff’s attorney failed to send to

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10 Id. at 58. (citation omitted).
11 768 F.2d 654 (5th Cir. 1985).
12 Id. at 656-57 (footnotes omitted).
the defendants the required return envelope. The court, however, found that this error was not grounds for vacating the service because the plaintiffs error was an oversight which did not greatly prejudice the defendant. Since adequate notice was given, "this technical failure created no basis for dismissal of the action."134

In Bruno v. Sweeney,135 a diversity case, the defendants alleged that the plaintiffs' attorney had served only one copy of Form 18-A and had failed to include the prepaid return envelope. The court ruled that the issue had become moot, however, because the plaintiffs later undertook other service which the court found proper.136

More recently, in Bernard v. Strang Air, Inc.,137 the plaintiffs mailed to the defendant, by certified mail, return receipt requested, a copy of the summons and the complaint. Apparently planning to use the certified mail return receipt as an acknowledgment, the plaintiffs did not include the self-addressed, prepaid return envelope and the notice and acknowledgment forms. The court held that because the plaintiffs had apparently attempted to substitute the certified mail return receipt for the acknowledgment form, the service had to be quashed.138 The court explained that the Rule requires the plaintiff to send "the prescribed materials to the defendant" and failure to comply results in ineffective service of process.139

Finally, in Watts v. Lyon,140 the plaintiff forgot to enclose the prepaid return envelope and the acknowledgment notices. The court explained that these omissions caused the plaintiff's attempted service to be invalid. The court concluded that the plaintiff did not fulfill the requirements of Rule 4(c)(2)(C)(ii) by mailing only a copy of the summons and complaint.141

D. The Need to Receive the Returned Acknowledgment Form

Assuming that the plaintiff who wishes to use Rule

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134 Id. at 1055.
136 See id.
138 See id. at 337-38.
139 Id.
141 Id. A further problem with plaintiff's service was that he was unable to prove that the person process was mailed to was even the defendant's agent. See id.; infra notes 179-80 and accompanying text.
4(c)(2)(C)(ii) to effect service gets past the problem of the Rule's effective date, remembers to include all of the required enclosures, and to be on the safe side, does not attempt to use the Rule to make service outside of the forum state, the next set of potential problems the plaintiff may encounter concerns the defendant's failure or refusal to sign and return the acknowledgment form.

Intrinsic to service by mail under Rule 4(c)(2)(C)(ii) is receipt by the plaintiff of the defendant's signed acknowledgment form. When the form is not returned, has the plaintiff effected service on the defendant? In Morse v. Elmira Country Club, the Second Circuit held that Rule 4(c)(2)(C)(ii) does not render void a "received-but-unacknowledged mail service[;] service may be effective without a return." However, in Delta Steamship Lines, Inc. v. Albano, the Fifth Circuit held that the defendant's return of the acknowledgment form was critical to effective service under the Rule. The court concluded that because Rule 4(c)(2)(C)(ii) was an integrated procedure for establishing in personam jurisdiction as well as service of process, the defendant's return and acknowledgment was essential. Another court was more blunt. In Wise v. Commissioner, the court unequivocally stated that "there is no valid service where an acknowledgment form is never signed and returned."

The conflicting positions taken by the Second and Fifth Circuits are represented in a number of cases in which the plaintiff has argued that the defendant's failure or refusal to sign and return the acknowledgment form was willful. In addition, several plaintiffs have argued that the acknowledgment form was signed and returned by someone who should be deemed the agent of the defendant. These cases have led to divergent results, even though Rule 4(c)(2)(C)(ii) itself is quite clear. The Rule states that if the defendant fails to return the acknowledgment form, the plaintiff is required to make personal service. When personal service is made, the plaintiff is then permitted to move for the cost of such

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142 752 F.2d 35 (2d Cir. 1984).
143 Id. at 39-40.
144 768 F.2d 728 (5th Cir. 1985).
145 Id. at 730.
147 Id. at 1127. The Wise court noted that there was no indication that plaintiff had ever sent the acknowledgment forms to the defendant. See id.
148 See infra notes 149-172 and accompanying text.
1. Defendants Who Willfully Refuse to Sign and Return the Form

The first case to raise and fully discuss the problem of defendants who ignore service under Rule 4(c)(2)(C)(ii) was *Billy v. Ashland Oil Inc.* On January 19, 1984, the plaintiff mailed a copy of the summons and complaint, along with the other required enclosures, to the defendant. After receiving the mailing, the defendant’s in-house counsel wrote a letter to its outside counsel which said in part: “It is our policy not to accept any service attempted under Rule 4(c)(2)(C)(ii) F.R.C.P. As soon as personal service is perfected on our registered agent, I will immediately notify you. Until that has been accomplished, please do nothing in the case.”

When the defendant failed to sign and return the acknowledgment form, the plaintiff sent another copy, this time by certified mail, return receipt requested. An authorized agent of the company signed and returned the postal service card. Upon receiving the postal service card, the plaintiff filed the card with the court, and when the defendant’s time to answer expired without the entry of a reply, the plaintiff sought and received a default judgment.

The defendant then moved to open the default judgment on the ground that the second notice sent by the plaintiff was improper because, having chosen to attempt service under Rule 4(c)(2)(C)(ii), the plaintiff thereafter was locked into making personal service. The court agreed with the defendant and vacated the default judgment. The court stated, “[n]owhere do the Federal Rules contemplate that a party may simply ignore pleadings it receives. . . . Actions of this character should certainly necessitate additional amendments to the Federal Rules in order to curb such abuses.”

Less than a week after the decision in *Billy*, another district court faced with the same problem came to a similar conclusion. In
Stranahan Gear Co., Inc. v. NL Industries, Inc., the plaintiff received a default judgment after an attempt at service pursuant to Rule 4(c)(2)(C)(ii) was ignored by the defendant. The court found that it had no choice but to vacate the default judgment. However, the court noted the facility with which "a defendant can frustrate the use of the inexpensive method of service provided in the recent amendments to Rule 4 by refusing to return the acknowledgment form."

In United States v. Jack Cozza, Inc., a court utilized a very traditional doctrine to circumvent the problem of a defendant who had refused to return the acknowledgment form. The federal government attempted to effect service pursuant to Rule 4(c)(2)(C)(ii) and later personally served the defendant. The defendant contended that it never received the mailed documents, and that service had not been effected within the 120-day time limit from date of filing. The court ruled that there was a presumption that the mailed service had been received by the defendant because, "[t]he mailing of a notice pursuant to standard office procedure creates a presumption that notice was received." The court found support for this ruling by pointing to a footnote in the Second Circuit's Morse decision: "In the absence of contrary indication we assume delivery in due course."

Reid v. Accutome, Inc. cited and followed Stranahan. In that case, the court found that the "defendant implicitly admits that it received a copy of the complaint and summons by mail, [but] it denies that it returned an acknowledgment of service to plaintiff as required by Rule 4(c)(2)(C)(ii)." Like the Stranahan court, the Reid court found that receipt of a signed acknowledgment form was a prerequisite to obtaining a default judgment. The Reid court stated that "[s]ervice . . . is not complete without the

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156 Id. at 252. In a later proceeding in the case, the Third Circuit approved the district court's finding regarding the awarding of costs rather than the granting of a default judgment. See Stranahan Gear Co., Inc. v. NL Indus., Inc., 800 F.2d 53, 56-58 (3d Cir. 1986).
158 Id. at 267. But see Boykin v. Commerce Union Bank of Union City, 109 F.R.D. 344, 347 (W.D. Tenn. 1986) (attorney's standard office procedure insufficient evidence to create presumption that defendant actually received mailing).
159 Id. at 267 (quoting Morse v. Elmira Country Club, 752 F.2d 35, 36 n.2 (2d Cir. 1984)).
161 Id.
return of the acknowledgment of service, and the plaintiff must resort to another method of service if the defendant fails to return the acknowledgment. Failure to return an acknowledgment is not grounds for the entry of a default judgment."

In *Bernard v. Strang Air, Inc.*, the plaintiff did not receive back the acknowledgment form. The court held that this was fatal to mail service and therefore required the plaintiff to effect personal service. The court stated that “receipt of the acknowledgment is a necessity for effective service by mail,” and that the certified mail method used by the plaintiff was contrary to congressional mandate.

The harshest judicial rebuke of a defendant who ignored a mailing under Rule 4(c)(2)(C)(ii) came in *United States ex rel. Itri Brick & Concrete Corp. v. Union Indemnity Insurance Co. of New York*. In that case, one of the defendant insurance companies ignored the plaintiff’s mailing of service. The plaintiff then made personal service upon the defendant. The defendant moved to have the service quashed upon the grounds that the personal service was defective.

Finding that the plaintiff’s personal service was proper, the court refused to quash the service. In discussing the defendant’s contention that the plaintiff had failed to follow the alternative service provisions of Rule 4(c)(2)(C)(ii), the court stated:

Once again a defendant has sought to delay and add to litigation expense by taking advantage of the somewhat confusing language of Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure. In the two years following the 1983 amendments this practice has already produced a long line of case law. [citations omitted] Under the Federal Rules as originally promulgated by the Supreme Court, the question now posed would not have arisen. [citation omitted].

Because defendant’s affirmative defense was not literally frivolous, no Rule 11 sanctions are imposed. The somewhat baroque structure by which the Federal Rules partially incorporate state law may have been the source of honest confusion. The court, nevertheless, deplores what seems to have been a practice of ignoring service by mail in an attempt to defeat jurisdiction and

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164 Id. at 338.
the congressional intent to reduce expense. Such an attitude is especially dubious in the regulated insurance industry that serves an important public need. The public ultimately pays the cost of this unnecessary motion practice.\(^{166}\)

In the past, case law clearly indicated that a plaintiff who was unsuccessful in making service by mail must additionally effect personal service. Recent cases, however, have departed from this rule. In *Deshmukh v. Cook*,\(^ {167}\) the plaintiffs attempted to serve the defendants under Rule 4(c)(2)(C)(ii) by mailing process to the offices of the defendants. The defendants received the mailing but refused to acknowledge service. Since the plaintiffs did not attempt to follow up with personal service, the defendants argued that they had not been properly served.\(^ {168}\) The court disagreed. Since the defendants did not deny that they had received the documents by mail and did not provide any explanation for failing to return the acknowledgments, the court held that the plaintiffs had made valid and effective service and concluded that “a recalcitrant defendant should not be accorded a windfall” for refusing to respond to the plaintiffs’ attempts of service by mail.\(^ {169}\)

More recently, in *Systems Industries, Inc. v. Han*,\(^ {170}\) another district court came to the same conclusion. In *Han*, the plaintiff attempted to serve the defendants by a mailing pursuant to Rule 4(c)(2)(C)(ii). The defendants received the copies and signed a postal receipt for it, but refused to return the acknowledgment form to the plaintiff. The plaintiff then moved for a default judgment and sent copies of its motion for entry of a default judgment to the defendants. The defendants, however, refused to open these envelopes.\(^ {171}\)

The plaintiff was granted the default judgment and a hearing was scheduled to determine damages. This prompted the defendants to become involved in the suit. They sought to have the default judgment vacated on the grounds that the plaintiff had never made proper follow up personal service as required by the Rule. The court disagreed, holding that where a defendant actually re-

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\(^{166}\) *Id.* at 156. The court did order the defendant to pay the cost of personal service. See *id.*


\(^{168}\) *Id.* at 958-99.

