Case Comments

Morse v. Elmira Country Club: Dealing With the Uncooperative Recipient of Mailed Service of Process Under the 1983 Amendments to the Federal Rules of Civil Procedure

I. Introduction

Morse v. Elmira Country Club[1] substantiates the maxim that hard cases make bad law. In *Morse*, the Second Circuit Court of Appeals faced the dilemma of being required to condone an injustice. Specifically, the defendant asked the court to abide by the mandate of rule 4 of the Federal Rules of Civil Procedure ("FRCP 4" or "Rule 4") and dismiss the plaintiff's complaint as time-barred despite the defendant's receipt of notice prior to the running of the statute of limitations.[2] Congressional requirements supported the defendant's position.[3] Justice and equity, however, cried out on behalf of the plaintiff.[4]

In *Morse*, the Second Circuit refused to allow recipients of mailed notice to frustrate a plaintiff's civil action, notwithstanding such plaintiff's failure to conform to Rule 4's strict requirements. This Comment argues that the *Morse* decision was an erroneous interpretation of FRCP 4(c)(2)(C)(ii).[5] The rule's language, congressional policies, and legislative history compel this conclusion.[6] This Comment then discusses whether, from a policy perspective, the outcome in *Morse* is desirable.[7] To the extent that *Morse* reached a desirable result, this Comment considers various proposals for an amendment to FRCP 4.[8] The objective of these proposals is to enable future courts to reach desirable results without distorting the language of the statute.

II. The Second Circuit's Decision in *Morse*

In *Morse* the Second Circuit gave Rule 4 a very strained reading. The issue which the court faced was whether received-but-unacknowledged service of process by mail was effective for tolling the applicable statute of limitations.[9]

The court interpreted FRCP 4(c)(2)(C)(ii), which was added to Rule 4 as part of the 1983 amendments.[10] That provision allows plaintiffs to serve process upon certain

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1. 752 F.2d 35 (2d Cir. 1984).
2. *Id.* at 39.
3. *See infra* Section II (C).
4. *See infra* Section III (A).
5. *See infra* Section II (C).
6. *Id.*
7. *See infra* Section III (A).
8. *See infra* Section III (B).
9. Morse v. Elmira Country Club, 752 F.2d 35, 40–41 (2d Cir. 1984).
10. FRCP 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)

defendants[11] by mailing the defendant a copy of the summons and complaint, along with an acknowledgment form and a return envelope.[12] The rule then prescribes the plaintiff's course of conduct in the event the defendant fails to return the acknowledgment form:

> If no acknowledgment of service under this subdivision of the 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).[13]

The court held that under FRCP 4, received-but-unacknowledged mail service was effective to toll the statute of limitations notwithstanding the rule's requirement of personal service.[14]

A. *Background to the* Morse *Decision*

The plaintiff, Agnes L. Morse, alleged that on June 28, 1980 she was injured on a dance floor owned and negligently maintained by the defendant, Elmira Country Club.[15] The plaintiff filed her complaint on May 23, 1983 in the Federal District Court for the Western District of New York.[16] Since the federal court's jurisdiction was based on diversity of citizenship, New York's statute of limitations applied.[17] New York law required service of process to toll its statute of limitations.[18] Therefore, the plaintiff had three years in which to serve process upon the defendant.

On May 25, 1983, the plaintiff's attorney used certified mail to send the defendant copies of a summons, the complaint, and a notice with attached acknowledgment forms.[19] A postal receipt showed the defendant had received the

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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 the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made under subparagraph (A) or (B) of this paragraph in the manner prescribed by subdivision (d)(1) or (d)(3).

For a discussion of the history of current Rule 4, see discussion *infra* at note 56.

11. The mailing method explicitly limits its application to defendants referred to in FRCP 4(d)(1) (individuals other than minors and incompetents) and 4(d)(3) (domestic or foreign corporations).

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

13. *Id.* (emphasis added). FRCP 4(d)(1) provides for personal service upon individuals other than incompetents. In the alternative it allows service by leaving the summons and complaint with a person "of suitable age and discretion then residing [at the defendant's abode]." FRCP 4(d)(3) provides for service upon corporations or partnerships by delivering the summons and complaint to an officer or agent of the corporation.

14. Morse v. Elmira Country Club, 752 F.2d 35, 41 (2d Cir. 1984).

15. *Id.* at 36.

16. *Id.*

17. Walker v. Armco Steel Corp., 446 U.S. 740 (1980) (holding that Rule 3 was not sufficiently broad so as to control what the plaintiff was required to do to toll the state statute of limitations. The Court held that Oklahoma law governed this question. Instead, Rule 3 merely defines at what point an action is commenced in non-diversity cases.).

18. N.Y. CIV. PRAC. LAW § 214(5) (McKinney 1973)("CPLR") provides that the statute of limitations for personal injury actions is three years. CPLR § 203(b)(1) provides that the statute of limitations is tolled when "the summons is served upon defendant."

19. Morse v. Elmira Country Club, 752 F.2d 35, 36 (2d Cir. 1984). FRCP 4(c)(2)(C)(ii) does not require certified mail. However, plaintiff's use of certified mail may have helped plaintiff's case by making it clearer to the court that defendant had received the mailed service.

letter on May 28, 1983,[20] exactly one month before the statute of limitations expired.[21] The defendant never returned the acknowledgment.

