

Your Client Has A Potential Cause of Action Against A Foreigner. Now What?

by Scott J. Robinson, Esq.

A phone call breaks your attention at 6:30 on a warm spring evening. Disregarding your hopes of making your kid's soccer game and ruining your chances at making happy hour at Applebee's, you decide to take it. On the other end, you hear a tale of woe and deceit from a potential client that breaks your heart. Someone harmed him exactly two years ago and he wants you to file a lawsuit –immediately – to beat the statute of limitations.

After reminding him that courts close at 4:30PM, you are surprised to discover that your potential client knows that electronic filing can be accomplished in federal court 24 hours a day. He also reminds you how many attorneys are in the phonebook who know that as well. So, being the accommodating chap that you are, you agree to help.

The story your client tells you is so compelling, and the misdeeds acted upon him so unconscionable, that the complaint nearly writes itself. Then, after a little googling you quickly discover that your new client forgot to tell you that the dastardly no-goodnick resides in a foreign country. Below are some useful tips to consider:

- If you simply file a complaint without further instruction, the court will serve the complaint against the foreign party by registered mail. This is good service upon a domestic party or corporation pursuant to Fed. R. Civ. P., Rule 4(h)(1)(B), and (e)(1). And, in circumstances where the foreign country's laws on service allow it, this can be good service pursuant to Fed. R. Civ. P., Rules 4(h)(2) and 4 (f)(2)(C)(ii).
- If not, service upon a foreign party can often be accomplished through the Hague Convention's prescribed means pursuant to Fed. R. Civ. P., Rule 4(f)(1), in conjunction with Rule 4(h)(2). Many, but not all, foreign countries are signatories to it. The problem with this method is that, even if your defendant is from a country that is a signatory to the Hague Convention, service in this manner often requires paying a significant fee.
- When in doubt, and if you have an attorney making an appearance for the defendant, pursuant to Fed. R. Civ. P., Rule 4(d)(1), you can issue a request for a service waiver. They are virtually free and attorneys will often execute them to take advantage of additional time to file a responsive pleading that accompanies the execution of a waiver.
- Some attorneys, however, will refuse to execute a service waiver, especially when it comes to foreign defendants. This is where the gamesmanship, and motion practice often begin. In such a situation, it is useful to remind the party's counsel that Fed. R. Civ. P., Rule 4 (d)(1), provides, in pertinent part, that a party "that is subject to service under Rule 4... (h)... has a duty to avoid unnecessary expenses of serving the summons."



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- An attorney representing a foreign party who is mindful of Fed. R. Civ. P., Rule 4 (d)(2), may remind his adversary that the rule provides for mandatory sanctions on a domestic defendant who unreasonably refuses to waive service. The rules, however, are silent on whether expenses and attorneys fees can be instituted on a foreign party for its unreasonable refusal.
- Considering the purpose of the rules, and the fact that they have been read expansively, one could argue that expenses and attorneys fees can be pursued when foreign defendants **unreasonably** refuse waiver requests. And, even if 4(d) does not expressly allow for sanctions for foreign defendants, courts arguably have an inherent power to impose sanctions upon parties for wasteful conduct.
- The purpose of Rule 4 is not to support gamesmanship, but rather to ensure that the parties have been properly notified of the allegations against them so that they can participate in litigation and prepare their defense. Courts have held “defendants that magnify costs of service by requiring expensive service not necessary to achieve full notice of an action brought against them are required to bear the wasteful costs.”
- If that discussion leads nowhere, FRCP Rule 4(f)(3), in conjunction with Rule 4(h)(2), provides that service upon a defendant can be accomplished “by other means not prohibited by international agreement, as the court orders.” One need not accomplish service, for example, under the Hague Convention or otherwise before seeking that type of relief.
- All the while, keep in mind that you are on the clock. FRCP Rule 4(m) allows dismissal “[i]f a defendant is not served within 120 days after the complaint is filed.” However, Rule 4(m) specifically provides that the 120 day rule “does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).” Indeed, no other rule provides for dismissal, so **arguably** a plaintiff can take all the time he needs to perfect service. But, some courts have found that this is not a blank check.

Whether prosecuting or defending a lawsuit, Wegman, Hessler & Vanderburg is very familiar with service-related issues and can help make sense of them.

This article is not providing legal advice or creating an attorney-client relationship. If you have any questions or would like to learn more about this topic or if you have other legal questions, do not hesitate to contact Scott J. Robinson, Esq. at sjrobinson@wegmanlaw.com.