\(^{169}\) *Id.* at 959.


\(^{171}\) *Id.*
ceives the mailed notice, follow up personal service is not required. The court wrote:

There is no indication that Congress intended to provide defendants who actually received the documents with a choice as to whether they would prefer service by mail or in person.

Moreover, to construe the rule as defendants have done would frustrate the very purpose of allowing service of process by mail. To allow defendants to insist on personal service of process would be to grant defendants yet another instrument of delay in an already ample arsenal, and there is no evidence that Congress intended such a result.\footnote{Id.}

The results reached in \textit{Cook} and \textit{Han} are interesting for two reasons. First, they clearly contradict the language of Rule 4(c)(2)(C)(ii) which states that a failed mail service requires subsequent personal service. Second, the results were reached in two districts which had already considered many Rule 4(c)(2)(C)(ii) cases and had previously indicated a willingness to abide by the text of the Rule.\footnote{83 Civ. 8862 (CSH) (S.D.N.Y. Oct. 15, 1985) (LEXIS, Genfed library, Dist file).} Thus, whether \textit{Cook} and \textit{Han} are momentary aberrations or whether they reflect the future is an open issue.

2. Defendants Whose “Agents” Sign and Return the Form

A number of cases have arisen in which the plaintiff has received the returned acknowledgment form, but the form has been signed by someone other than the defendant. The first case to address this situation was \textit{Day v. Commissioner of Correction}.\footnote{See \textit{Reid v. Accutome, Inc.}, No. 85-3592 (E.D. Pa. Oct. 30, 1985) (LEXIS, Genfed library, Dist file)(alternate service required); United States v. Jack Cozza, Inc., 106 F.R.D. 264, 266-68 (S.D.N.Y. 1985) (personal service required).} In \textit{Day}, a prison inmate brought a section 1983 action against a number of prison officers and attempted service pursuant to Rule 4(c)(2)(C)(ii). Two of the defendants did not return the acknowledgment, while a third defendant’s acknowledgment form was returned for him by the Commissioner of the Corrections Department. The court dismissed the complaint against the first two defendants, finding that return of the acknowledgment form or personal service was a prerequisite to the court’s jurisdiction over a defendant.\footnote{Id.} As to the third defendant, the court dismissed the complaint against him on the grounds that there was no evidence...
in the record that the Commissioner had been appointed by the
defendant as his agent for service of process and that it did not
appear that she was authorized by law to receive service of process
on his behalf.\footnote{6}

An even more bizarre set of facts was present in \textit{Anderson v.}
\textit{Stevas}.\footnote{177} In \textit{Anderson}, the plaintiff attempted to effect service on,
among others, the assistant clerk of the United States Supreme
Court. When the plaintiff's papers reached the Supreme Court, the
Court's mailroom personnel, rather than the assistant clerk him-
self, stamped and returned the acknowledgment. The \textit{Anderson}
court found that the mailroom's stamp was insufficient because
Rule 4(c)(2)(C)(ii) requires the defendant himself to sign the
acknowledgment.\footnote{7}

The most recent case addressing this issue is \textit{Watts v. Lyon}.\footnote{178}
In \textit{Watts}, the plaintiff's process server attempted to serve the de-
fendant, a policeman, by sending a copy of the summons and com-
plaint by certified mail to the Fraternal Order of Police ("FOP").
The FOP received and signed the postal receipt card. The plaintiff
argued that this constituted effective service on the defendant.
However, the court disagreed, explaining that the FOP had not
been shown to be defendant's agent. The court stated that there
was no showing that the person who signed the summons and com-
plaint was an agent authorized to receive service of process on the
defendant's behalf. The court refused to infer from these facts that
the individual was an agent authorized to receive service of process
on behalf of the defendant.\footnote{180}

\section*{E. The Right to Shift Service Devices}

1. Plaintiffs Who Initially Use Rule 4(c)(2)(C)(ii) and Are
   Successful

In an interesting case, a plaintiff who had been successful at
serving the defendant under Rule 4(c)(2)(C)(ii) was confronted
with the argument that he also had a duty to serve the defendant
by state service methods.

\footnotesize{\footnote{176} Id.}
\footnotesize{\footnote{177} 625 F. Supp. 1244 (D.D.C. 1985).}
\footnotesize{\footnote{178} Id. at 1245-46 & n.3.}
\footnotesize{\footnote{179} No. 84-2593 (E.D. Pa. May 28, 1986) (LEXIS, Genfed library, Dist file).}
\footnotesize{\footnote{180} Id. The court also discussed the plaintiff's failure to enclose the required acknowl-
edgment forms in the mailing. \textit{Id.; see supra} notes 140-41 and accompanying text.}
McDougald v. Jenson\textsuperscript{181} involved a complicated child custody battle in which the father attempted to serve the mother by means of Rule 4(c)(2)(C)(ii). When that failed, he effected personal service on her. On appeal, the mother conceded that service was made as required by the Rule, but argued that this was insufficient because such service did not comply with the applicable Florida long-arm statute. The Eleventh Circuit disagreed, explaining that when service is made pursuant to Rule 4(c)(2)(C)(ii), there is no requirement that such service "also satisfy the requirements of the state long-arm statute."\textsuperscript{182}

McDougald is a particularly interesting case because it was decided four days after Academy Life Insurance Co. v. Roth.\textsuperscript{183} In Academy, the plaintiff had successfully served the defendant pursuant to Rule 4(c)(2)(C)(i), which permits a party in federal court to make service pursuant to a state statute. The defendant argued that service should also have been made under Rule 4(c)(2)(C)(ii). The court rejected this argument, explaining that, "Rule 4(c)(2)(C)(i) and Rule 4(c)(2)(C)(ii) are alternate means to make service upon individuals."\textsuperscript{184}

2. Plaintiffs Who Use Rule 4(c)(2)(C)(ii) and Are Not Successful

May a plaintiff shift service devices when initial attempts to serve under Rule 4(c)(2)(C)(ii) fail, or is the plaintiff constrained to use the Rule after initially choosing to effect service under its terms? Rule 4(c)(2)(C)(ii) does require that personal service be made if the defendant does not sign and return the acknowledgment form within twenty days. However, some plaintiffs have argued that a failed attempt at mail service under Rule 4(c)(2)(C)(ii) does not preclude other avenues of service, such as service by publication. Defendants, on the other hand, have argued that, having chosen its path, the plaintiff's subsequent course is governed solely by the Rule.

This question, of course, is opposite to the question posed above in the McDougald case. The first case to discuss this issue

\textsuperscript{181} 786 F.2d 1465 (11th Cir. 1986).
\textsuperscript{182} Id. at 1468, 1487. The mother apparently relied on Federal Rule 4(e), which the court held only permits and does not require out-of-state service pursuant to the state's long-arm statute. See id. at 1487; Fed. R. Civ. P. 4(e).
\textsuperscript{183} No. 84-4989 (E.D. Pa. Apr. 17, 1986) (LEXIS, Genfed library, Dist file).
\textsuperscript{184} Id. 
was Packard Press Corp. v. Com Vu Corp. In Packard, the plaintiff moved for, and received, a default judgment after the defendant failed to return the acknowledgment form. The defendant then moved to vacate the default judgment. The plaintiff argued that as mail service had not been made pursuant to Rule 4(c)(2)(C)(ii) rather than pursuant to the Pennsylvania long-arm statute, the default judgment should not be vacated because no follow up personal service was required. The court did not rule on the plaintiff's contention. Instead, the court held that since the defendant had not acted in a culpable fashion, vacating the default was proper.

In FDIC v. Sims, the plaintiff attempted service by mail, which remained unclaimed at the post office and was eventually sent back to the plaintiff. The plaintiff's attorney then asked the court to permit service by publication and subsequently filed an affidavit with the court alleging that the failure of the defendant to claim the mail was proof that the defendant was secreting herself and avoiding service. The court noted that the affidavit filed by the plaintiff's attorney did not state the contents of the envelope which had been mailed to the defendant, and also did not state whether the service was made in accordance with Rule 4(c)(2)(C)(ii). The court explained that:

> [I]f a form 18-A was here sent by the FDIC, it thereafter locked itself into the only subsequent mode of service, namely, actual personal delivery of the summons and complaint on defendant, a mode of service which admittedly has not been attempted, much less accomplished, here. Therefore, if form 18-A was mailed, there is no valid service in this case, and FDIC must follow the mandate of Rule 4(d)(1).

Because the court could not determine from the record whether Form 18-A had been included, the court considered whether the plaintiff had actually attempted service pursuant to state procedures under Rule 4(c)(2)(C)(i). The court found that the plaintiff, even if he had not initially elected Rule 4(c)(2)(C)(ii) and was therefore not bound by the mandate of that rule, had still failed to comply with applicable state rules, and had not made ef-

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186 Id. at 75. The court did reject, however, the defendant's contention that the court lacked in personam jurisdiction. Id. at 75-76.
188 Id. at 794.
effective service.\textsuperscript{189}

Subsequent to Sims came Armco, Inc. \textit{v. Penrod-Stauffer Building Systems}.\textsuperscript{190} In Armco, the plaintiff attempted to effect service pursuant to Rule 4(c)(2)(C)(ii). When the defendant failed to acknowledge the service, the plaintiff argued that he had made good service under Maryland state law. The Fourth Circuit rejected the plaintiff's contention. Specifically, the court found:

The attempted service in this case was unequivocally made pursuant to Federal Rule 4(c)(2)(C)(ii). When no acknowledgment was received within twenty days, that rule itself required that service be made upon this corporate defendant under subparagraph (A) or (B) in the manner prescribed by subdivision (d)(3) [of Rule 4], which provide for personal service upon an agent of the corporate defendant. Once service is attempted under Rule 4(c)(2)(C)(ii), service of process in accordance with state law, as otherwise authorized by 4(c)(2)(C)(i), is not permissible.\textsuperscript{191}

\textit{Billy v. Ashland Oil, Inc.}\textsuperscript{192} was the next case to consider the issue. In Billy, the defendant refused to return the acknowledgment form. The plaintiff then moved for and received a default judgment, without first attempting to make personal service. Relying on Sims, the court vacated the default judgment, writing in part that, "[w]hen [p]laintiff did not receive the Notice and Acknowledgement forms after the first attempted service, having elected to proceed under Rule 4(c)(2)(C)(ii), personal service was mandatory."