On August 5, 1983, the defendant's attorney informed the plaintiff's attorney that the defendant would not return the acknowledgment and that the plaintiff should proceed with personal service.[22] The plaintiff did not personally serve the defendant until August 30, 1983, sixty-three days after the running of the statute of limitations.[23]

New York required service of process within three years of the plaintiff's injury to toll its statute of limitations.[24] Since the personal service came sixty-three days too late, it was necessary for the court to determine the effect of the plaintiff's attempt to serve the defendant through the mail. Established precedent declares that the FRCP govern inquiries into the validity of the method of service employed by a plaintiff in federal court.[25] Therefore, the plaintiff could remain in court only if the defendant's receipt of the mailed service constituted effective service under the FRCP.

The federal district court granted the defendant's motion to dismiss the complaint.[26] That court held that received-but-unacknowledged mail service was completely inoperative under FRCP 4(c)(2)(C)(ii).[27] This interpretation of the language in the rule seemed clear to the district court, as it concluded:

> Nowhere in [Rule 4(c)(2)(C)(ii)] is there any hint of congressional intent to consider an action commenced when filed or when the first service by mail attempt is made. To the contrary, sub-division (c)(2)(C)(ii) makes it clear that if an acknowledgment is not received within 20 days of mailing, the party should pursue the more conventional forms of service.[28]

The Second Circuit reversed the district court, holding that the plaintiff's mailed service effectively tolled New York's statute of limitations.[29] This Comment argues that the Second Circuit's interpretation of the rule was incorrect.

B. *The Basis for the Second Circuit's Decision in* Morse

The Second Circuit based its holding upon three considerations: 1) the language of rule 4(c)(2)(C)(ii); 2) the legislative history of the rule; and, 3) "justice and equity."[30]

The first basis of the court's holding was the language of rule 4(c)(2)(C)(ii), or more precisely, the absence of any contrary language. The court held: "[T]he words do not say in terms that a received-but-unacknowledged mail service is ineffective,

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20. *Id.* It is not clear whether the defendant made an admission of receipt. Indeed it appears that the court made that finding upon the undisputed record.

21. *Id.*

22. *Id.* This correspondence was probably the defendant's fatal mistake. This communication assured the court of defendant's notice of the lawsuit. Under FRCP 4(c)(2)(C)(ii), the defendant was not obligated to do anything at that time.

23. *Id.*

24. *See supra* note 18.

25. Hanna v. Plumer, 380 U.S. 460 (1965) (holding that service made pursuant to FRCP 4(d)(1) was effective notwithstanding contrary state provisions for service).

26. Morse v. Elmira Country Club, 102 F.R.D. 199 (W.D.N.Y. 1984).

27. *Id.* at 201.

28. *Id.*

29. Morse v. Elmira Country Club, 752 F.2d 35, 42 (2d Cir. 1984).

30. *Id.* at 39–40.

nor do they command personal service as a prerequisite to effective service by mail (if mail service is unacknowledged)."[31] The court viewed the requirement of subsequent personal service as a "second service" which functioned only as proof of the defendant's receipt of the mailed service.[32]

The second basis for the court's decision was the legislative history of the rule.[33] Here the court noted that under the original proposal for the amended rule (which authorized the plaintiff to use certified or registered mail) service was complete upon the defendant's receipt or refusal of the mailing.[34] The court observed that when Congress revised the rule, substituting regular mail delivery, it "gave no indication that it intended to change the prior view that mail service was effective where the recipient received the mail and accordingly obtained actual notice."[35]

The court admitted that the strongest basis for its interpretation of the rule was "justice and equity."[36] To the court, the decisive facts in the case were the defendant's actual, timely receipt of the mailed service and expressed refusal to return the acknowledgment.[37] The court viewed a defendant's desire to harass or inconvenience the plaintiff, or delay the tolling of the statute of limitations as an adequate reason to interpret the statute in favor of the plaintiff.[38] Indeed, the court opined that no reason existed for Congress to intend a different interpretation of the statute: "In short, Congress would have no ground for providing that proper and known mail service would become ineffective simply because the defendant, without reason, [withheld acknowledgment]."[39]

C. *Evaluation of the* Morse *Decision*

1. *The Language of FRCP 4(c)(2)(C)(ii)*

The initial inquiry into the meaning of any statute must begin with the language of the statute itself.[40] If the language reveals Congress' intent clearly, a court must defer to the wisdom of Congress in its legislative capacity.[41] The Second Circuit could not find any affirmative language in FRCP 4 to support its holding. Instead the

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31. *Id.* at 39.

32. *Id.*

33. *Id.* at 40–41. For background information on the 1983 amendments, *see infra* note 56.

34. *Id.* at 41. *See infra* note 56.

35. Morse v. Elmira Country Club, 752 F.2d 35, 41 (2d Cir. 1984).

36. *Id.* at 40.

37. *Id.*

38. *Id.*

39. *Id.*

40. Albernaz v. United States, 450 U.S. 333 (1981); Berner v. Famy, 11 F.R.D. 506 (D.C.N.J. 1951) (where the court dismissed the plaintiff's suit for improperly serving the defendant under FRCP 4(d)(1) despite defendant's actual notice). The court stated:

> Were this court to have any discretion in the matter it would hold the service of process valid. But I do not see how the service of process can be sustained in the instant suit in the face of the clear legislative limitation. . . . The responsibility of establishing criteria by which service of process can be effectuated belongs to the Congress subject, of course, to constitutional safeguards which may be invoked through the process of judicial review. But beyond this the courts cannot go when the legislative body has spoken.

