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Modern Statutory Approaches to Service of Process outside the State -- Comparing the North Carolina Rules of Civil Procedure with the Uniform Interstate and International Procedure Act

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MODERN STATUTORY APPROACHES TO SERVICE OF PROCESS OUTSIDE THE STATE—COMPARING THE NORTH CAROLINA RULES OF CIVIL PROCEDURE WITH THE UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT†

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INTRODUCTION

In 1967 North Carolina adopted a version of the Federal Rules of Civil Procedure (FRCP)[1] and a comprehensive long-arm statute.[2] Consequently, the legislature repealed most of the state's jurisdictional statutes including the nonresident motorist act,[3] which provided, like most of its counterparts,[4] for registered mail service upon those subject to its terms. Under the new procedures,[5] all nonresident defendants were to be served by the personal delivery of process outside the state or, failing this, by publication and mailing.[6] The greater expense of serving nonresident motorists in this manner understandably upset many attorneys, and they eventually prevailed upon the North Carolina General Statutes Commission, the sponsor of these new statutes, to revive the nonresident motorist act, or at least the registered mail provisions thereof.[7] As a mem-

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[1] N.C.R. CIV. P. 1-84, N.C. GEN. STAT. § 1A-1 (1969). Unlike the FRCP and most other state versions thereof, the North Carolina Rules of Civil Procedure (NCRCP) were enacted directly by the legislature.

[2] N.C. GEN. STAT. § 1-75.4 (1969). This statute was based upon the Wisconsin long-arm statute. WIS. STAT. ANN. § 262.05 (Supp. 1970).

[3] N.C. GEN. STAT. §§ 1-105 to -107 (1953), repealed by Ch. 954, § 4, [1967] N.C. Sess. L. 1353.

[4] *See, e.g.*, Hess v. Pawloski, 274 U.S. 352 (1927); 2 J. MOORE, FEDERAL PRACTICE ¶ 4.41-[2] (2d ed. 1970) [hereinafter cited as MOORE]; Annot., 95 A.L.R.2d 1033 (1964).

[5] Service of process is governed primarily by NCRCP 4.

[6] This scheme was also based upon the provisions of the Wisconsin statute. WIS. STAT. ANN. § 262.06 (Supp. 1970).

[7] The NCRCP, though adopted by the General Assembly during the 1967 session, were originally scheduled to become effective on July 1, 1969. Ch. 954, § 10, [1967] N.C. Sess. L. 1354. The interim period was to be used, *inter alia*, in studying the new statutes and making necessary corrections and changes before their effective date. All recommendations were channeled to the North Carolina General

ber of the Commission's drafting committee,[8] I was assigned to the task initially. I soon came to the view that all nonresident defendants, and not just motorists, should be subject to service by registered mail. With the acquiesence of my colleagues and the Commission, I undertook to draft such provisions, which, I had assumed, could be found in various existing long-arm statutes. To my surprise, I discovered that almost none contained such provisions, that few satisfactory models were available, and that I would probably have to create or borrow piecemeal much of the necessary language. Nevertheless, the draft was eventually completed, approved with minor changes by the Commission, and enacted in 1969 as an amendment to rule 4 of the North Carolina Rules of Civil Procedure (NCRCP).[9]

In the course of preparing the provisions and incorporating them into the statutory scheme, I faced more choices and constitutional questions than I would have thought possible in such a limited task. In the belief that other states will seek to enact similar provisions in the near future, I have attempted to set down here a discussion of these questions and problems and the reasons that guided my eventual choices. I shall also contrast the North Carolina provisions with those of other jurisdictions, most notably section 2.01 of the Uniform Interstate and International Procedure Act (IIPA), which was, together with rule 4(e) of the Arizona Rules of Civil Pocedure, my principal point of reference. I hope the discussion will be helpful to attorneys who must use the new North Carolina provisions and to the courts that must eventually construe them.

The Conceptual and Constitutional Background

Early American courts often stated that judicial process could not run from one state to another.[10] This maxim expressed their belief that the exercise of jurisdiction over a nonresident required the presence of his person or property within the territory. In 1877 in *Pennoyer v. Neff*,[11] this territorial view of jurisdiction became the standard of due process and consequently a constitutional restriction upon the range of state judicial process. This restriction might have become increasingly unfair

Statutes Commission, which was preparing an omnibus amending act that was adopted in 1969. As part of that amending act, the effective date of the rules was postponed until January 1, 1970. Ch. 895, § 21, [1969] N.C. Sess. L. 1033.

[8] The committee consisted of three professors of law—one each from Duke University, the University of North Carolina, and Wake Forest University.

[9] Ch. 895, §§ 1-4, [1969] N.C. Sess. L. 1026-29. This was part of the omnibus amending act. See note 7 *supra*.

[10] *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714 (1877).