A similar result was indicated in \textit{Henry v. Glaize Maryland Orchards, Inc.}\textsuperscript{194} There the court raised \textit{sua sponte} the hypothetical issue of whether personal service would have to be carried out by a plaintiff who received a signed acknowledgment from the defendant more than twenty days after the date of mailing. In particular, the court asked whether personal service would be required if the acknowledgment was returned on the twenty-first day after mailing. The court concluded that in such a situation, personal service would have to be carried out, even though such service would

\textsuperscript{189} See id. at 794-97.
\textsuperscript{190} 733 F.2d 1087 (4th Cir. 1984).
\textsuperscript{191} Id. at 1089.
\textsuperscript{193} Id. at 233.
\textsuperscript{194} 103 F.R.D. 589 (D. Md. 1984).
be “superfluous.” In addition, the court noted that requiring a plaintiff to make personal service in such a case would “defeat one of the primary purposes of the new mail service provision, that of simplifying service of process and reducing its cost to would-be litigants.”

In Griffin v. Argonne National Laboratory, the court, without any extended discussion or analysis, noted that the plaintiff was, “required under the rule to attempt service by other means when the Laboratory failed to respond to mail service within 20 days.”

In Norlock v. City of Garland, the Fifth Circuit also briefly discussed the issue. In Norlock, the plaintiff attempted mail service under Rule 4(c)(2)(C)(ii), but failed to enclose the required acknowledgment forms and return envelope and did not attempt to follow up with personal service. The defendant challenged the sufficiency of the service. Relying on Sims, the court stated: “by first essaying service by mail, he ‘thereafter locked [him]self into the only subsequent mode of service, namely, actual personal delivery. . . .’”

Subsequently, in Shuster v. Conley, the court relied on Billy in reaching the same conclusion. “[O]nce plaintiff has unsuccessfully attempted service by mail pursuant to Fed.R.Civ.P. 4(c)(2)(C)(ii), personal service is mandatory.” The court therefore refused plaintiff’s request for permission to serve by publication pursuant to state law under Rule 4(c)(2)(C)(i). The requirement that a plaintiff effect personal service after mail service under Rule 4(c)(2)(C)(ii) has failed received a particularly strong endorsement in In re Alexander Grant & Co. Litigation. In that case, the plaintiffs attempted to sue the partners of a national accounting firm for alleged violations of federal securi-

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106 Id. at 591.
108 Id. The court held that the plaintiff's service by mail was ineffective because he failed to include the required acknowledgment form. See id.
109 768 F.2d 654 (5th Cir. 1985).
110 Id. at 656-57 (quoting FDIC v. Sims, 100 F.R.D. 792, 794 (N.D. Ala. 1984)). Norlock was later specifically overruled by the Fifth Circuit on this point. See Mumana, Inc. v. Jacobson, 804 F.2d 1390, 1393 (5th Cir. 1986) (personal service not “automatically” required by Rule after service by mail fails since other authorized methods may be employed).
112 Id. at 757 (citing Billy v. Ashland Oil, Inc., 102 F.R.D. 230, 233 (W.D. Pa. 1984)).
113 Id. at 758.
ties laws. The firm consisted of approximately 470 partners, and the plaintiffs attempted to serve each partner by sending hundreds of individual notices under Rule 4(c)(2)(C)(ii). Only four acknowledgments were returned. The plaintiffs then asked the court to issue an order determining whether service by mail had been completed. The court refused and stated that although “[t]hese plaintiffs have been frustrated by their inability to obtain personal service and have incurred substantial expenses in their futile attempts . . . absent the return and filing of the defendants’ acknowledgments, mail service is insufficient.”

F. Deadlines in Connection with Rule 4(c)(2)(C)(ii)

One of the most vexing problems in using Rule 4(c)(2)(C)(ii) is the need to observe the various deadlines which surround the Rule. In particular, plaintiffs must be wary of the twenty-day deadline imposed by Rule 4(c)(2)(C)(ii) and the 120-day deadline imposed by Rule 4(j). In addition, there is a deadline contained in Rule 4(g) relating to the filing of proof-of-service, which does not state a specific deadline but which appears to imply an outside limit of 120 days.

1. The Twenty-Day Deadlines of 4(c)(2)(C)(ii) and Form 18-A

As a result of poor drafting, the twenty-day deadline actually refers to two different twenty-day periods. One twenty-day period is mentioned in Rule 4(c)(2)(C)(ii) itself. The Rule states that if the sender does not receive an acknowledgment of service “within 20 days after the date of mailing, service of such summons and complaint shall be made [by personal service].” Form 18-A also refers to a twenty-day period, but it is not the same twenty-day period mentioned in the Rule. The notice part of the Form states, “You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within twenty days.” Thus, while the Rule measures the twenty days from the time the sender first mails the Form, the Form measures the twenty days from the time the recipient first receives the Form.

The inconsistency between the Rule and the Form has caused problems when a plaintiff, who has followed up an unsuccessful attempt at service by mail with personal service, moves for the costs

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204 Id. at 530, 532.
of personal service under Rule 4(c)(2)(D). In Henry v. Glaize Maryland Orchards, Inc., the court stated:

Rule 4(c)(2)(D), strictly construed, would permit the costs of subsequent personal service to be levied against a defendant who fails to “complete and return [the form 18-A notice and acknowledgment] within 20 days after mailing[.]” Yet form 18-A only requires that it be completed and returned to the sender “within 20 days.” No specific reference to the date of mailing as being the first of the 20 days is set out in full therein—indeed, the Rule is not even specifically cited to the party being served. Thus, some doubt exists as to the proper method to be employed when computing time under Rule 4(c)(2)(D).

A recent case that considered the twenty-day requirements contained an unusual fact pattern. Unionmutual Stock Life Insurance Co. of America v. Beneficial Life Insurance Co. concerned alleged breaches of a reinsurance agreement. The contract called for disputes to be resolved through arbitration to be held in Portland, Maine. In December 1984, the defendant attempted to rescind the agreement on the ground that the contract had become frustrated. In response, the plaintiff filed a petition on January 14, 1985, seeking an order directing the parties to submit to arbitration the issue of frustration. The plaintiff gave notice of its petition by sending to the defendant by registered mail, return receipt requested, a copy of the summons and petition together with acknowledgment forms pursuant to Rule 4(c)(2)(C)(ii). The postal receipt indicated that the defendant received the mailing on January 18, 1985. On February 1, 1985, counsel for the defendant signed and mailed back Form 18-A.

Also on February 1, 1985, a hearing was held before a magistrate who granted the plaintiff’s petition and ordered the parties to arbitration. The district court, making de novo determinations, also ordered the parties to arbitration. The defendant then ap-
pealed to the First Circuit. One of the issues which the First Circuit addressed was whether the defendant had received timely notice of the hearing. Under Rule 4(c)(2)(C)(ii), it appeared that the hearing had been held too soon. Under section 4 of the Federal Arbitration Act ("FAA"), however, only five days notice is required. The plaintiff contended that whether notice was timely should be determined under the FAA, while the defendant argued that timeliness had to be determined under the Federal Rules because the plaintiff had opted to make service in accordance with Rule 4(c)(2)(C)(ii). The First Circuit agreed with the plaintiff.

The court concluded that while the FAA provided that service under it was to be made in the manner provided by the Federal Rules, this referred only to the manner in which notice is sent and not to the specific time provisions of the Federal Rules. The court next addressed the fact that the plaintiff used Form 18-A. The court found that because the plaintiff had coupled its petition for arbitration with a complaint for declaratory judgment, the twenty-day period of the Federal Rules applied only to the underlying complaint and did not extend to the petition. Thus, while an answer to the complaint was not due until February 20, 1985, a response to the petition could be made due any time after January 23, 1985.

2. The Unspecified Deadline of Rule 4(g)

Rule 4(g) states that after service is made, the party making service must file an affidavit to that effect with the court. In cases where service has been made pursuant to Rule 4(c)(2)(C)(ii), the Rule directs that, "return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision."

In Morse v. Elmira Country Club, the plaintiff attempted to make service by mailing process to the defendant pursuant to Rule 4(c)(2)(C)(ii). When the defendant refused to acknowledge the ser-

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209 Id. at 525-26.
212 See id.
213 See Fed. R. Civ. P. 4(g).
214 752 F.2d 55 (2d Cir. 1984).
vice, the plaintiff effected personal service. In the course of its opinion, the Second Circuit considered the effect of Rule 4(g) on Rule 4(c)(2)(C)(ii) service. The court concluded that when the plaintiff's mail service was not acknowledged by the defendant, then:

It may well be that, under the literal terms of Rule 4(g), plaintiff could not make proof of service without the subsequent personal service. However, service may be effective without a return. Rule 4(g) provides that “[f]ailure to make proof of service does not affect the validity of the service.” [citation omitted] . . . The apparent purpose of the second service—to provide a foundation for the return—is another indication that it is irrelevant for valid and effective service.218

In Zisman v. Sieger,216 the court provided further comment on the interplay between Rules 4(c)(2)(C)(ii) and 4(g). Relying heavily on Morse, the court explained that the purpose of Rule 4(g) was to make clear that the defendant had to receive actual notice of the suit. Thus, if the mailed service under Rule 4(c)(2)(C)(ii) does not succeed, a plaintiff must effect personal service. In the court's opinion, Rule 4(g) forces the plaintiff to undertake personal service if the acknowledgment form is not returned by the defendant.217 However, the court then noted that if the defendant had actual notice of the suit from the mailed service, failure to return the acknowledgment form would not invalidate the mailed service. In Zisman, the third-party defendant had refused to return the acknowledgment form but knew of the suit through its wholly-owned subsidiary. In light of this, the court held that the defendant could not “claim that such service is ineffective merely because it refused to return the acknowledgement.”218

3. The 120-Day Deadline of Rule 4(j)

Included in the changes made to Rule 4 by Congress in 1983 was the requirement that service on a defendant be completed by the plaintiff within 120 days of the filing of the complaint with the court.219 Prior to 1983, a flexible standard was used, which one

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215 Id. at 36, 39-40.
217 See id. at 200.
218 Id. at 200.
219 Rule 4(j) states:
If a service of the summons and complaint is not made upon a defendant within
writer described as resembling a tall tree swaying in a high wind. Rule 4(j) states that its 120-day requirement does not apply when service is being attempted on a party in a foreign country. In addition, the Rule provides the court with discretion to extend the time past 120 days if there is good cause shown. In addition, since the dismissal contemplated by the Rule is without prejudice, the plaintiff is able to institute a new suit if the initial attempts to effect service fail within the time period proscribed.

To date, only a few cases have considered the interaction between Rules 4(c)(2)(C)(ii) and 4(j). In Cool v. Police Department of the City of Yonkers, the plaintiff filed a complaint in March, 1976. In December, 1979, the complaint was amended and in June, 1984 an attempt was made to serve a number of the defendants pursuant to Rule 4(c)(2)(C)(ii). These defendants refused to acknowledge the mail service. Before the plaintiff attempted personal service, the defendants moved for an order dismissing the suit on the grounds that the strictures of Rule 4(j) had not been met. The court agreed with the defendants and granted their motion. The court found that, "[s]ervice of the amended complaint was not attempted until four and one half years after it was filed. It is just this type of dilatory non-action that Rule 4(j) is designed to eliminate."