Id. at 508. *See also* Di Leo v. Shin Shu, 30 F.R.D. 56, 58 (S.D.N.Y. 1961).

41. *See supra* note 40.

court emphasized that "the words do *not* say in terms that a received-but-unacknowledged mail service is ineffective . . . ."[42]

The plain language of FRCP 4 suggests a result contrary to the Second Circuit's interpretation. When the defendant withholds acknowledgment, the rule requires "service of such summons and complaint . . . in the manner prescribed by subdivision (d)(1) or (d)(3)."[43] As the district court believed, the rule's requirement of alternative personal service was meant to be a completion or substitute for the unacknowledged mail service.[44] The Second Circuit, however, held that FRCP 4(c)(2)(C)(ii) required personal service ("a second service") only as a foundation for proof of the unacknowledged mail service's receipt.[45]

This question-begging analysis is unconvincing. The court's argument assumes the effectiveness of the unacknowledged mail service and focuses on the problem of the service's proof. Following this logic, the court conjectures that since proof of mail service is impossible without the acknowledgment, Congress must have intended for the second service to provide an alternative means of *proof*. Yet subsequent personal service would be irrelevant to proof of a party's prior receipt of mailed service.[46] Such reliance on irrelevant evidence as some sort of proof of the defendant's timely receipt of service, implicates due process concerns when used as the basis for a default judgment. Clearly, these statutory and constitutional barriers to the use of evidence of personal service preclude adoption of the Second Circuit's syllogism. The only viable reason for the rule's requirement of personal service would be for the personal service to replace the flawed mailed service. Consequently, FRCP 4's language contradicts the Second Circuit's holding.

Unconvinced by the presence of Rule 4's plain language, the court placed great importance on the absence of language indicating that unacknowledged mail service was "ineffective."[47] The court stated:

> Under the original [proposal] of the rule, effective service was complete upon the first mailing; all defendant needed to produce in order to obtain a default judgment was the returned envelope plus another mail delivery. When Congress changed the particulars of the

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42. Morse v. Elmira Country Club, 752 F.2d 35, 39 (2d Cir. 1984)(emphasis added).

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

44. Morse v. Elmira Country Club, 102 F.R.D. 199, 201 (W.D.N.Y. 1984).

45. Morse v. Elmira Country Club, 752 F.2d 35, 39–40 (2d Cir. 1984). The court was saying that FRCP 4(g)'s strict construction would not allow proof of service absent an acknowledgment form. FRCP 4(g) states:

> If service is made under subdivision (c)(2)(C)(ii) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision. Failure to make proof of service does not affect the validity of the service.

One flaw in the court's analysis is that the existence of such a limit on the means of proving receipt of mailed service indicates a congressional intent to avoid litigation of that question as much as possible. However, the Second Circuit's holding ignores this mandate. *See infra* text accompanying notes 65–73.

46. FED. R. EVID. 401 states:

> Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402 forbids the admission at trial of evidence that is not relevant. FED. R. EVID. 402. Possibly, proof of subsequent mail service might be relevant to a determination of whether the previous mail service was received by the defendant, since arguably, such evidence would tend to show the accuracy of postal service. Proof of subsequent personal service, however, bears no relation at all to a determination of the defendant's prior receipt of mailed service.

47. Morse v. Elmira Country Club, 752 F.2d 35, 41 (2d Cir. 1984).

initial mailing and substituted personal service as a follow-up, it gave no indication that it intended to change the prior view that mail service was effective where the recipient received the mail and accordingly obtained actual notice.[48]

Yet the court's conclusion from this legislative history seems flawed given the substantive differences between the original proposed rule and the rule as adopted by Congress.[49]

The earlier version mandated service by certified or registered mail (return receipt requested) with delivery restricted to the addressee.[50] If the summons failed to reach the defendant, the plaintiff would receive no receipt and the service would be ineffective. Therefore, a mailbox rule made sense while avoiding problems of proof.

Now, however, the amended rule allows unregistered mail but requires the defendant to acknowledge it.[51] In the absence of any such acknowledgment, "service of such summons and complaint *shall be made* [according to (d)(1) or (d)(3)]."[52] Under the adopted rule, many of the required acts remain unperformed at the time of the mailing.[53] Therefore, it seems apparent that Congress had reason to treat the adopted mailing process differently from the original version. This distinction undermines reasonable reliance on the original version as support for the court's conclusion.

2. *The Legislative History of FRCP 4(c)(2)(C)(ii)*

When the language of a statute is ambiguous on its face or in its application to the facts before the court, the court's interpretive analysis should first consider legislative history and explicit legislative policies.[54]

The 1983 amendments to Rule 4 were produced by rather "unusual proceedings."[55] Ordinarily, amendments to the FRCP are drafted by an advisory committee and adopted by the Supreme Court; historically, Congress has allowed these proposals to become law.[56] The advisory committee notes are, therefore, usually the

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48. *Id.*

49. *See infra* note 56 for text of original proposal.