[11] *Id.*

to the states and their citizens as interstate business and travel burgeoned thereafter; but the courts employed fictions of presence and consent to circumvent it and extend the jurisdictional grasp of the states.[12] Finally, in 1945 in *International Shoe Co. v. Washington*,[13] the Supreme Court rejected the territorial view as the measure of due process and held that a nonresident defendant could be summoned to a jurisdiction whenever his activities there reasonably justified requiring his presence. It followed that whenever such an appropriate basis for personal jurisdiction over a nonresident was asserted, process could openly run to him beyond the boundaries of the state so long as the mode of the delivery employed was reasonably calculated to give him notice of the pendency of the action.[14]

This change in conceptual reasoning made possible two related statutory reforms. The first, now implemented in many states, involved the enactment of modern long-arm statutes requiring a person to appear anywhere his acts give rise to the claim asserted against him. The second, which is still unimplemented in most states and is the subject of this article, involved the adoption of provisions allowing the use of any convenient and reliable method of giving notice to a nonresident defendant of the pendency of an action. The failure of so many states to enact modern service provisions cannot be attributed to any doubts as to the constitutionality of such "substituted" or special service of process. Any such doubts were buried long ago under a score of approving decisions.[15] Whether the failure to implement this reform has been due to inertia, indecision as to how far to go, or a fear of the dark corners at the extremities of the law is unclear. In any event there appears to be a gathering momentum that may complete this second reform within the decade.

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[12] For a general review of these developments, see Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569 (1958).

[13] 326 U.S. 310 (1945).

[14] *Id.* at 320. The same bifurcated approach had earlier been employed in cases upholding substituted service of process upon state citizens absent from the jurisdiction. Milliken v. Meyer, 311 U.S. 457 (1940); Walker, *Foreign Corporation Laws: The Loss of Reason*, 47 N.C.L. REV. 1, 25 (1968).

[15] *E.g.*, McGee v. International Life Ins. Co., 355 U.S. 220 (1957) (registered mail); Travelers Health Ass'n v. Virginia, 339 U.S. 643, 650-51 (1950) (registered mail to serve individual and corporation); International Shoe Co. v. Washington, 326 U.S. 310, 320 (1945) (personal service upon agent within the state and registered mail outside state); Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957) (service by personal delivery outside state); Smyth v. Twin State Improvement Corp., 116 Vt. 569, 80 A.2d 664 (1951) (registered mail).

SELECTING THE MODES OF SPECIAL[16] SERVICE OF PROCESS

There are three basic methods of serving process outside the state—personal delivery, mail requiring a signed receipt, and publication with notification by ordinary mail (hereinafter referred to as publication and mailing).[17] The IIPA also allows service as directed by the court or in the manner prescribed by the law of the place where it will be made,[18] but these options essentially provide only new means of access to these three basic methods.

Personal delivery would undoubtedly be included today in any general scheme of service outside the state because it is familiar, reliable and effective.[19] But because personal delievery is expensive and sometimes ineffective, its supplementation through service by mail requiring a signed receipt or by publication and mailing must be considered. Mail requiring a signed receipt is economical and reliable[20] and has long been successfully employed in serving foreign corporations[21] and nonresident motorists.[22] Now that its usage is no longer limited to those classes of defendants from which the state may exact a fictitious consent to the appointment of a local agent,[23] the only consideration is its efficacy in giving notice of the pendency of an action. And, since it has been satisfactory for notifying nonresident motorists, it should also be satisfactory for notifying any other nonresident tort-feasor or, for that matter, any other nonresident defendant over whose person the court may validly acquire jurisdiction.

[16] "Special" service includes all types of service other than personal delivery within the state. The word "special" is used to denominate these types of service because the more familiar words are inaccurate. Thus, "substituted" or "constructive" service is inaccurate because "special" service includes service by personal delivery outside the state. And viewing "special" service as solely service outside the state is also inaccurate because "special" service includes the use of registered mail and publication within the state.

[17] Except where the context clearly suggests otherwise, the use of the word "publication" alone as descriptive of a mode of service includes notification to the defendant, whenever possible, by ordinary mail.

[18] UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 2.01(a).

[19] *Id.* at § 2.01, Commissioners' Note.

[20] Mail requiring a receipt signed by the addressee may actually be more reliable than personal delivery since forgery of the signature, being more easily detectable than a false return, will presumably be less frequently essayed. Where the signed receipt may be signed by persons other than the addressee, its reliability goes down, of course, just as it does for personal delivery in jurisdictions permitting process to be left with persons other than the party to be served. *E.g.*, FED. R. CIV. P. 4(d)(1). There is also some reason to fear that registered mail service in foreign countries is not as reliable as it is domestically.

[21] *E.g.*, N.C. GEN. STAT. § 55-146(a) (1969) (originally enacted in 1955).

[22] See note 4 *supra.*

[23] Olberding v. Illinois Cent. R.R., 346 U.S. 338, 340-41 (1953).