In Montalbano v. Easco Hand Tools, Inc., the third-party plaintiff attempted to effect service pursuant to Rule 4(c)(2)(C)(ii) on a third-party Japanese defendant by serving the defendant's supposed American agent. It was determined that the American defendant was not the agent of the Japanese defendant, and that the Japanese defendant had no contacts with New York. The Second Circuit therefore affirmed the dismissal of the third party plaintiff's complaint on the ground that the 120-day deadline of Rule 4(j) had passed. The third-party plaintiff argued that it

120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

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

220 Siegel, Practice Commentary, supra note 1, at 101.


222 Id.

223 766 F.2d 737 (2d Cir. 1985).
should not be held to the 4(j) deadline because of that Rule's foreign country exception. The court disagreed, noting that the third party plaintiff had "never attempted to serve process in a foreign country," and that the time limit was "especially" applicable "since [the third party plaintiff] has not exactly bent over backwards to effect service."²²⁴

The next case to juxtapose Rules 4(c)(2)(C)(ii) and 4(j) was Shuster v. Conley.²²⁵ In Shuster, the plaintiffs twice mailed service to the defendant in accordance with the procedures set forth in Rule 4(c)(2)(C)(ii). The mailings were returned marked "insufficient address," and plaintiffs' letter to the postal service requesting defendant's address was answered with "address not known." The plaintiff then contended that the defendant was attempting to avoid service by concealing his whereabouts. On the 122d day after the complaint had been filed, the plaintiff moved for an extension of time in which to effect service. The court denied the request, finding that the plaintiffs did not make a diligent effort to locate the defendant and noted that "[i]ndiscretion or heedless non-service is precisely what Rule 4(j) was designed to prevent."²²⁶

In a more recent case, Watts v. Lyon,²²⁷ the plaintiff attempted to effect service under Rule 4(c)(2)(C)(ii) by mailing a copy of the summons and complaint to what was believed to be an agent of the defendant, but who in fact was not. Moreover, the mailing was defective because it did not enclose all of the required forms. By the time these mistakes became known to the plaintiff, the statute of limitations had run. Thus, the defendant argued, inter alia, that the suit should be dismissed with prejudice.²²⁸

The court indicated that it was not clear on what basis the defendant thought the complaint should be dismissed, since the complaint had been filed prior to the running of the statute. The court noted, however, that if the defendant was arguing that the complaint should be dismissed because the plaintiff failed to comply with the Rule 4(j) due diligence requirement and that such due diligence was necessary to toll the statute, there was merit to such

²²⁴ Id. at 738, 740.
²²⁶ Id. at 757. The court also denied a request by plaintiffs for permission to serve by publication holding that "personal service is mandatory" once service by mail is unsuccessfully attempted under Rule 4(c)(2)(c)(ii). See id.
²²⁸ Id.
an argument. The court decided that, before dismissing the suit without prejudice under Rule 4(j), the plaintiff would be given an opportunity to "establish, by affidavit or other competent evidence, not only why he failed initially to serve [the] defendant properly, but also why, after defendant first raised the issue of insufficient service, he failed to perfect service upon defendant by alternative means." The court explained that it was giving the plaintiff this opportunity because the plaintiff was appearing pro se.

G. Rule 4(c)(2)(C)(ii) and Statutes of Limitation

The interplay between Rule 4(c)(2)(C)(ii) and the statute of limitations presents a timing problem which deserves special mention. The leading case in this area is Morse v. Elmira Country Club. In Morse, the plaintiff alleged that she had suffered injuries on June 28, 1980, while dancing on the defendant's dance floor. Her complaint was filed on May 23, 1983, and on May 25, 1983, her attorney mailed copies of the summons, complaint, and acknowledgment forms in accordance with 4(c)(2)(C)(ii). The defendant did not return the acknowledgment and, on August 5, 1983, defendant's attorney advised plaintiff's attorney that the acknowledgment form would not be returned. Plaintiff then personally served the defendant on August 30, 1983, three years and 63 days after the claim arose. In New York, the statute of limitations for torts is three years.

The defendant moved for dismissal on the ground that the claim was time-barred, and the district court dismissed the suit. On appeal, however, the Second Circuit reversed and remanded. The court noted that since this was a diversity suit, New York law governed the statute of limitations question and in New York, the statute is not tolled until service of the defendant has actually been made. The court also noted that the Federal Rules controlled the proper method of service and, therefore, held that service on the defendant had been achieved when the defendant received the

229 Id.
230 Id. For another case in which service was attempted pursuant to Rule 4(c)(2)(C)(ii) and the court lessened the requirements of Rule 4(j) because the plaintiff was proceeding pro se, see Pimperl v. Information Resources, Inc., No. 83 C 9562 (N.D. Ill. Dec. 4, 1984) (LEXIS, Genfed library, Dist file).
231 752 F.2d 35 (2d Cir. 1984).
232 Id. at 36; see also N.Y. Civ. Prac. L. & R. 214(5) (McKinney 1985).
unacknowledged mail service in May, 1983, prior to the running of the statute. The court rejected the defendant's contention that unacknowledged mail service was invalid and stated that the requirement in Rule 4(c)(2)(C)(ii) of follow up personal service was designed only so that the plaintiff could make proof of service pursuant to 4(g).233

The court supported this decision with an analysis of the history and purposes of Rule 4(c)(2)(C)(ii) and concluded:

Above all, strong factors of justice and equity push toward reading Rule 4(c) as providing for effective mail service where, as here, the recipient actually receives the mail service but refuses to acknowledge it properly. We have been given no adequate explanation why the acknowledgment was withheld here, nor any proper basis for nullifying mail service deliberately left unacknowledged. Certainly, the desire to harass or inconvenience plaintiff, or to delay the tolling of limitations, should not be an excuse or a reason to interpret the rule against plaintiff. There is, in other words, no rationale for allowing a properly served defendant deliberately and willfully to postpone the ending of limitations by simply refusing to do what the rule calls upon him to do. In short, Congress would have no ground for providing that proper and known mail service would become ineffective simply because the defendant, without reason, acted like the dog in the manger.234

A similar result was reached by the Eighth Circuit in Elisadle v. International Association of Machinists.235 In Elisadle, a former employee of TWA brought suit against both the airline for firing him, and against the union for refusing to continue to represent him in grievance proceedings against the airline. The plaintiff served both defendants under Rule 4(c)(2)(C)(ii).

The airline acknowledged receipt of the summons and complaint but the union did not, thereby forcing the plaintiff to personally serve the union. The union then moved for dismissal on the ground that the plaintiff had not effected service on either the airline or the union until approximately seven to eight months after being told by the union that it would no longer represent him. The

233 See 752 F.2d at 36-37; see also N.Y. Civ. Prac. L. & R. 203(a), (b) (McKinney 1985).
234 752 F.2d at 40. Cf. Bell v. London, 580 F. Supp. 62, 63-64 (S.D.N.Y. 1984) (same result reached on similar facts but pursuant to Rule 4(d)(8), service by mail rule which Supreme Court proposed but which Congress rejected in favor of Rule 4(c)(2)(C)(ii)).
235 792 F.2d 114 (8th Cir. 1986).
union contended that this violated the six-month statute of limitations of the National Labor Relations Act.\(^{236}\)

The court held for the plaintiff. Since the basis for plaintiff's suit was federal question jurisdiction, the court was able to take advantage of Rule 3 of the Federal Rules of Civil Procedure, which deems an action commenced for limitations purposes at the time the complaint is filed. Thus, unlike the Second Circuit which was forced to look at state law in *Morse* because of diversity jurisdiction, the Eighth Circuit was able to easily brush aside the defendant's claim that the suit was untimely by looking to federal law.\(^{237}\)

**H. Costs Recoverable by the Plaintiff**

In drafting Rule 4(c)(2)(C)(ii), Congress provided only one penalty for those situations where the defendant refuses or fails to acknowledge the plaintiff's mailing. If the plaintiff effects personal service after the defendant fails or refuses to send back the acknowledgment form, the plaintiff may recover the costs of personal service unless the defendant is able to show good cause for not awarding the plaintiff costs. This provision is contained in Rule 4(c)(2)(D).\(^{238}\) Among the issues raised by 4(c)(2)(D) are: 1) what constitutes good cause; 2) are any other penalties available; and, 3) do costs include attorneys' fees?

The first case to deal with Rule 4(c)(2)(D) was *Sally Beauty Co., Inc. v. Nexxus Products Co., Inc.*\(^{239}\) In *Sally*, the plaintiff effected service on the defendant by mail in accordance with Rule 4(c)(2)(C)(ii). The defendant's attorney refused to sign and return

\(^{236}\) See id. at 115; 29 U.S.C. §§ 160(b), 185 (1982). For other cases which have considered the statute's six-month statute of limitation where service was attempted by mail pursuant to Rule 4(c)(2)(c)(ii), see Ellenbogen v. Rider Maintenace Corp., 794 F.2d 768, 770-72 (2d Cir. 1986); Waldron v. Motor Coils Mfg. Co., 608 F. Supp. 658, 658-59 (W.D. Pa. 1985), aff'd, 791 F.2d 923 (3d Cir. 1986).


\(^{238}\) The Rule 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.


\(^{239}\) 578 F. Supp. 178 (N.D. Ill. 1984) (mem.).
the acknowledgment form unless he was granted additional time by the plaintiff to appear. Instead of granting additional time, the plaintiff effected personal service. Once personal service was complete, the plaintiff sought an order directing the defendant to pay to the plaintiff $307.32, the cost of hiring a special process server. The court granted the plaintiff's request, finding that "[t]here is no authority under the rule [4(c)(2)(C)(ii)] authorizing the imposition of a condition upon the acknowledgment of service such as the insistence upon a stipulated extension of time."240

Subsequently, in *Eden Foods, Inc. v. Eden's Own Products, Inc.*,241 the plaintiff served the defendants by mail. When the defendants failed to respond, the plaintiff effected personal service and then sought $59.25, the cost of such personal service. The court granted the plaintiff's request, finding that "[t]he only means for enforcing this inexpensive method of service" by mail is to award costs if the plaintiff makes personal service. Since the plaintiff had made such service, the court ordered the defendants to pay the plaintiff's costs "within 10 days of the date of this order or a default judgment will be entered against the offending defendant."242 It is interesting that the court coupled its order with the threat of entering a default judgment if the costs remained unpaid for more than ten days, because Rule 4(c)(2)(D) says nothing about such default judgments. Apparently, the court was motivated by the fact that the defendants had not responded to the mail service.