50. *Id.*

51. *See supra* note 10 for text.

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

53. *Id.*

54. *See supra* note 40. In International Brotherhood of Teamsters v. Daniel, 439 U.S. 551 (1979) the U.S. Supreme Court observed federal courts' "obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Id.* at 566 n.20.

55. Siegel, *Practice Commentaries on FRCP 4*, 28 U.S.C.A. 18, C4–19 (Supp. 1985).

56. The Supreme Court of the United States is empowered by 28 U.S.C. § 2072 (1976) to prescribe rules of civil procedure for the federal district courts. In 1958, Congress created the Judicial Conference of the United States. One of its functions is to study practice and procedure in the federal courts and to make recommendations to the Supreme Court. *See* 28 U.S.C. § 331 (1976). The Judicial Conference has, in turn, created advisory committees to make recommendations to it for referral to the Supreme Court. Currently, an Advisory Committee on the civil rules reports to the Standing Committee on Rules of Practice and Procedure, which reports to the Judicial Conference, which reports to the Supreme Court. Rules adopted by the Supreme Court "shall not take effect until they have been reported to Congress by the Chief Justice . . . and until the expiration of ninety days after they have thus been reported." 28 U.S.C. § 2072 (1976).

Amendments to the rules have almost always "been adopted without congressional alteration." Nordenberg, *The Supreme Court and Discovery Reform: The Continuing Need for an Umpire*, 31 SYR. L. REV. 543, 551 at n. 36 (1980). For a more detailed discussion, *see* 4 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE, 47–60 (1969); Chandler,

greatest source of the rules' legislative history. The Supreme Court's proposal to Rule 4, however, was rejected by Congress which substituted its own rule for the Supreme Court's proposal.[57] Therefore, Rule 4's legislative history consists mainly of Congressman Edwards' (the bill's sponsor) report ("congressional report") which he inserted into the Congressional Record.[58] As Professor Siegel noted, "whatever its technical status, the report is the most extensive statement of background & intent on the amendment, and as such is a more dependable guide than the Advisory Committee's cursory note on the Supreme Court promulgation, which the Committee had drafted."[59] Therefore, this Comment relies heavily on the congressional report.

It is ironic that the Second Circuit relied upon the rule's legislative history for support of its proposition, since the legislative history provides the fatal blow to the court's analysis. Specifically, three facets of the legislative history cut against the court's result.

First, the congressional report shows that the mailing provision of FRCP 4 was modeled after the corresponding mailing provision of California's rule.[60] Significantly, the California courts have interpreted their rule to require dismissal on facts identical to those in *Morse*.[61]

Some Major Advances in the Federal Judicial System, 1922–47, 31 F.R.D. 307, 505–12 (1963). Recognizing the lack of congressional intervention in the Court's excercise of its rulemaking power, Mr. Chief Justice Burger noted in 1973 that "while Congress has rendered us the compliment of general approval in the past, it does not mean that the Congress should accept blindly or on faith whatever we submit." HEARINGS ON PROPOSED RULES OF EVIDENCE BEFORE THE SUBCOMMITTEE ON CRIMINAL JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY—SUPPLEMENT, 93rd Cong., 1st Sess., Ser. 2, at 8–9 (1973).

According to the March 1982 Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice, the Advisory Committee "conducted public hearings on the proposed amendments to the civil rules distributed to the bench and bar" in June of 1981, and submitted a "final draft" of its proposed Rule 4 amendments on January 15, 1982. 93 F.R.D. 255, 260 (1982). The proposed amendments went through the appropriate channels, and the Supreme Court promulgated the proposal to Congress on April 28, 1982. These amendments were to take effect on August 1, 1982, absent congressional action to the contrary. *See* 28 U.S.C. § 2072 (1976).

The rule which was then in effect contained no general mailing provision. Rather, it merely allowed mailed service to the extent, and in the manner, comtemplated by the applicable state's law. FED. R. CIV. P. 4(d)(7). The Supreme Court's proposed amendment added general authority for mailed service of process. The relevant text of the proposal was as follows:

> Service of a summons and complaint upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule may be made by the plaintiff or any person authorized to serve process . . . by registered or certified mail, return receipt requested and delivery restricted to the addressee. Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing acceptance by the defendant or a returned envelope showing refusal of the process by the defendant . . . .

Proposed Rule 4(d)(8). Located at 93 F.R.D. 255, 256 (1982).

Reacting to objections from practitioners, *see infra* text accompanying notes 66–69, Congress postponed the effective date of Rule 4. Public Law 97–227 (1982). Apparently heeding Chief Justice Burger's advice, Congress went to work extensively revising Rule 4. Congress produced its own amendment, the current law, and rejected the Supreme Court's proposal. Public Law 97–462 (1982). The President signed Congress' Rule 4 amendment on January 12, 1983 and the current Rule 4 took effect on February 26, 1983.

57. *See supra* note 56.

58. 128 CONG. REC. H9848 (daily ed. Dec. 15, 1982)(statement of Rep. Edwards), *reprinted in* 96 F.R.D. 81, 116 (1983).

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

60. *Supra* note 58, at 119. CAL. CIV. PROC. CODE § 415.30(a) (West 1973).