Unlike mail requiring a signed receipt, publication is not "a reliable means of acquainting interested parties of the fact that their rights are before the courts."[24] Consequently, the constitutionality of its use has often been questioned,[25] and its inclusion within any general scheme of substituted service must be approached with caution. Since *Pennoyer v. Neff*,[26] its use in in personam proceedings has largely been forbidden, but its wide use in in rem type proceedings has often been to the exclusion of other, more reliable, modes of services. These seeming antinomies, which were largely caused by the territorial notion of jurisdiction,[27] have now diminished along with the notion itself. Thus, presently in in rem type cases, publication without mailing is ordinarily not sufficient to notify persons interested in such proceedings.[28] And in cases in which jurisdiction is asserted to be in personam, a combination of publication and mailing is being increasingly used to give actual or acceptable constructive notice to persons who apparently cannot otherwise be notified.[29] Indeed, such persons may be the only ones today who may properly be notified by publication, even when the proceedings are in rem or quasi in rem. But for the previously mentioned historical distinction and the number of potentially invalid statutes involved, the Supreme Court perhaps should so hold.[30] But the prime concern of this article with publication is its use

[24] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

[25] *Id.*

[26] 95 U.S. 741 (1877).

[27] Jurisdiction over the person of a nonconsenting nonresident could only be based upon his presence within the jurisdiction. Personal service of process upon him within the territory was, therefore, the only way to serve him. Even if he "consented" to jurisdiction in advance, he was to be notified pursuant to service upon a local agent since process could not run outside the state. Similarly, notice to persons whose property had been attached or garnished or was the subject of the proceeding was given constructively by publication within the state.

[28] Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The decisions in these cases do not point out whether registered mail or personal delivery, rather than ordinary mail, will be required to satisfy due process when defendants are few and their addresses are known.

[29] *E.g.*, Dobkin v. Chapman (Sellars v. Raye), 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968); WIS. STAT. ANN. § 262.06 (Supp. 1970); Note, *Civil Procedure—Constitutionality of Constructive Service of Process on Missing Defendants*, 48 N.C.L. REV. 616 (1970).

[30] If a diligent effort to give notice by personal delivery or registered mail is required by the due process clause in in personam proceedings, it should also be required in in rem type proceedings unless some difference between the two proceedings dictates a different result. The only possible difference is that the seizure of property when an action is begun in an in rem type case may itself come to the attention of the defendant or his agents in whose custody he may have left the property. See note 33 *infra*. But often the defendant will not receive timely actual

to achieve jurisdiction in personam; and, therefore, the discussion will hereafter be primarily so confined.

To give notice satisfying the requirements of due process, "the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."[31] The appropriate means to inform a known defendant is undoubtedly personal delivery or mail requiring a signed receipt. But is constructive notice appropriate when the defendant cannot be found or, for some other reason, cannot be served? For example, suppose that a motorist gives the injured person a false address or moves without leaving a forwarding address and cannot be found. He may, of course, be validly served by publication if his property[32] is first attached or garnished, even though neither the newspaper notice nor the seizure of his property[33] comes to his attention. It is his own fault he cannot be informed, and public policy favors immediate compensation to the plaintiff through execution upon the previously seized property after judgment by default has been entered.[34] Should not these same considerations authorize the use of publication in in personam actions involving missing or absconding defendants?[35] The two are not very different because there is present in each an appropriate basis for jurisdiction and the same gesture of notice. In an in personam proceeding there will of course be one basic proceeding in the jurisdiction where the accident occurred, rather than one or more anywhere the property of defendant is found. But relieving the plaintiff of the possible inconvenience

notice in this manner, and, in addition, there is no way for the court to know of this fact before judgment by default is entered. Thus, modern service of process provisions often provide that defendants in in rem or quasi in rem actions must be served in the same way as in in personam actions. N.C.R. Civ. P. 4(k)(1); Wis. Stat. Ann. § 262.06 (Supp. 1970).

[31] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 315 (1950).

[32] New York now holds that a defendant's insurance policy is a chose in action subject to garnishment. Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966). *Contra*, State *ex rel.* Government Employees Ins. Co. v. Lasky, 454 S.W.2d 942 (Mo. Ct. App. 1970); Howard v. Allen, — S.C. —, 176 S.E.2d 127 (1970).

[33] The fact that people usually leave their property in the care or custody of another, who would inform them of a judicial seizure, is regularly used to justfy the use of publication in in rem type cases. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 316 (1950); Pennoyer v. Neff, 95 U.S. 714 (1877). That the custodian does not know where defendant is does not, however, invalidate the service.

[34] *Cf.* Walker v. City of Hutchinson, 352 U.S. 112, 115 (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950).

[35] *Cf.* Dobkin v. Chapman, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968).

or hardship of the in rem type proceeding is hardly a denial of due process to the defendant.