The next case to discuss Rule 4(c)(2)(D) did so in dictum. In *Armco, Inc. v. Penrod-Stauffer Building Systems, Inc.*,243 the plaintiff's attorney neglected to enclose the required self-addressed, stamped envelope. In a footnote the court wrote, "[t]hat neglect may have foreclosed a possible claim for reimbursement of the cost of effecting personal service."244

Billy v. Ashland Oil, Inc.245 presented an interesting use of Rule 4(c)(2)(D). In Billy, a default judgment was entered when the defendant failed to respond to the plaintiff's attempt at mail service under Rule 4(c)(2)(C)(ii). When the defendant moved to va-

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240 Id. at 179.
242 Id. at 96.
243 733 F.2d 1087 (4th Cir. 1984).
244 Id. at 1089 n.1.
cate the default judgment, the court reluctantly did so on the ground that the plaintiff failed to follow the unsuccessful attempt at mail service with personal service within thirty days of the order. However, the court ordered the defendant to pay the costs of the service pursuant to Rule 4(c)(2)(D).248

The result reached in Billy is very interesting in light of the result reached a few months later in Crocker National Bank v. Fox & Co.247 Crocker raised the issue as to when a plaintiff may bring a motion for costs under Rule 4(c)(2)(D). The case involved a complex set of securities fraud actions in which the plaintiffs sued approximately 400 present and former partners of a national accounting firm. The plaintiffs mailed service pursuant to Rule 4(c)(2)(C)(ii) to each defendant. Only two of the defendants acknowledged the service. The plaintiffs then personally served 118 of the 398 defendants who did not respond, and moved for the costs of such service in an apparent attempt to induce the remaining 280 defendants to return their acknowledgments. Prior to the plaintiffs’ Rule 4(c)(2)(D) motion, the court stayed all other motions in the case pending certain negotiations.

The court ruled that the plaintiff’s motion for costs was premature, stating that such a motion could not be brought until:

the time the defendants must contest in personam jurisdiction or waive all objections to it. . . . [A] Rule 4 motion is properly heard at the same time that a Rule 12(b)(2) motion must be made under Rule 12(h). [citation omitted] Since defendants cannot raise the defense of lack of personal jurisdiction until the stay is lifted, plaintiffs must also wait.248

The plaintiff in Henry v. Glaize Maryland Orchards, Inc.249 faced a similar situation. Henry involved a plaintiff’s attempted service by mail pursuant to Rule 4(c)(2)(C)(ii).250 Service was sent by certified mail, return receipt requested. The envelope was not claimed by the defendant, and after twenty-five days, returned by the postal service.251

Upon receiving the unclaimed envelope, the plaintiffs then ef-

\[246 \text{ See id. at 231-35.} \]
\[247 \text{ 103 F.R.D. 388 (S.D.N.Y. 1984).} \]
\[248 \text{ Id. at 392.} \]
\[249 \text{ 103 F.R.D. 589 (D. Md. 1984).} \]
\[250 \text{ Id. at 590-91.} \]
\[251 \text{ Id. at 591. The court indicated that it would be unjust to hold the defendant liable for failing to comply with instructions on a form it never received. See id. at 590.} \]
fected personal service, and moved for the costs of such service. The defendant did not oppose the plaintiff's motion but the court nevertheless denied it. The court explained that "[i]t is uncontroverted that the defendant here never received the form 18-A notices in plaintiffs' initial attempt at service. Defendant's silence notwithstanding, the Court will not order it to pay the costs incurred by plaintiffs in their subsequent employment of a process server." 252

In Wall v. Jacobs, 253 the plaintiff filed a section 1983 suit alleging that the defendants had interfered with his right to parole. Plaintiff attempted service pursuant to Rule 4(c)(2)(C)(ii), and defendants in due course signed and returned the acknowledgment form. When the form was received by the plaintiff, however, the "date of receipt" stamp had been obliterated. Plaintiff contended that this date had been obliterated in order to confuse the court as to when service had been made. Plaintiff therefore moved the court for an order directing the defendants' counsel to withdraw his appearance. The court refused, stating that, "Rule 4(c)(2)(D) provides that the only sanction that may be imposed against a person not complying with the twenty day rule is to order the payment, by such person, of the cost of alternative service." 254

Another case that discussed Rule 4(c)(2)(D) was Reno Distributors, Inc. v. West Texas Oil Field Equipment, Inc. 255 In Reno, the plaintiff attempted service pursuant to Rule 4(c)(2)(C)(ii) on two occasions. The first envelope was returned to the plaintiff marked "insufficient address." The second envelope, mailed to a different address, was returned marked "not deliverable as addressed," and also contained a handwritten notation, "opened in error—not at this box number." Plaintiff thereafter effected personal service on the defendants and then moved for the costs of personal service. 256

The plaintiff contended that the defendants had received the second envelope and that it was the defendants who had written "opened in error." The defendants argued that they never received either envelope. The court agreed with the defendants and noted

252 Id. at 591.
254 Id. The court also noted that no "date of receipt" stamp need be applied to the acknowledgment form in the first place. See id.
256 Id. at 514.
that the

that the plaintiff has presented no evidence to support its contention that defendants opened the second envelope and then returned it. The court would be indulging in sheer speculation to conclude that defendants engaged in the devious activity alleged. It would be equally plausible to assume that plaintiff incorrectly addressed the envelopes or that the post office improperly delivered the envelopes.257

Subsequently, in *Excalibur Oil, Inc. v. Gable*,258 the court made it clear that the only penalty which can be visited upon a defendant who refuses to respond to mail service under Rule 4(c)(2)(C)(ii) is the awarding of costs if the plaintiff subsequently makes personal service. The court noted that “[i]t is a fact, obvious from Rule 4(c)(2)(D), that the only consequence of a defendant’s ignoring mail service is to impose on that defendant the cost of subsequent personal service—not, as with ignoring original personal service, the risk of a default judgment.”259

In *Perkin Elmer (Computer Systems Division) v. Trans Mediterranean Airways, S.A.L.*,260 the plaintiff mailed service in accordance with the procedures set forth in Rule 4(c)(2)(C)(ii). Plaintiff received from the defendant a copy of the letter sent by the defendant to the defendant’s attorney acknowledging receipt of the summons. Unsure whether this letter constituted a sufficient acknowledgment, the plaintiff then effected personal service on the defendant and thereafter moved for costs. The court agreed that the plaintiff was entitled to costs and stated:

A contrary holding would ignore the language of the Rule, eviscerate the incentive to return the acknowledgment form that Congress intended the Rule to provide, and require plaintiff either to take the risk that the document received would later be found insufficient or to incur the potentially unreimbursable cost of personal service.261

One of the more interesting cases in this area is *C.I.T. Leasing Corp. v. Manth Machine & Tool Corp.*262 In *C.I.T.*, the plaintiff moved for both the actual cost of making personal service and the

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257 *Id.*
258 105 F.R.D. 543 (N.D. Ill. 1985) (mem.).
259 *Id.* at 545 n.5.
261 *Id.* at 60.
attorneys' fees involved in effecting such personal service. The court granted both, finding that if not for the defendant's unreasonable refusal to acknowledge the mailed service, the plaintiff would not have been forced to make personal service.

No case before or since C.I.T. has awarded attorneys' fees, and it is therefore impossible to say whether attorneys' fees will be awarded in future cases. Although there is nothing in the language of Rule 4(c)(2)(D) which prohibits an award of attorneys' fees, in numerous other contexts federal courts have repeatedly stated that attorneys' fees are not recoverable unless there is an affirmative provision in the statute empowering the court to award such fees. These cases, of course, do no more than follow the American rule (in contrast to the English rule) under which each party is expected to bear its own legal costs. Although one commentator has called the result in C.I.T. necessary if plaintiffs are to have the necessary incentive to bring 4(c)(2)(D) claims, the number of such claims made to date do not support this conclusion.

In United States ex rel. Itri Brick & Concrete Corp. v. Union Indemnity Insurance Co. of New York, the court awarded $67.50 after the court found that the defendant, an insurance company, had engaged in a deliberate pattern of refusing to acknowledge the plaintiff's mail service.

In Fee v. Steve Snyder Enterprises, Inc., the court awarded the greatest costs recovered by a plaintiff to date. In that wrongful death case, the plaintiff attempted to serve the defendant by Rule 4(c)(2)(C)(ii). The defendant refused to acknowledge the service and told the plaintiff that he expected to be served personally. Thereafter, the plaintiff attempted on more than thirty occasions to serve the defendant, but each time the defendant thwarted the process server. Finally, the process server was able to make the ser-

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283 Id.
284 See, e.g., Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975); Jarvis, Expanding the Carrier's Right to Claim Indemnity Under Section 3(5) of COGSA for Inaccurate Bills of Lading, 24 Duq. L. Rev. 811, 830 (1986) (attorneys' fees not recoverable under maritime statute which allows the successful party to recover its "costs" in bringing suit).
285 Alyeska Pipeline, 421 U.S. at 247.
288 Id. at 158.
vice. The plaintiff then moved for $1,628.47, the costs for these numerous service attempts. The court granted these costs, finding that in light of the defendant’s conduct, there was “no reason why costs should not be assessed against it.”

The next case to consider the awarding of costs under Rule 4(c)(2)(D) was Gear, Inc. v. L.A. Gear California, Inc. In Gear, the plaintiff attempted service by mail under Rule 4(c)(2)(C)(ii). When the defendants failed to return the acknowledgement form, the plaintiff attempted personal service and then moved the court for the cost of such service. Since the defendants were unable to show that there was good cause not to assess costs, the court ordered the defendants to pay the costs of the personal service.

A more recent case of this type is Allright Missouri, Inc. v. Billeter which involved an allegation that the defendants had committed RICO violations in connection with a limited partnership. The plaintiff attempted to recover costs for service on the numerous defendants by employing Rule 4(c)(2)(D). The court found this request proper, noting that, “[f]ailure to return the notice and acknowledgment form upon receipt of mail service is not a proper means of challenging the jurisdiction of the Court.”

V. COMMENTATORS AND RULE 4(c)(2)(C)(ii)

Although the 1983 amendments to the Federal Rules of Civil Procedure immediately received much attention from commentators, Rule 4(c)(2)(C)(ii) was largely glossed over. Instead, commentators focused on the amendments to Rules 7, 11, 16, and 26, which primarily involve certification requirements for all papers filed with the court and sanctions imposable on attorneys for dilatory pre-trial and discovery procedures. Only with the passage of
three years and the emergence of substantial case law, did Rule 4(c)(2)(C)(ii) begin to attract serious attention from commentators. Unfortunately, even when commentators have addressed Rule 4(c)(2)(C)(ii), they often have been perplexed by the inconsistencies inherent in it. As a result, while often recognizing many of the problems with the language and application of the Rule, the writers sometimes have misconstrued the details that complicate what appears to be an easily misunderstood rule.