61. Tandy Corp. v. Sup. Ct., 117 Cal. App. 3d 911, 173 Cal. Rptr. 81 (Ct. App. 1981).

The Second Circuit attempted to distinguish the California rule on the basis of language which appears in the California rule but not in the FRCP.[62] California's rule provides: "[S]ervice of summons pursuant to this section is *complete* on the date a written acknowledgment of receipt of summons is *executed*, if such acknowledgment thereafter is returned to sender."[63] The absence of such language (i.e., that service is "complete" only upon "execution" of the acknowledgment) in the FRCP does not compel a different outcome. FRCP 4 is clear that service is not complete until either the defendant acknowledges the service or the plaintiff personally serves the defendant.[64] When the congressional report states that the FRCP is intended to operate the same as the California rule, a showing of anything less than affirmative language in the FRCP to the contrary is not persuasive. Thus, the court's attempt to distinguish the California rule is unconvincing.

Second, the Second Circuit's interpretation of FRCP 4 cuts against the congressional policy of avoiding unnecessary factual disputes, underlying the current rule. Congress drafted FRCP 4 based on the policy of avoiding difficult problems of proof regarding the defendant's actual receipt of service.[65] The congressional report makes this policy clear in its explanation for the rejection of the Supreme Court's proposal:

> [C]ritics of [the Supreme Court's proposed system] have argued that certified mail is not an effective method of providing actual notice to defendants of claims against them because signatures may be illegible or may not match the name of the defendant, or because it may be difficult to determine whether mail has been "unclaimed" or "refused," the latter providing the sole basis for a default judgment.[66]

Congress felt that under the current rule there would be no great need to inquire into the difficult question of the defendant's actual receipt.[67] The rule requires the defendant to acknowledge the receipt of service.[68] Upon defendant's failure to do so, personal service would assure actual notice to the defendant, eliminating burdensome battles of proof, while preserving the defendant's constitutional right to due process.

However, the Second Circuit's interpretation of FRCP 4 frustrates that rule's underlying policy by requiring a factual determination of a defendant's actual receipt.[69] For example, in *Morse*, if the defendant's attorney had not admitted receipt

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62. Morse v. Elmira Country Club, 752 F.2d 35, 40 (2d Cir. 1984).

63. CAL. CIV. PROC. CODE § 415.30(c) (West 1973) (emphasis added).

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

65. *Supra* note 58, at 118.

66. *Id.* at 116.

67. *Id.* at 119. "This system of mail service avoids the notice problems created by the registered and certified mail procedures proposed by the Supreme Court." *Id.*

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

69. *Supra* note 55, at C4–19. Professor Siegel argues:

> A potentially unfortunate impact of the *Morse* decision may be to invite fact contests on a case-by-case basis about whether or not an alleged mailing was actually received by the defendant. This can entail a substantial additional expenditure of judicial time and effort in respect of an issue Congress apparently sought to avoid with the acknowledgment requirement. Thus, in order to spare the *Morse* plaintiff the consequences of his own delay and inattentiveness, the court may have carved out a rule for which other parties—and the courts—may in the long run have to pay a price in diverted time and effort.

Id.

of the mailed service to the plaintiff's attorney, the court would have had to engage in an extended factual hearing in order to find the mailed service effective. This satellite litigation surely frustrates the rule's underlying policy.

The court recognized this dilemma in a footnote, but dismissed it by observing that a factual inquiry into the issue of actual receipt would still be necessary for purposes of assessing costs to the uncooperative defendant under FRCP 4(c)(2)(D).[70] That rule allows the plaintiff who is required to use personal service under FRCP 4(c)(2)(C)(ii) to recover the costs for the service from the defendant who refuses to return the acknowledgment form.[71]

Once again the court's argument is unpersuasive. Concededly, an apparent inconsistency exists between allowing such an inquiry for purposes of assessing costs and refusing to do so for tolling the statute of limitations. Yet two considerations resolve this problem. Congress expressly stated that it sought to avoid the inquiry for purposes of giving effect to a mailing because such inquiries often were defective.[72] Congress was willing, however, to allow such an inquiry for the limited purpose of assessing costs to the defendant. An erroneous decision on this limited issue carries a risk of far less damage to the defendant.

In addition to being less harmful, this limited purpose inquiry would occur less frequently. Since the imposition of costs is not relevant to the issue of whether personal service has been effected, either party could avoid litigating the question of the defendant's receipt of the mailed notice, without any significant sacrifice. The plaintiff could choose to forego reimbursement, or the defendant may wish to simply pay the costs of the personal service. Alternatively, the defendant could admit actual receipt if he or she could show good cause for failing to return the acknowledgment.[73] Therefore, the mere fact that such a determination might be made in some other context does not support the court's conclusion that this inquiry is appropriate for determining the occurrence of effective service.

The third, and perhaps most convincing part of Rule 4's telling legislative history, is found in the congressional report submitted by the bill's sponsor. The bill's sponsor prepared comments in the Congressional Record concerning a section-by-section analysis of the bill. The pertinent provisions contained therein state:

> This system of mail service avoids the notice problems created by the registered and certified mail procedures proposed by the Supreme Court. *If the proper person receives the notice and returns the acknowledgment, service is complete.* If the proper person does not receive the mailed form, or if the person receives the notice but fails to return the acknowledgment form, another method of service authorized by law is required.[74]

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70. Morse v. Elmira Country Club, 752 F.2d 35, 41 n.12 (2d Cir. 1984). FRCP 4(c)(2)(D) states:
Unless good cause is shown for not doing so the court shall order the payment of the costs of personal service by the person served if such person does not complete and return within 20 days after mailing, the notice and acknowledgment of receipt of summons.