Another difference between in personam and in rem type proceedings as to the possible use of publication arises from the possibilty that the holder of an in personam default judgment entered on such service may never locate property of the defendant upon which to execute. The same possibility cannot arise, of course, if the plaintiff is compelled to proceed in rem because such a proceeding requires the seizure of property at the time the action is begun. In view of this difference, busy courts, being obviously reluctant to do a vain act, should arguably permit the use of constructive notice by publication only for in rem type proceedings. But such proceedings may have to be duplicated if sufficiently valuable property cannot be located in a single state. Furthermore, an in personam judgment can often reach a missing defendant's insurance company or a public agency prepared to compensate the victims of uninsured motorists.[36] Finally, even though the plaintiff is unable to obtain immediate pecuniary satisfaction on his default judgment, he will at least be spared the necessity of litigating a stale claim whenever the defendant or his property is located. For all these reasons, an increasing number of cases sanction the use of publication to give notice to missing defendants in in personam actions.[37]

Even when defendant's address or whereabouts is known, he sometimes cannot be served by ordinary means because he has intentionally evaded the process server or refused to accept or call for a registered letter.[38] In this situation can there be any constitutional objection to service by publication and mailing? Delivery of the letter, the use of which has been compelled by defendant's own misconduct, is highly probable. Furthermore, the alternative is unnecessarily costly surveillance by

[36] *Id.*

[37] Dobkin v. Chapman, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968); Cradduck v. Financial Indem. Co., 242 Cal. App. 2d 850, 52 Cal. Rptr. 90 (Dist. Ct. App. 1966); Harrison v. Hanvey, 265 N.C. 243, 143 S.E.2d 593 (1965). Dicta supporting these decisions are found in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950) and Walker v. City of Hutchinson, 352 U.S. 112, 115 (1956). Arizona has by judicial construction unfortunately limited the publication provisions of ARIZ. R. CIV. P. 4(e)(3) to in rem type cases. O'Leary v. Superior Court of Gila County, 104 Ariz. 308, 452 P.2d 101 (1969). *See generally* Note, 48 N.C.L. REV., *supra* note 29.

[38] Many cases hold that a returned, unclaimed registered letter does not meet the requirements of a nonresident motorist act requiring a signed receipt. Annot., 95 A.L.R.2d 1033, 1045 (1964). They do not, however, say that the plaintiff may not thereafter resort to publication and mailing or any other form of constructive notice.

a private process server or perhaps no service at all. And although the expense involved in employing a private process server would presumably be chargeable to the defendant as costs if the plaintiff ultimately prevailed, it does not follow that the plaintiff should be compelled to incur these expenses since there is no guarantee that the defendant will ever be found.

However, an unopened door or an unclaimed registered letter does not always indicate a missing or skulking defendant. He may simply be away from home for an extended period. This common situation raises a swarm of difficult questions over the use of service by publication. Must the plaintiff use diligence to find and serve the defendant elsewhere by ordinary means before he may resort to publication? How extensive or costly must the inquiry or search be? If it appears that the defendant is traveling and cannot be readily located but will return in a period of weeks or months, must the plaintiff await his return? Is a default judgment based on service by publication and mailing void or voidable if the plaintiff fails to exercise due diligence in any of these regards? Should the defendant who honestly absents himself from the jurisdiction for a long time but unreasonably fails to provide a forwarding address or other means of contact be constitutionally amenable to service by publication?[39] If so, should the judgment be set aside under rule 60(b)(1) or equivalent provisions if he shows upon his return a meritorious defense to plaintiff's claim?[40]

Questions like these inspire the nightmare in which a person returns home to find that his house and effects have been seized by others pursuant to execution upon a default judgment. Does this possibility or those questions that inspired it justify or require the rejection of publication as a service device of last resort? Arguably, it does not. The defendant is not seriously injured before his property is sold. The burden of opening the judgment would be imposed upon him, but that burden may not be great if he is an innocent and wronged as the question supposes. He must hire a lawyer, of course, but that necessity arose when plaintiff first decided to sue him.

But what if his property is sold at auction before his return? Obviously this will not happen frequently because most defendants will learn of the peril before the substantial passage of time required by statute from the

[39] In answering this question affirmatively in the case of a missing defendant not shown to be hiding intentionally, one writer has stated: "The careless as well as the scoundrel owe equal responsibility to answer for their obligations." Note, *Service by Publication on a Defendant Who Cannot be Located in California*, 3 U. SAN FRANCISCO L. REV. 320, 326 (1969).

[40] Note, 48 N.C.L. REV., *supra* note 29, at 623.

filing of the complaint to the sale at execution. Furthermore, property that is subject to execution is also subject to attachment or garnishment, and the use of published notice plus mailing has never been (though arguably it should be) found to be insufficient in in rem type cases. In any event, although restitution in kind may not be possible, financial restitution can be assured by requiring an execution bond.[41] The danger can be further reduced by requiring prior judicial approval of all default judgments obtained through service by publication.[42] The court could then refuse to enter the judgment if it were not convinced that the defendant was missing or hiding or had negligently concealed his whereabouts. Alternatively, it could defer entry of judgment until the plaintiff took additional steps to locate the defendant or give him notice.[43]

The plaintiff should, of course, know of these possibilities and voluntarily delay or forswear the use of publication if it places his judgment under a cloud. The cost of a necessary execution bond may itself give him pause. But he would presumably prefer the right to assume the risk and cost when necessary than to have no chance for service when defendant is really hiding or missing. Thus, service by publication can, when properly supervised, provide justice for deserving plaintiffs who otherwise would have no recourse, and it rarely causes injustice or inconvenience to innocent defendants. Consequently, no effort was made to restrict or eliminate its use in the North Carolina provisions.