A. Early Commentators

1. Applicability of Rule 4(c)(2)(C)(ii)

In an early report from the House of Representatives' Committee on the Judiciary, it was made clear that Congress' intent was to provide a smooth transition between methods of service, acknowledging the potential confusion among the effective dates of the Supreme Court Rules, the proposed congressional amendments, and the pre-existing rules. Although courts were quickly confronted with issues concerning the efficacy of Rule 4(c)(2)(C)(ii) in actions which were initiated before its effective date, February 26, 1983, only Professor David Siegel, in the second of his three relevant practice commentaries, discussed possible problems of transition. Professor Siegel emphasized that if counsel is unsure of the applicability of a Rule 4 provision during the transition pe-
Because of the nature of Rule 4, Professor Siegel additionally noted that the forty-five-day delay between the passage of the amendment and its effective date was insufficient to provide the practicing bar with sufficient time to become aware of the changes and to adjust accordingly. This delay may have provided "adequate notice for amendments that touch only the incidentals of an action, but not for one that prescribes its beginning." 283

2. Out-of-State Defendants

A second important aspect of the Rule that has not been adequately addressed by commentators has been the availability of mail service on out-of-state defendants under Rule 4(c)(2)(C)(ii). Perhaps the lack of attention was based on the assumption by many that this application was understood; case law has shown this to be untrue. 284

In his 1985 practice commentary, Professor Siegel discussed the questions posed by the overlap of Rules 4(c), 4(e), and 4(f). 285 Although he warned that if a state long-arm statute is invoked, the practitioner should use state methods of service rather than the 4(c)(2)(C)(ii) mail service, Professor Siegel indicated that the potential advantages of mail service may warrant its attempt, provided there is sufficient time under the applicable statute of limitations to commence a new suit should the court decide against out-of-state mail service. 286 One year later, with some case law at his disposal, Professor Siegel concluded that service under Rule 4(c)(2)(C)(ii) is not available if the defendant is not present in the forum state. 287

Two early discussions illustrated the confusion surrounding out-of-state service by mail. In a 1983 article, Professor George Walker called for clarification of the various provisions addressing out-of-state service contained in Rule 4. 288 Although Professor

283 See Siegel, Practice Commentary, supra note 1, at 92-94.
284 Id. at 94.
285 See supra notes 45-99 and accompanying text.
286 1985 Commentary, supra note 281, at C4-30.
287 Id. at C4-20, C4-27, C4-30.
288 1986 Commentary, supra note 266, at C4-30.
289 Walker, The 1983 Amendments to Federal Rule of Civil Procedure 4 — Process, Jurisdiction, and Erie Principles Revisited, 19 Wake Forest L. Rev. 957 (1983). The article, a useful comparison of the methods of mail service provided respectively by federal, California, and North Carolina statutes, proposes that North Carolina legislators carefully
Walker discussed the overlap and redundancies in Rules 4(c)(2)(C)(ii), 4(d), and 4(e), he omitted any discussion of the extraterritorial aspects of Rule 4(c)(2)(C)(ii). Apparently, the article was written for the North Carolina practitioner familiar with that state's provision for service by certified mail, and therefore, the article was concerned more with the distinction between methods of mail service rather than with the federal provisions themselves.

A 1984 Comment called for an amendment to Rule 4 allowing service pursuant to state law subsequent to failed service under Rule 4(c)(2)(C)(ii). This writer questioned the applicability of Rule 4(f)'s territorial restrictions on mail service and the ability to follow ineffective extraterritorial mail service with service under 4(e). While it raised important issues, the article failed to consider the relevant case law which had developed prior to the time of publication.

The issue of whether Rule 4(c)(2)(C)(ii) may be used to effect service abroad and the Rule's relationship to the Hague Convention was discussed extensively in another article. This article pointed out the potential conflict between Article 10 of the Convention, which has been expressly rejected by many of the nations that otherwise are parties to the Convention, and Rule 4(c)(2)(C)(ii). Acknowledging the possible benefits of mail service, the authors concluded that if mail service under the Rule is sustained, and a favorable judgment subsequently rendered, enforcement of that judgment outside of the United States may prove especially problematic, particularly in those countries that have formally spurned Article 10 of the Hague Convention. Professor Siegel briefly discussed this issue in his 1986 Commentary and argued that since countries ratifying the Convention may express their disapproval of mail service, their failure to object should be a

monitor the federal court's reactions to Federal Rules of Civil Procedure 4(c)(2)(C)(ii) and 4(j), and consider amendments to the North Carolina statutes accordingly. See id. at 982-86.


Comment, supra note 19, at 577-79.

See id. at 578.

See supra note 102 and accompanying text. For a discussion of the Convention, its interplay with Federal Rule 4, and cases that construe it, see supra notes 104, 109, 115-119, and accompanying text.


See supra note 106.

Newman & Burrows, supra note 293, at 3, col. 1.

1986 Commentary, supra note 266, at C4-34.
3. Enclosure Requirement

One of the first problems to be recognized and discussed was the level of compliance needed to meet the enclosure requirements of 4(c)(2)(C)(ii). Many cases have contained arguments asking the court to quash service due to typographical errors, omissions of one or more of the enclosures, or, most frequently, the interpretation of the Rule’s requirement for a “notice and acknowledgment conforming substantially to form 18-A.”

Despite the number of cases involving enclosure requirements, the only mention of these cases made in other commentaries was a footnote citing Armco. This lack of commentary is disconcerting in light of both the ease with which technical but potentially fatal errors can be made and the potential for abuse by either party.

It clearly has become the plaintiff’s obligation to dutifully follow the enclosure requirements and to serve them within the prescribed time limits. As Professor Siegel has advised, plaintiff’s counsel should not employ the federal mail service provisions if a statute of limitations deadline is nearing. Employing Rule 4(c)(2)(C)(ii) in such cases would provide the defendant with a “temptation” to willfully refuse to sign and return the notice and acknowledgment form.

4. Failure to Return the Acknowledgment Form

The advantage of mail service under Rule 4(c)(2)(C)(ii) depends entirely on the willingness of the defendant. It was suggested that if defendants refuse to acknowledge service, the time and expense of the plaintiffs and the courts will be unnecessarily wasted. If the plaintiff does not receive an executed notice and

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297 Id. at C4-27.
298 See supra notes 120-21 and accompanying text.
299 See supra notes 128-27, 131-141, and accompanying text.
300 See Fed. R. Civ. P. 4(c)(2)(C)(ii); supra note 35. For a discussion of illustrative cases, see supra notes 122-25, 128-30 and accompanying text.
301 See Comment, supra note 19, at 574 n.54, 578-79.
302 It is especially disconcerting that while the amendments to Rules 7, 11, 16, and 26 increase attorney responsibility, the sloppy drafting of Rule 4(c)(2)(C)(ii) encourages unethical attorney practices.
303 1985 Commentary, supra note 281, at C4-42.
304 Id. at C4-19, C4-20.
305 Note, supra note 6, at 1018.
acknowledgment back from the defendant within twenty days from plaintiff's mailing, subsequent personal service must be effected.\textsuperscript{306} Plaintiff's only remedy is the cost of such personal service unless defendant can show "good cause" why costs should not be awarded.\textsuperscript{307}

A 1984 Note suggested three possibilities as to what might constitute good cause for not returning the acknowledgment form.\textsuperscript{308} Two of the possibilities, that the defendant was traveling and did not receive the process until after the twenty day period had expired and that the defendant did not speak English and therefore could not read the process or understand its command to return the acknowledgment, have not been tested in the federal courts. The third possibility, that the process was mailed to an incorrect address, was an issue in \textit{Reno},\textsuperscript{309} and there the court denied the motion for costs of personal service.\textsuperscript{310}

Professor Siegel has argued that if good cause for failing to return the acknowledgment could not be shown, stronger penalties than those explicitly mandated by Rule 4(c)(2)(C)(ii) should be imposed. In particular, he considered it to be proper to award attorneys' fees to compensate the plaintiff for having to arrange for subsequent personal service.\textsuperscript{311} In light of this possibility, Professor Siegel suggested that attorneys should carefully record their time so as to accurately reflect all pertinent action on their part.\textsuperscript{312}

Courts, for the most part, have upheld the rigid provision of Rule 4(c)(2)(C)(ii) requiring subsequent personal service in cases in which the defendant either willfully failed to execute and return the acknowledgment form or cases in which someone other than the defendant itself signed the form. Attempts by plaintiffs to avoid follow up personal service when it is apparent that the defendant has received the mailing, or attempts to enforce default judgments entered for a defendant's failure to enter a reply, have been unsuccessful.\textsuperscript{313}

\begin{footnotes}

\textsuperscript{306} See \textit{supra} notes 142-180 and accompanying text.

\textsuperscript{307} Fed. R. Civ. P. 4(c)(2)(D). For cases which have construed the rule, see \textit{supra} notes 238-275 and accompanying text.

\textsuperscript{308} Note, \textit{supra} note 6, at 1016-18.

\textsuperscript{309} 105 F.R.D. 511 (D. Kan. 1985).

\textsuperscript{310} See \textit{supra} notes 255-57 and accompanying text.

\textsuperscript{311} 1985 Commentary, \textit{supra} note 281, at C4-19.

\textsuperscript{312} Id.

\textsuperscript{313} For a discussion of the cases which have considered this issue, see \textit{supra} notes 142-66.
\end{footnotes}
More recently, however, two courts considering this issue, have indicated displeasure with what they believed to be the defendants' effort to frustrate the system. These courts held that the plaintiffs were not required to make subsequent personal service when it was shown that the defendants actually knew about the claims. In both of these cases, the defendants purposefully failed to return the acknowledgment forms. Though these decisions have yet to be commented upon by other writers, they are reflective of the courts' increasing displeasure with the inadequacy of the penalties provided by Congress.

Despite the minor penalties for not doing so, commentators in general recommend that the defendants return the acknowledgment as quickly as possible. However, two practitioners, drawing on their own litigation experience, noted that defendants rarely return the forms. Unfortunately, little mention is made anywhere of the ethical considerations that are most disturbingly tested by this Rule and that heavily contribute to this Article's suggestion that the Rule be repealed.