71. *Id.*

72. *Supra* note 58, at 116–19.

73. FRCP 4(c)(2)(D) provides the defendant with a good cause defense. *See supra* note 70.

74. *See supra* note 58, at 119 (emphasis added).

This language clearly states that a received-but-unacknowledged mailing was not intended to be complete service. The rule's plain language, its underlying policy and legislative history all show that the Second Circuit's interpretation of FRCP 4(c)(2)(C)(ii) rests on a shaky foundation. Not only does the Second Circuit's holding violate a congressional mandate, it also forces satellite litigation upon an already overburdened court system.

III. Where do We Go from Here?

Though the Second Circuit's interpretation of FRCP 4(c)(2)(C)(ii) is suspect, it is important to consider the case's outcome from a policy perspective. If the outcome in *Morse* is desirable, then FRCP 4 should be amended to reach that result properly. Several possibilities exist for amending the rule to achieve that end. If the case's outcome is not desirable, Congress need not amend the rule, yet the court's interpretation in *Morse* should not be followed.[75]

A. *Policy Perspective*

The constitutional requirement for service of process is found in the fifth and fourteenth amendment due process clauses. *Mullane v. Central Hanover Bank & Trust Co.*[76] specifically requires that notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[77]

Whenever a defendant receives actual notice of the institution of an action, the constitutional requirement has clearly been satisfied. The Constitution does not go so far as to require actual notice, however.[78] In *Mullane*, the Supreme Court found a series of newspaper advertisements to be sufficient notice to distant and uncertain claimants to a trust fund.[79] Mailed service of process was not only adequate but actually considered optimal for more nearly situated claimants.[80]

In *Morse* the defendant received actual notice.[81] Though the country club was fully apprised of the action's pendency well before the statute of limitations had run, they defeated the claim by deliberately ignoring the action. However, when the Second Circuit corrected this unsavory result, it created a holding which presents additional procedural difficulties while disregarding congressional directives.

A court goes beyond its powers when it ignores a statute's requirements. Congress did not intend to allow unacknowledged mail service to be effective.[82]

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75. A court in another circuit has followed the *Morse* holding, without any discussion. Zisman v. Sieger, 106 F.R.D. 194, 200 (N.D. Ill. 1985). Additionally, one Fifth Circuit opinion implied in dictum that it would follow *Morse*. *See* Norlock v. City of Garland, 768 F.2d 654, 657 (5th Cir. 1985). It is urgent, therefore, for the *Morse* holding to be reevaluated before other courts travel the erroneous path traversed by the Second Circuit.

76. 339 U.S. 306, 314 (1950).

77. *Id.*

78. *Id.* at 318. *See generally* Note, *Constitutional Law: The Validity of Service of Process by Mail When There Is No Return Receipt: The Outer Limits of Due Process*, 25 Okla. L. Rev. 566 (1972).

79. *Id.*

80. *Id.* at 319.

81. Morse v. Elmira Country Club, 752 F.2d 35, 39 (2d Cir. 1984).

82. *See supra* Section II(C).

Since the plaintiff failed to meet Rule 4's requirements, the plaintiff should have been prevented from continuing the action. If Congress feels that this result is unfair to plaintiffs such as Agnes Morse, then it should consider amending it.

B. *Alternatives to FRCP 4(c)(2)(C)(ii)*

Since the outcome to the parties in *Morse* is desirable for policy reasons, it is necessary to examine how Congress could restructure the rule so as to effect the result that the plaintiff obtained in *Morse* while simultaneously taking into account other necessarily relevant factors.

At the outset it is worth noting that Congress' insertion of a mail provision served the important objectives of promoting uniformity of procedure and efficiency in commencing a lawsuit. Prior to the insertion of Rule 4(c)(2)(C)(ii) into the FRCP in 1983, a plaintiff in federal court could use mail service only if it was available under the forum state's rules of civil procedure.[83] When a state's rules so provided, the plaintiff was required to follow the state's requirements.[84] Thus, even when mail service was available, the plaintiff had to exercise a watchful eye for slight variations in the states' requirements or risk suffering a dismissal. A dismissal can have dire consequences for the plaintiff (and the plaintiff's attorney) if the statute of limitations runs out following the failed attempt at service.

The addition of the mailing provision to FRCP 4 provided the federal courts much needed uniformity in mail service. The mail service allowance, a key part of the 1983 amendments, arose from a desire to grant plaintiffs a cost-efficient manner of service while maintaining a system which would be effective in providing defendants with actual notice.[85] Therefore, any new changes to FRCP 4 should retain some version of federal mail service.[86]

Assuming that a mailing provision will be retained, what should it look like? A few considerations include fairness, efficiency, and clarity.

First, the rule's requirements should promote fairness to all the litigants. The due process clause mandates that this be a minimum objective.[87] Fairness to the defendant means that the rule should contemplate a manner of service which will be as effective as practicable.[88] The current rule was effectively drafted to meet this objective. Under the current rule Congress intended that there would be no complete service of process absent the defendant's signed acknowledgment form or personal service, thereby assuring the defendant's notice.[89]

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83. FED. R. CIV. P. 4(d)(7) (prior to 1983 amendments).