Those who wish to urge their jurisdiction to use registered mail or publication and mailing as modes of process service may choose to make the legislative debating point, regardless of how insular or parochial it may otherwise be, that the benefit of such provisions inures to local citizens, whereas the harm or inconvenience falls principally upon nonresidents. Such sentiments, when carried too far, may lead to due process challenges or refusals to accord comity or full faith and credit. But what has been suggested herein apparently offends none of these principles of fairness, at

[41] *E.g.*, N.C.R. Civ. P. 55(c).

[42] If the plaintiff's claim is not for a sum certain, he must apply to the court for a default judgment. N.C.R. Civ. P. 55(b)(2). But if it is for a sum certain, the application must be to the clerk. N.C.R. Civ. P. 55(b)(1). The court must still approve the execution bond before the entry of the default judgment. N.C.R. Civ. P. 55(c). In this way the court should have an adequate opportunity to scrutinize all judgments by default entered upon service by publication.

[43] The IIPA does not allow publication except upon court order. Uniform Interstate and International Procedure Act § 2.01(a). Consequently, the court may protect the defendant as it sees fit.

least when measured by the United States Constitution. Consequently, it may not be inappropriate in selling the use of such devices to note whose ox is gored in their rejection.

Priorities Among the Modes of Service

Some service of process provisions purport to leave the choice of mode to the absolute discretion of the party making service.[44] Others condition the availability of some modes on the nonavailability of others.[45] The latter approach offers guidance in the choice of mode, but in the process it creates statutory prerequisites the existence of which the plaintiff may be required to establish, sometimes in a collateral attack at a time and place inconveniently distant from their occurrence. Choosing between personal delivery and mail requiring a signed receipt on the basis of these considerations is not difficult. Neither is so much more unreliable than the other[46] that its availability must be limited or conditioned in order to meet the requirements of due process. Both offer advantages and disadvantages that are not easily summarized in statutory language and that are, therefore, best left to a statutory comment or other published material. Consequently the choice between them should be left to the party making service. Most statutes so provide.[47]

The nonavailability of the more reliable modes of service is generally a prerequisite to the constitutionality of the use of publication[48] and would, therefore, have to be established when the latter is challenged, regardless of what the publication provisions themselves require.[49] Thus, nothing is saved if these provisions do not so condition the use of publication, except the effort of draftsmanship; and the best way to warn of constitutional dangers is lost. For this reason, including such conditions in the statutory requirements is an appealing option.[50] In any event, an accompanying statutory comment explaining these constitutional requirements in detail

[44] H. Smit, Report on Whether to Adopt in New York, in Whole, or in Part, the Uniform Interstate and International Procedure Act 145, *reprinted from*, Report of the Administrative Board of the Judicial Conference of the State of New York for the Judicial Year July 1, 1966 through June 30, 1967.

[45] *E.g.*, Wis. Stat. Ann. § 262.06 (Supp. 1970); N.C.R. Civ. P. 4(j).

[46] See note 20 *supra*.

[47] *E.g.*, Ariz. R. Civ. P. 4(e)(2); N.C.R. Civ. P. 4(j)(9); Uniform Interstate and International Procedure Act § 2.01(a).

[48] See text accompanying notes 32-34 *supra*.

[49] Cases cited note 28 *supra*.

[50] *E.g.*, Wis. Stat. Ann. § 262.06 (Supp. 1970).

should be prepared.[51] Furthermore, the courts will hopefully function as a backstop to the attorney's judgment whenever the use of publication or the granting of default judgments is judicially supervised.

North Carolina now permits the use of personal delivery and registered mail interchangeably and without restriction.[52] And NCRCP 4(j)(9)(c) permits service by publication and mailing whenever the "address, whereabouts, dwelling house or usual place of abode" of the party to be served "is unknown and cannot with due diligence be ascertained or there has been a diligent but unsuccessful attempt to serve the party under either paragraph a [personal delivery] or under paragraph b [registered mail] or under paragraphs a and b of this subsection (9)." The first part of the immediately preceding language provides in effect that when the party to be served is missing and cannot be located, a formal but useless effort at service by registered mail or personal delivery at some last known address or place currently known to be incorrect is not a prerequisite to the use of service by publication and mailing. Obviously, such a charade could not satisfy the requirement of diligence under the statute or due process under the fourteenth amendment.[53] To satisfy either, there must be a diligent, but unsuccessful, effort to locate the missing defendant.[54] Consequently, if his disappearance is first discovered in the course of a formal attempt to make service, efforts to ascertain his correct address or whereabouts should still be made.[55]

The second part of NCRCP 4(j)(9)(c)—allowing the use of publication and mailing whenever there has been a diligent, but unsuccessful, effort to serve defendant by personal delivery or registered mail or both—is properly invoked only when the defendant's correct address or where-

[51] *E.g.*, ARIZ. R. CIV. P. 4(e)(1), State Bar Committee Note.