5. State Methods of Service

Shortly after the Rule's enactment, Professor Siegel questioned whether state methods of service may be employed under

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314 See supra notes 167-72 and accompanying text.
315 Cf. supra notes 269-70 and accompanying text, where the court awarded $1,628.47, the largest award to date, after the defendant avoided thirty attempts by plaintiff to serve process.
316 Since the only penalty for refusal to acknowledge the mailed service is the relatively small cost incurred by the plaintiff to make subsequent personal service (typically no more than fifty dollars), there is little monetary incentive for defendants to sign and return the acknowledgment form. The defendant may have more incentive to return the form if courts begin to assess attorneys' fees in addition to the cost of personal service. For a case in which attorneys' fees were granted, see supra notes 262-266 and accompanying text.
317 See, e.g., 1985 Commentary, supra note 281, at C4-20.
318 See Newman & Burrows, supra note 293, at 16, col. 6, n.53.
319 As previously stated elsewhere by one of the authors:
   It is, of course, the ethical duty of a lawyer to improve the administration of justice. It is also the ethical duty of a lawyer to further his client's cause. These two demands place the lawyer in an impossible situation: by delaying legal proceedings, he helps his client but fails in his obligation as a court officer. By pushing forward, he fulfills his duty to the tribunal but not to his client. The problem does not admit of an easy answer. Jarvis, The Problem of Post-Hearing Delay in Maritime Arbitrations: "When Did You Say We Would Receive the Arbitrators' Award?", 9 Md. J. Int'l L. & Trade 19, 22 n.9 (1985) (citations omitted).
Rule 4(c)(2)(C)(i) after mail service has failed. In view of the lack of an express provision permitting it, Professor Siegel initially advised the plaintiff not to attempt state methods, nor to permit a process server attempting personal service to use mail service. By 1986, Professor Siegel had become more certain of the unavailability of state methods once service under Rule 4(c)(2)(C)(i) had failed. However, he noted that if mail service was initially attempted under Rule 4(c)(2)(C)(i), a subsequent service pursuant to Rule 4(c)(2)(C)(ii) would probably be acceptable.

Professor Walker, referring to Professor Siegel’s 1983 comments, questioned the availability of service under Rule 4(c)(2)(C)(i) after a failed attempt at Rule 4(c)(2)(C)(ii) service. Professor Walker contended that the use of the word “or” between Rules 4(c)(2)(C)(i) and 4(c)(2)(C)(ii) implied that if service under either Rule fails, service under the other rule may follow.

Since that time, it has become apparent that once service under Rule 4(c)(2)(C)(ii) has been attempted, the subsequent shifting of service devices is not permitted. Relying heavily upon Armco v. Penrod-Stauffer Building Systems, one writer advised that a plaintiff attempting to mail service under state law should not include Form 18-A, or a form that might otherwise be construed as to conform to Form 18-A, since it would imply service under Rule 4(c)(2)(C)(ii) and lock the plaintiff into compliance with the federal method.

This has been a particular point of discussion in California and North Carolina where mail service has been adopted as a state method of service. Writing before the 1983 amendments were enacted, but while they were under consideration, Professor William Slomanson compared California's mail service provisions with the then-proposed, but later rejected, federal certified mail provi-

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320 Siegel, Practice Commentary, supra note 1, at 96.
321 Id.
322 1986 Commentary, supra note 266, at C4-18.
323 See Walker, supra note 288, at 970.
324 Id.
325 See 733 F.2d 1087 (4th Cir. 1984) (unacknowledged mail service under Rule 4(c)(2)(C)(ii) precludes use of otherwise acceptable state methods); Comment, supra note 19, at 574.
326 Id.
327 See supra note 26.
328 See supra note 289.
Although some of the comparisons are no longer timely because the Rule as finally enacted is substantially different from that under review at the time of Professor Slomanson's comments, the article is a reminder that parties must be cognizant of which set of laws control a particular mail service.

Professor Walker commented on the situation in North Carolina where service is permitted by certified mail in a manner similar to the one proposed by the Supreme Court and later rejected by Congress. He called North Carolina's system a "clear alternative for the Rule 4(c)(2)(C)(ii) acknowledgment method," but failed to provide a useful discussion of the comparative advantages.


The deadlines in connection with Rule 4(c)(2)(C)(ii) have been addressed extensively by commentators. Discussions range from descriptive to prescriptive, illustrating the contradiction and questions posed by the deadlines of the Rule itself, and, out of necessity, of the Rules that interact with it.

In practice, the first deadline with which the parties must contend with is the twenty-day deadline within which the defendant must return the signed notice and acknowledgment form. The language of Rule 4(c)(2)(C)(ii) indicates that the twenty days runs from the date of mailing. Form 18-A, however, instructs the defendant to "complete and return the form to the sender within 20 days. . . ." Professor Walter Taggart was the first commentator to note this inconsistency, and to caution the practitioner of its pitfalls.

The notice and acknowledgment form also informs the defendant that if he returns the acknowledgment, he has twenty days within which to answer the complaint. Professor Taggart questioned when this twenty-day period commences, pointing out the possible interpretations that may ensue and called for consis-

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329 Slomanson, supra note 26, at 64-73.
330 See Walker, supra note 288, at 983.
331 Id. at 969.
332 See supra note 28 and accompanying text.
334 See supra note 28 and accompanying text.
335 Taggart, supra note 333, at 25, 27-32.
tency between the summons and notice.\textsuperscript{336}

It has been suggested by one commentator that the plaintiff must wait for the twenty days to expire before attempting service under another method.\textsuperscript{337} This view, however, may be incorrect and cases have yet to address this issue.\textsuperscript{338} In any event, it appears that the twenty-day period, whenever it commences and concludes, is part of the 120 days from the time the complaint is filed in which the plaintiff must effect service.

The 120-day deadline, proscribed by Rule 4(j), is the first federal imposition of a fixed time in which service must be made after the complaint has been filed. If the plaintiff fails to effect proper service within this period and cannot show "good cause" for its failure, the complaint will be dismissed without prejudice.\textsuperscript{339} Concern was expressed that in states such as California, where the time period is fixed at three years, the state courts would be inundated with cases that otherwise might have been brought in federal court had the time in which to file not been an issue.\textsuperscript{340} In response to this, Professor Slomanson offered three possible alternatives. The first alternative was to shorten the state period to align it with the federal. The second alternative was to do away with any statutory state time limit in which to serve, and leave the question of timeliness to the court's discretion. The third, favored by Professor Slomanssen, would provide a one-year state deadline which "would be [a] reasonable accommodation of the competing virtues of reasonable diligence and litigation on the merits."\textsuperscript{341} Regarding this issue, Professor Siegel has been the most instructive. Urging throughout his commentaries that time should not be wasted in mailing, signing, answering, and filing, he advised that "[attorneys] should assume the worst . . . that the period [in which to file] starts from the earliest rather than the latest possible time."\textsuperscript{342}

\textsuperscript{336} Id. at 33-34.
\textsuperscript{337} Note, supra note 6, at 1019.
\textsuperscript{338} Several interesting issues arise regarding the efficacy of a second service before the expiration of the twenty-day period, and its effect on the statute of limitations. It would seem that plaintiff's election to serve process before the twenty-day period has run accepts as invalid the first service. This may become a problem if the statute of limitations has run in the intervening time, since in making the second service, plaintiff probably has waived any claim to having made earlier service. See supra notes 203-04 and accompanying text.
\textsuperscript{339} See FED. R. CIV. P. 4(j); see also supra notes 219-230 and accompanying text (discussion of cases construing Rule 4(j)).
\textsuperscript{340} Slomanson, supra note 26, at 64-68.
\textsuperscript{341} Id. at 71-73.
\textsuperscript{342} 1985 Commentary, supra note 281, at C4-20.
7. Statutes of Limitation and Rule 4(c)(2)(C)(ii)

Early commentators were concerned largely with Rule 4(c)(2)(C)(ii)'s interplay with statutes of limitations, often distinguishing the Rule's applicability in diversity actions from federal question suits. They predicted that the major Rule 4 statute of limitations question would deal with the 120-day period of Rule 4(j). Their concern largely was with the interplay between Rule 4(j) and the state laws in diversity actions and with the danger of running the statute of limitations in federal question actions if service is not made within 120 days. Although these writers were without the advantage of any case law, subsequent writers have also missed the point.

The important conflict that has arisen in this area concerns the question of tolling the statutes of limitation and the efficacy of mail service. The leading case addressing this issue was Morse v. Elmira Country Club. In Morse, a diversity action, the court ruled that the statute of limitations had been tolled despite the fact that personal service was not made until after the statute of limitation had run. As important as the Morse ruling is, only Professor Siegel has fully discussed its implications. The court's frustration with the Rule, and its subsequent interpretation, deserve wider comment and discussion, since it incorporates the sentiments expressed by many earlier courts who were not faced with a statute of limitations problem.


It is clear that a plaintiff may recover the cost of effecting personal service if the notice and acknowledgment form is not returned within twenty days, unless the defendant can show "good cause" why the award should not be made. Whether a plaintiff may also obtain attorneys' fees or the cost of obtaining an award is

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345 752 F.2d 35 (2d Cir. 1984).

346 Id. at 40.

347 1985 Commentary, supra note 281, at C4-19.

348 See supra notes 142-66 and accompanying text.
far less clear. Professor Taggart interpreted 4(c)(2)(D) as not permitting reimbursement for the cost of obtaining attorneys’ fees. However, he failed to discuss what would constitute good cause sufficient to excuse the defendant from having to pay the cost of personal service. Professor Taggart hinted that the defendant might be able to demonstrate good cause in situations where the defendant was confused by the conflicting instructions on when the twenty-day period commences and concludes.

9. Summary of Early Commentators

Many of the problems with Rule 4(c)(2)(C)(ii) were well-presented in an article which depicted a light-hearted scenario concerning the fate of a practitioner who was at first unaware of the twists and turns of the Rule, then confused by them, and, lastly, beaten by them. The imaginary attorney confronted the enclosure requirements, the twenty-day and 120-day deadlines, the statute of limitations issue, the applicability of mail service for out-of-state defendants, and other problems raised by the language of the Rule. This article should not be overlooked because of its humorous tone; its warning to the unwary is clearly serious.

In summation, early commentators generally were unable to predict the consequences of the 1983 amendments, perhaps because the amendments seemed so unambiguous. It is indicative of the revealed incomprehensibility of Rule 4(c)(2)(C)(ii) that such a learned group as the foregoing writers exhibited confusion and misunderstanding.

B. Later Commentators

The mounting confusion in the courts and among early commentators led to the appearance of two articles which directly address the problems of Rule 4(c)(2)(C)(ii). Writing with a substantial body of case law, these commentators call for changes in the Rule in order to make the Rule work as Congress had intended.

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349 For a case which has dealt with this question, see supra notes 262-66.
350 Taggart, supra note 333, at 25.
351 Id. at 25, 27.
1. Deadlines and Sanctions Under Rule 4(c)(2)(C)(ii)

In the earlier of the two articles, Professor Linda Mullenix focuses on the various deadlines set forth in Rule 4, paying particular attention to Rule 4(j) and its statute of limitations implications. In addition, Professor Mullenix explores the inter-relationship between the federal and state service methods which are authorized by Rule 4. The thrust of her article, however, revolves around the consequences facing a plaintiff who fails to make timely service when using mail service. Professor Mullenix concludes that the federal courts are taking a liberal view towards plaintiffs, and are permitting plaintiffs to re-serve defendants when the initial service fails. She notes, however, that this results in one disadvantage, that is, defendants have already received notice of the lawsuit when effective service finally is made because of the initially ineffective mail service and are therefore not surprised by the suit.