84. *Id.*

85. Siegel points out that the mailing method "has the potential for becoming a favored [method] . . . ." Siegel, *Practice Commentaries On FRCP Rule 4*, 28 U.S.C.A. 4, 35 (Supp. 1985).

86. Although FRCP 4(c)(2)(C)(i) allows for state mailing methods, not all states provide for mail service. *See supra* note 85. In addition there is much to be said for the availability of one uniform system of mail service. Rules of civil procedure should be made as simple as possible so as to avoid loss of claims due to procedural error.

87. *See* Daniels v. Williams, 106 S. Ct. 662 (1986); Wainwright v. Greenfield, 106 S. Ct. 634 (1986).

88. *See generally* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

89. *See supra* Section II(C).

Fairness to the plaintiff means that the rule should try to eliminate dismissals for ineffective service when the defendant has been provided with actual notice of the lawsuit.[90] Stripped of the Second Circuit's creative statutory interpretation, the current rule fails in this respect.[91]

Second, efficiency concerns are a fundamental aspect of any rule governing the manner of service of process.[92] Therefore, the rule should anticipate and avoid factual disputes which would waste the litigants' and the courts' resources. The congressional report discussing the 1983 amendments to FRCP 4 indicates that this was Congress' intent when it rejected the original proposal of the rule.[93]

Finally, and somewhat related to the efficiency concern, the drafters of a new rule should try to avoid needless complexities or ambiguities. At least for rules of civil procedure, clarity is a virtue. One of the major criticisms of the amended FRCP 4 is that it leaves too many questions unanswered.[94] These questions create unnecessary pitfalls for the unwary plaintiff's attorney. Congress intends for the FRCP to be an aid to fair and efficient resolutions of disputes on their merits.[95] This policy is explicitly stated in FRCP 1: "[These rules] shall be construed to secure the just, speedy, and inexpensive determination of every action."[96] With these considerations in mind, alternative avenues of congressional action will be explored.

1. *Strict Compliance with the Present Rule*

One option is to leave the rule intact and reject the court's interpretation in *Morse*. California's statute operates exactly the same as FRCP 4(c)(2)(C)(ii), except that California's courts interpret their statute to require dismissal in situations like *Morse*.[97] This approach has two advantages. First, it is very efficient because it avoids any disputes over whether or not the defendant received the mailed service. Moreover, the rule is easily applied, thereby reducing the areas in which a plaintiff's attorney might stumble. The one major drawback with this approach is that it is fundamentally unfair to allow a defendant to escape potential liability due to ineffective service when the defendant received service and then acted in bad faith.[98]

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90. *See supra* Section III(A).

91. *Id.*

92. *See infra* text accompanying note 95.

93. *See supra* note 58, at 116–19.

94. *See generally supra* note 59.

95. FED. R. CIV. P. 1.

96. *Id.*

97. Tandy Corp. v. Sup. Ct., 117 Cal. App. 3d 911, 173 Cal. Rptr. 81 (Ct. App. 1981) (where plaintiff mailed copies of summons and first amended complaint and appropriate notice and acknowledgment of receipt of summons to defendant's agent for service within state by certified mail, but acknowledgment was not executed and returned by agent, service was not completed and in personam jurisdiction over defendant was not obtained). The court stated that "the postal service return receipt does not suffice as a substitute for an executed acknowledgment of receipt of summons." *Id.* at 82.

98. *See supra* Section III(A).

2. *Incorporating the Second Circuit's View into the Rule*

Another option would be to amend the rule to incorporate the court's interpretation in *Morse*.[99] Under this approach the rule might read " . . . Despite the defendant's refusal to return the acknowledgment form within 20 days, if the plaintiff can prove that the defendant actually received the mail service, then service of process will be deemed complete on the date of the defendant's receipt."

This option avoids the unfairness to the plaintiff which undermined the utility of the first option. However, two problems with this alternative reveal its fatal weaknesses. First, when there is a factual determination of whether a defendant actually received mail service, a risk of an erroneous fact finding exists. Consequently, a defendant may be subjected to liability without being notified of the lawsuit. In all factual determinations there is a risk of error. But here that risk is unnecessary, since other versions of a mailing provision either reduce or eliminate altogether the need for a factual determination.

The second and even more damaging problem with this option is the inefficiency that will result from delving into the difficult factual issue of a defendant's actual receipt. This is the type of evidentiary difficulty which Congress sought to avoid when drafting the current rule.[100] These determinations can be very time-consuming, a trait which is particularly hostile to the policy embodied in FRCP 1,[101] because they have nothing to do with the merits of the plaintiff's cause of action.

Also, many questions flowing from this type of factual inquiry were not addressed by the Second Circuit in *Morse*. Some of these important questions include: the burdens of proof of the plaintiff; how this proof may be made; whether a presumption of receipt will be made upon proof of mailing;[102] and whether or not an admission of receipt from the defendant will be necessary for the holding in *Morse* to apply.