[52] N.C.R. CIV. P. 4(j)(9)(a)-(b).

[53] *Cf.* Schroeder v. City of New York, 371 U.S. 208 (1962); Walker v. City of Hutchinson, 352 U.S. 112 (1956).

[54] Grigsby v. Wopschall, 25 S.D. 564, 570, 127 N.W. 605, 607 (1910); Note, 48 N.C.L. REV., *supra* note 29.

[55] At first glance, this possibility seems to be governed by the second part of rule 4(j)(9)(c), which would lead to the same result if the failure to look for the defendant after the unsuccessful attempt to serve him did not satisfy the "diligence" requirement thereof. Such a result would also seem to be required by the sense of the first part of rule 4(j)(9)(c) and the due process standard it codifies. Indeed, the "diligence" requirement of the second part must incorporate the requirements of the first part to avoid constitutional difficulties. Thus, it is correct to say, though the text of paragraph (c) does not clearly so indicate, that the second part of the pargraph is invoked only when attempts to serve defendant have failed, even though his correct address or whereabouts is apparently known.

abouts is known but attempts to serve him personally have failed.[56] Since his correct address is known, he should actually learn of the pendency of the action from the notice sent to him by ordinary mail in accordance with the rule's requirements. Consequently, there is no need to exhaust completely the possibilities of serving him through the other modes. For example, if the defendant evades a process server or refuses a registered letter, he has received all the "diligence" he is owed and may then at plaintiff's option be served immediately by publication and mailing.

Suppose, however, that the registered-mail letter is returned unclaimed or efforts at personal delivery fail because the defendant is away from home. Here a diligent effort may require the plaintiff to locate and serve the defendant elsewhere or await his forthcoming return home. And if the plaintiff does not know from the first unsuccessful effort at service whether the defendant is "lying low" or is simply away from home, he must make a diligent effort to learn which of these alternatives is the case and then proceed accordingly.

A party not away from home who receives timely actual notice through service by publication and mailing to his home may still appear and challenge service if he was denied due "diligence." But if he appears without objection or does not appear and allows judgment by default to be entered against him, he waives the error. NCRCP 12(h)(1) and 4(j)(9)(e)[57] specifically so provide. However, if the defendant was away from home and did not receive timely actual notice, which through due diligence could have been given him elsewhere or later when he returned, the default judgment is presumably void and subject to direct[58] or collateral attack.[59]

In short, publication is permitted whenever the defendant cannot with due diligence be served by personal delivery or registered mail. This terse statement might just as well have been the statutory language. It would not have made much difference substantively, and it would have avoided difficulties that may lurk within the more complicated language actually used in the new rules in an attempt to guide the bench and bar in

[56] See note 55 *supra.*

[57] Mere errors in service of process which do not deny the defendant actual notice generally cannot support an attack. Pennoyer v. Neff, 95 U.S. 714 (1877); RESTATEMENT OF JUDGMENTS § 8, Comment b (1942); 46 AM. JUR. 2d *Judgments* § 659 (1969). See the further discussion of this point in the text following note 121 *infra.*

[58] *E.g.*, FED. R. CIV. P. 60(b)(4); N.C.R. CIV. P. 60(b)(4).

[59] F. JAMES, CIVIL PROCEDURE § 11.6 (1965); RESTATEMENT OF JUDGMENTS § 8.11 (1942).

the use of publication.[60] Thus, it may be better to require "diligence" in the statute as a constitutional warning that the requirements of due process must be met, but to leave the definition of "diligence" entirely to the courts. More sophisticated warnings, guidance, or definition can still be placed in a statutory comment.

Another approach is found in the IIPA. It purports to allow all modes of service to be used interchangeably and without restriction. But it does not explicitly mention publication, which is presumably available if "directed by the court" under section 2.01(5).[61] Such judicial direction allows the greatest flexibility in dealing with the kinds of situations for which service by publication is an appropriate last resort. Furthermore, it automatically provides a mechanism for guiding the plaintiff and protecting the defendant. Consequently, it may give the use of publication greater prestige in the eyes of a foreign court asked to enforce a resulting default judgment. But the plaintiff may not need the court's advice or warrant its scrutiny; and if the defendant appears, he can protect himself. Thus, mandatory judicial intervention at the beginning of the litigation, rather than at the end when a default judgment is sought, may produce unnecessary delay, waste precious judicial time, and constitute an overcautious statutory overkill. Furthermore, any resulting default judgment is still *ex parte* and subject to attack on due process grounds even though it bears the imprimatur of the rendering court.

Actually, there appears to be no clearly preferable choice between the two approaches. The choice for NCRCP 4(j)(9) was in effect predetermined by the provisions existing when the amended rules were drafted. Those provisions conditioned the availability of publication on the nonavailability of personal delivery[62] and virtually demanded the same approach in the case of registered mail.

Circumstances Under Which a Person is Subject to the Special Service of Process Provisions

The Constitution merely requires a mode of service reasonably calculated to give actual notice. Thus, a state could give the plaintiff a free choice between registered mail or personal delivery within or without

[60] See note 55 *supra*.