At the end of her article, Professor Mullenix asks the question, "[i]s federal mail service working?" Although she answers this question with a tentative yes, she calls for revision of the Rule in order to increase the penalties which a court can impose upon a recalcitrant defendant. Professor Mullenix states that, "[p]laying costs of alternative service is a small sanction for the defendant who successfully evades suit altogether. To date, this loophole has proved to be the most critical in the new mail service provisions." In reaching her conclusion, Professor Mullenix appears to have overlooked C.I.T. Corp. v. Manth Machine & Tool Corp., where the court awarded not only the costs of personal service but also the attorneys' fees incurred by the plaintiff in effecting per-

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254 Id. at 323-28.
255 Id. at 331-34.
256 Id. at 328-31; see also Fed. R. Civ. P. 4(j) (action dismissed if plaintiff failed to make service within 120 days after filing complaint and cannot show good cause for untimely serving).
257 Mullenix, supra note 353, at 331-38.
258 Id. at 338.
259 Id.
260 Id.
261 Id.
262 No. 85-261C (W.D.N.Y. Sept. 3, 1985) (LEXIS, Genfed library, Dist file); see also supra notes 261-65 and accompanying text.

A more recent discussion of the Rule is a Note detailing the technical hurdles to be cleared in properly effecting mail service. After describing these hurdles, the Note suggests that the present system of first class mail and return of an acknowledgment form by the defendant should be replaced by a system of certified mail. The Note further recommends that the plaintiff be required to effect personal service only in those cases in which the certified mail remains unclaimed. If the certified mail is either claimed or refused, then the plaintiff should be deemed to have made service on the defendant. In defense of this proposal, the Note compares the cost of certified mail with the cost of personal service. The Note suggests that while certified mail will normally cost the plaintiff $1.70, personal service will average $20 or more, and the author of the Note claims that this monetary difference is burdensome.

The Note’s comparison of the cost between certified mail and personal service is erroneous in two respects. First, it seems safe to say that no plaintiff has ever been deterred from bringing suit because of the cost of service. Since the filing a complaint in federal
court costs $120, and attorneys' fees can run from $50-$200 per hour, the cost of personal service is not usually discussed when the plaintiff and attorney consider initiation of a suit. Second, and perhaps more important, the cost of personal service is recoverable under Rule 4(c)(2)(D). Even the most cost-conscious plaintiff need not be concerned about the cost of personal service given the willingness of courts to reimburse plaintiffs, and the possibility that attorneys' fees can be included in such costs. The Note's decision to focus on the cost advantages of certified mail misses the mark in that certified mail is simply not as reliable as personal service. Even if the plaintiff receives a signed postal receipt, in most instances it is impossible for the plaintiff to prove with certainty that it is the defendant's signature which appears on the postal card. In response, the Note states that if any problems arise as a result of the defendant not receiving the summons and complaint, they can be rectified when the defendant moves, pursuant to Federal Rule 60, to vacate the default judgment which the plaintiff has received. What this approach fails to take into account, however, is the time, cost, and resources which are wasted by both the parties and the courts when a default judgment is challenged.

VI. Rewriting the Rule

As the foregoing discussion demonstrates, Rule 4(c)(2)(C)(ii) is in a hopeless state of confusion. Courts and commentators alike have attempted to answer the questions raised by this poorly-drafted Rule. These attempts, however, are inadequate because of conflicting interpretations of the Rule as well as the numerous questions which have been left unanswered. As indicated by the

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373 For a case in which the plaintiff received a signed postal receipt card which it claimed bore the defendant's signature, but which the defendant claimed he had not signed, see System Indus., Inc. v. Han, No. 84-5457 (E.D. Pa. May 23, 1986) (LEXIS, Genfed library, Dist file), discussed at supra notes 170-72 and accompanying text. For a Rule 4(c)(2)(C)(ii) case in which the handwriting on the postal receipt card was indecipherable, see Anderson v. Champale, Inc., No. 85-0007 (E.D. Pa. Sept. 4, 1985) (LEXIS, Genfed library, Dist file).
374 Indeed, there are already a large number of cases in which the courts have had to vacate default judgments entered pursuant to Rule 4(c)(2)(C)(ii) service. See, e.g., Tecmart Industria E Comercio Ltda. v. Nova Fasteners Co., Inc., 107 F.R.D. 283 (E.D.N.Y. 1986).
survey of case law and commentary set forth above, the Rule, as currently understood and applied by the courts, may be summarized as follows.

First, except for the 100-mile "bulge" provided in Rules 14 and 19, service under the Rule, regardless of the basis of jurisdiction, cannot be made if the defendant is not present in the forum state. As stated above, it is unclear whether this prohibition extends to defendants living in foreign countries.

Next, service under the Rule must be carried out in accordance with all of the enclosure requirements of the Rule. Thus, the plaintiff must mail to the defendant a copy of the summons and complaint, two copies of a notice and acknowledgment form which substantially comports with Form 18-A, and a prepaid, self-addressed return envelope. Minor deviations are usually acceptable. The documents need not be sent by registered or certified mail, although using registered mail, return receipt requested, can be helpful, especially in those courts which do not require the plaintiff to make follow-up personal service where the plaintiff can prove that the defendant did receive the mailing.

Third, service under the Rule is not valid in the view of most courts if the plaintiff does not receive the signed acknowledgment form from the defendants within twenty days of mailing: Mere receipt of the postal card, if the mailing has been sent by return receipt requested, is not sufficient, although an acknowledgment form signed by someone other than the defendant will be sufficient if that person has been authorized by the defendant to accept service. If the defendant willfully refuses to acknowledge the service, such willfulness will probably toll the statute of limitations and may, in some instances, cause an otherwise failed service by mail to be deemed by the court as constituting effective service.

Additionally, if the defendant refuses or fails to acknowledge the mail service, the plaintiff then has little choice but to effect personal service. All other methods of service such as publication or state methods are forfeited when the plaintiff chooses to make his initial attempt at service pursuant to the Rule. The question of whether the plaintiff may make more than one attempt at mail service before being obligated to make personal service is unsettled. Recent cases, however, have loosened these requirements and no longer require personal service if the plaintiff can prove that the defendant received the mailed service.

Fifth, service, whether by mail or by follow-up personal ser-
vice, must be completed within 120 days of the filing of the complaint or the plaintiff’s action will be subject to dismissal without prejudice by the court. Moreover, if service is made by mail and the defendant signs and returns the Form 18-A, the Form must be filed with the court.

Finally, if the defendant refuses to acknowledge the mail service and the plaintiff thereafter achieves personal service, the plaintiff may recover the cost of the personal service, which may or may not include attorneys’ fees. Such costs are the only penalty which can be visited on a recalcitrant defendant and, even then, such costs will not be granted if the defendant proves that it did not receive the plaintiff’s mailed notice. In addition, the plaintiff must prove the costs incurred. An affidavit detailing the plaintiff’s expenses should suffice to prove the costs.

The summary listed above is subject to numerous exceptions and quirks, depending upon the particular federal court. Given the current and rapidly increasing confusion regarding 4(c)(2)(C)(ii), it is suggested that the time is long overdue for a serious evaluation of how well the Rule is “secur[ing] the just, speedy, and inexpensive determination of every action” as mandated by the Federal Rules. It is the opinion of the authors that the Rule is neither just, speedy, nor inexpensive. Rather, it is nothing more than a litigation breeder, chock full of unpredictable twists and turns, and far worse than the system which it replaced. Indeed, any system which would lead one court to describe it as “baroque” and another court to liken it to a “trap” for the unwary is clearly in need of serious modification.

The authors believe that the answer lies in replacing Rule 4(c)(2)(C)(ii) with the simple requirement that personal service be made in every case. Since the Rule mandates that the plaintiff effect personal service if the attempt at mail service fails, it clearly could not have been Congress’ fear that the burden of making personal service would prevent meritorious claims from being instituted. Moreover, the cost of personal service, as judged from those cases in which such costs have been awarded pursuant to Rule 4(c)(2)(D), is relatively small.

A proposal such as the one advocated by this Article would

370 FED. R. CIV. P. 1.
have been unthinkable in previous times when service was often required to be made by the marshal. Now that Rule 4(c)(2)(A) allows service to be made by any non-party adult, a system which does away with mail service and replaces it with personal service is not only feasible but actually desirable. Since one purpose of service is to notify the defendant that a lawsuit has been instituted against him, personal service is the method least likely to breed the wasteful motion practice and default judgment litigation which has already become the legacy of Rule 4(c)(2)(C)(ii).

VII. CONCLUSION

Congress attempted to provide a speedy and inexpensive method of service when it enacted Rule 4(c)(2)(C)(ii). However, as the foregoing discussion has demonstrated, the Rule is plagued by unanswered questions and inconsistencies. Courts and commentators alike have failed to resolve such vexing problems in the years since the inception of the Rule. These problems are further exacerbated by potential abuses and a deteriorating postal system which continues to grow more unreliable with each passing year. The result is a crying need for reform.

The answer, therefore, lies in doing away with a system which cannot possibly work and replacing it with one that has already

379 Fed. R. Civ. P. 4(c)(2)(A). Certain exceptions remain. Under Rule 4(c)(2)(B), the summons and complaint must be served by a United States Marshal, deputy United States Marshal, or "by a person specifically appointed for that purpose," if the plaintiff is: 1) proceeding in forma pauperis pursuant to 28 U.S.C. § 1915; 2) a seaman authorized to proceed pursuant to 28 U.S.C. § 1916; 3) the United States Government or an officer or agency of the United States; or 4) directed by a court to have service made by a Marshal. Fed. R. Civ. P. 4(c)(2)(B).

380 See Fed. R. Civ. P. 4(b). At least one court has looked past the procedural quagmire of Rule 4(c)(2)(C)(ii) and stated that the only relevant inquiry regarding service by mail is whether the defendant received notice. See Gilliam v. Quinlan, 608 F. Supp. 823, 829 n.3 (S.D.N.Y. 1985).

381 It is generally acknowledged that the United States Postal Service has deteriorated since it became a quasi-independent government agency. See, e.g., Blumenthal, Officials Call Postal Delays Worst Since 1980, N.Y. Times, Dec. 24, 1983, at 1, col. 3. This deterioration has led to the formation of numerous private carrier services, such as Federal Express, United Parcel Service, DHL, and Emery, which have become very popular with business users, especially attorneys. See Hollander, Attorney and Overnight Courier Services, 72 A.B.A. J. 62 (May 1, 1986). Although the Postal Service has attempted to meet such private sector challenges through a combination of improved services and litigation aimed at having such private competition declared illegal, both initiatives have generally failed. See Sterne, Postal Monopoly Obsolete, 3 J.COM. 1A, col. 3 (May 19, 1986).
proven its utility: personal service.\textsuperscript{382} Attempts to keep the present system and modify it will only result in more confusion, more abuse, more litigation, more costs, and ultimately, less justice.

\textsuperscript{382} If there is a real need to have the defendant rather than the plaintiff bear the cost of personal service, Congress, or the courts, can simply adopt a rule which would allow a successful plaintiff to recover, as part of the costs permitted under Rule 54(d), the cost of making personal service. See Fed. R. Civ. P. 54(d).