3. *The Hybrid Rule*

Another possibility would be a hybrid rule which generally would not allow an inquiry into a defendant's actual receipt, yet would call an unacknowledged mailing complete service when the defendant admitted to the receipt. Application of the *Morse* facts would lead to the same result obtained by the Second Circuit, while avoiding any inefficient and error prone factual determination.[103]

This hybrid rule seems to offer a good compromise between the competing policies of avoiding excessive factual findings and removing the defendant's undeserved statute of limitations shield. It is certainly fair to the plaintiff since the plaintiff, under *Morse*'s facts, would be entitled to proceed with the lawsuit. Also, it is a very efficient and reliable rule since an admission eliminates the necessity of any

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99. *See supra* text accompanying notes 29–38.

100. *See supra* note 58, at 116–19; *see also supra* note 55, at 24.

101. *See supra* text accompanying note 95.

102. The court in *Morse* seemed to presume defendant's actual receipt from the mere fact of plaintiff's mailing. Morse v. Elmira Country Club, 752 F.2d 35, 36 n.2 (2d Cir. 1984).

103. It is not clear whether the court was saying that defendant's attorney's letter to plaintiff constituted an admission of receipt or if the court was making a finding of fact on its own. *See supra* note 20.

factual determination. The only remaining concern would be the question of what constitutes an admission. Congress could, however, easily deal with this. Therefore, this hybrid might offer a good resolution in a *Morse* situation.

However, if such a rule were to be enacted, future defendants would need only to deny receipt in order to frustrate the rule's operation. Defense attorneys would be entirely ethical advising their clients merely to keep quiet. Hence the rule might perform splendidly in theory, but in practice such a rule would rarely make a difference.

4. *Registered or Certified Mail*

Another possible system uses registered or certified mail. Under this approach, either a receipt signed by the defendant or a note from the postal carrier indicating the defendant's refusal to accept the mail will serve as proof of service.

This was the method of mail service which was contained in the Supreme Court's proposal for Rule 4, which was rejected by Congress upon urging by California attorneys. The congressional report reveals the following criticisms of the proposed rule:

> Critics of that system of mail argued that registered and certified mail were not necessarily effective methods of providing actual notice to defendants of claims against them. This was so, they argued, because signatures may be illegible or may not match the name of the defendant, or because it may be difficult to determine whether the mail has been "unclaimed" or "refused," the latter apparently providing the sole basis for a default judgment.[104]

Three observations should be made in defense of the certified mail method of service. First, as one commentator has noted, "nearly all statutes authorizing service by mail require the use of registered or certified mail."[105] Indeed, California's mail method, which the federal rule was modeled after, is unique.[106] The mere fact that so many states have found the certified mail method satisfactory is compelling evidence of the efficacy of this method.

Second, the problem of illegibility of the signature on the receipt is not unique to certified or registered mail service. The current rule suffers from this potential problem as well. Under the current rule, nothing prevents a defendant from attacking the authenticity of the signature on the acknowledgment form. It may even be easier for a defendant to argue that the signature is a forgery under the current rule, since only regular mail is required. At least under the certified mail method, the delivering postal carrier is a potential witness for the plaintiff.

Along these lines, another problem with the current rule, under the *Morse* interpretation, is that courts will be forced to make factual determinations of actual receipt when the defendant fails to return the acknowledgment. In terms of the rule's

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104. *Supra* note 58, at 118.

105. Note, *Service of Process by Mail*, 74 MICH. L. REV. 381, 381 (1975). Many of these states' rules bear a striking resemblance to the Supreme Court's proposed rule. *See, e.g.*, Alabama CO. CIV. PROC. § 4.1(a).

106. *See supra* note 105.

ability to avoid protracted factual issues, the current rule is less effective than the certified mail method.

One other point should be made in response to the California critics of the certified mail method. Even if the certified mail method is not flawless, at least it is more fair to plaintiffs than the current rule, as properly construed. There is some potential under both the current rule and the certified mail method for mistakes to be made with regard to the issue of the authenticity of the defendant's signature. Perhaps it is better to err on the side of the method which provides the fairest results. Under the current rule an uncooperative defendant may frustrate the plaintiff's lawsuit. However, under the certified mail method, the most the defendant can do is refuse to accept the mail, and this will serve as the basis for a default judgment against the defendant.[107]

IV. CONCLUSION

The Second Circuit was faced with a difficult situation in *Morse*. Led by a desire for a "just" result, that court misinterpreted Congress' clear command by allowing unacknowledged mail service to be effective for tolling the state statute of limitations. As a result, that court has opened the door to widespread disputes over a defendant's actual receipt of service of process. Future courts, in proper deference to Congress' legislative authority, should abandon the Second Circuit's erroneous interpretation of FRCP 4(c)(2)(C)(ii).

Unfortunately, this leaves plaintiffs in a poor position, while encouraging defendants to withhold acknowledgment in bad faith. Either Congress or the Supreme Court should reevaluate the current rule in light of the policies and practical considerations highlighted in this Comment. One thing is certain—a uniform mailing provision should be retained in the FRCP. What form this should take is not entirely clear, although the certified mail method seems to offer the most efficient and fair method while avoiding the worst aspects of the current rule. The essential objectives illuminating the parameters of this legislative inquiry must be to provide an efficient and effective method of serving notice without creating incentives for litigants to misbehave.

James M. Underwood

107. See proposed rule *supra* note 56.