[61] Presumably it can also be used under § 2.01(2) of the IIPA if "prescribed by the law of the place in which service is made."

[62] These provisions were derived from Wis. Stat. Ann. § 262.06 (Supp. 1970), which is still so conditioned.

the state in a single statutory section. But most states apparently are not ready to authorize the unconditioned use of registered mail within the state.[63] Consequently, it is much simpler to draft special provisions covering those persons who cannot be served by personal delivery within the state.

Such a bifurcated approach, however, expresses of necessity a statutory preference for service within the state by personal delivery; and a defendant served outside the state may complain that he has been denied such service. The denial is not of constitutional dimensions, of course. Consequently, the North Carolina special service provisions require only a diligent effort to effect service by personal delivery within the state.[64] What actually constitutes diligence in the discharge of this duty is unclear. It should vary with the likelihood that the party to be served can actually be found within the state.[65] In any event, an asserted lack of due "diligence" that results only in service of process outside the state perhaps need not be scrutinized as sedulously as when it results in constructive service and a denial of actual notice.

To minimize even further the effect of this preference for service within the state by personal delivery, such provisions can contain a list of categories of persons who are denied it and can be served immediately in any manner consistent with due process. The persons listed should be those not ordinarily amenable to service by personal delivery within the state. The North Carolina list, which is longer than most,[66] includes any party

> that is not an inhabitant of or found within this State, or is concealing his person or whereabouts to avoid service of process, or is a transient person, or one whose residence is unknown, or is a corporation incorporated under the laws of any other state or foreign country and

[63] California and Illinois permit service by certified or registered mail within the state in small claims actions. CAL. CIV. PRO. CODE § 117c (West Supp. 1970); ILL. STAT. ANN. ch. 110A, § 284 (Smith-Hurd 1968) (certified mail only). Presumably small claims defendants are also entitled to service satisfying the notice requirements of the due process clause.

[64] The special service provisions contained in NCRCP 4(j)(9) become operative whenever a party "cannot after due diligence be served within this State in the manner heretofore prescribed [personal delivery] . . . ."

[65] If plaintiff reasonably believes at the time service is made that defendant is not within the state, he should not be required to establish this fact to a certainty. But, if plaintiff knows that a nonresident is, or recently has been, temporarily present within the state, he must serve him accordingly or establish that he has departed.

[66] *Compare* FED. R. CIV. P. 4(e) *with* ARIZ. R. CIV. P. 4(e)(1).

has no agent authorized by appointment or by law[67] to be served or to accept service of process. . . .[68]

The foregoing list, as well as the basic definition of those subject to the special service provisions—*i.e.*, all those persons within the court's jurisdiction[69] who cannot after due diligence be served by personal delivery within the state[70]—intentionally covers some persons who ordinarily would be served personally *within* the state. An obvious illustration is a resident temporarily absent from the state. Since he is not "found within this State,"[71] he may be served immediately outside the state by personal delivery or registered mail, even though he might also be served within the state by leaving the papers at his dwelling house with some person of suitable age and discretion then residing therein.[72] Furthermore, if process could not be left at his residence with a proper person, he might then also be a person who cannot after due diligence be served within the state.

A more interesting case arises when the sheriff is unable to serve a party supposedly residing or present within the state. The party may be

[67] Because of the unrepealed service provisions of the North Carolina Business Corporation Act, N.C. GEN. STAT. §§ 55-143, -144 (1965), this language contains a possible trap for the unwary attorney. The language was obviously not intended to include a foreign corporation that has obtained a certificate of authority to do business and has thereby consented to service of process under North Carolina General Statutes section 55-143. But it was intended to cover any non-registered foreign corporation. Unfortunately for this intention, North Carolina General Statutes section 55-144 provides that the Secretary of State shall be an agent for service upon any such corporation on a cause of action arising out of the transaction of business within the state. Consequently, the corporation has, in the words of NCRCP 4(j)(9), "an agent authorized . . . by law to be served or to accept service of process" and arguably must be served under the Business Corporation Act. This would mean that a foreign corporation could never be served under rule 4(j)(9) unless the long-arm provisions of North Carolina General Statutes section 1-75.4 are "longer" than the definition of "transacting business" found in section 55-131 of the Business Corporation Act. Even worse, the mention of foreign corporations in rule 4(j)(9) might deceive the plaintiff into thinking that those corporations could sometimes be served thereunder. Obviously section 55-144 should be repealed immediately or rule 4(j)(9) should be amended to express its original purpose of including all foreign corporations lacking a certificate of authority to do business within the state.

[68] N.C.R. CIV. P. 4(j)(9) (footnote added).

[69] The basic requirement, which is expressed in NCRCP 4(j), serves as a reminder that whenever the sole basis of jurisdiction over a defendant is his presence within the state, he can only be served by personal delivery within the state.

[70] N.C.R. CIV. P. 4(j)(9).

[71] *Id.*

[72] N.C.R. CIV. P. 4(j)(1)(a).

"concealing his person or whereabouts to avoid service of process."[73] He may also be someone who cannot after due diligence be served within the state. In either case, an attempt to serve him by registered mail *within* the state may then be made.[74] Furthermore, if he refuses to accept or pick up the registered letter and this refusal satisfies, as it should, the statutory requirement of "diligence," he may then be served by publication and mailing at his last known address within the state.

These provisions make it possible to serve local deadbeats and others of that stripe without resorting to the costly services of private process servers[75] or requiring proof that the party has concealed himself or left the state to avoid service of process.[76]

Unlike the North Carolina provisions, the IIPA unfortunately may not now perform this useful function. Article I, which contains the long-arm provisions, is entitled "Basis of Personal Jurisdiction over Persons Outside This State." And Article II, section 2.01, which contains the "special" service provisions, is invoked "when the law of this state authorizes service outside this state." This language may persuade a court that section 2.01 does not permit service within the state, even though it would permit service upon the same person if he stepped outside the state. Such a result, though perhaps illogical, is not tragic if the provisions governing service within the state permit substituted service on such persons. But FRCP 4 does not contain such alternatives. Consequently, combining it with the IIPA may leave an unintended gap in the provisions.

Needless to say, the gap is easily closed. Persons subject to service of process outside the state under Article I of the IIPA are obviously also amenable to special service within the state.[77] Consequently, it is necessary only that sections 2.01(a)(3) and 2.01(a)(5), authorizing substituted service by mail requiring a signed receipt or as directed by the court, also be available for use within the state. Since this result is not now specifically precluded by the language of those sections, it

[73] N.C.R. Civ. P. 4(j)(9).

[74] N.C.R. Civ. P. 4(j)(9)(b). This paragraph makes no mention whatsover of service outside the state. Thus, it would clearly be available for service within the state under these circumstances. *But see* Ariz. R. Civ. P. 4(e)(2), which limits the use of registered mail to addresses outside the state.

[75] McKelway, *Profiles—Place and Leave with*, New Yorker, Aug. 24, 1935, at 23-26, *reprinted in part in* J. Cound, J. Friedenthal & A. Miller, Civil Procedure 143-45 (1968).

[76] *E.g.*, Robbins v. Bowman, 9 N.C. App. 416, 176 S.E.2d 346 (1970).

[77] See note 69 *supra*.

may be assured perhaps by nothing more than a statutory note to that effect, some changes in the title of Article I, and a slight redraft of the introductory language of section 2.01.

Judicial Supervision of Special Service of Process

There is no absolute need for judicial supervision of special service of process since the defendant may challenge its inadequacy by appearance or by attack upon a resulting default judgment. Judicial supervision may nevertheless have much to commend it, especially when publication is the mode of service involved. Thus, it may prevent default judgments based on an improper use of such service and, thereby, avoid a resulting execution for which the plaintiff possibly cannot later make restitution, and it can at least require security in case restitution is eventually ordered. It can also bring about additional efforts by the plaintiff to give the defendant actual notice or to demonstrate the necessity for constructive notice. Finally, it may, by compelling diligent efforts to give the defendant actual notice, give service a judicial imprimatur that may be persuasive to other jurisdictions asked to honor a resulting default judgment.

The foregoing reasons should incline most jurisdictions to some degree of supervision. However, when registered mail or personal delivery is the mode employed, no supervision seems to be necessary prior to the time that a default judgment is sought. Either is reasonably calculated to give the defendant actual notice. Consequently, he will probably appear without objecting to the service, thus rendering any prior supervisory requirements mere rigmarole.[78] Furthermore, he is fully competent to assert any failure to use due diligence to serve him by personal delivery within the state. If there is a default, the application for judgment will, of course, require proof that service was effected.[79] NCRCP 4(j)(9) also requires a contemporaneous filing of an affidavit of service showing the circumstances warranting the use of special service. This requirement provides the court with its only opportunity to enforce the legislative preference for service within the state by personal delivery, the denial of which cannot thereafter support an attack on the requested default judgment.[80] Filing the affidavit

[78] Ariz. R. Civ. P. 4(e)(2)(a) requires the filing of proof of service of process by registered mail immediately after service is effected. Aside from creating a judicial record of the fact and date of service before entry of default—which record serves no apparent purpose—it seems to serve only the tradition that an officer file his return of service directly with the courts as soon as it has been effected.

[79] N.C.R. Civ. P. 4(j)(9)(a)-(b).

[80] Defendant has been given actual notice by personal delivery outside the state

with the required proof of service requires no extra steps, of course. Nor is its preparation particularly burdensome. In fact, affidavits would be required anyway as part of the proof of service when registered mail or publication is the mode employed.[81]

Waiting until the application for default judgment will arguably also suffice when publication is the mode employed, though some would, as already indicated, require judicial permission even to use it.[82] The affidavit showing the circumstances warranting the use of publication is important because it must establish, by showing the plaintiff's diligent but unsuccessful efforts to give the defendant actual notice, the constitutional unavailability of the other modes. And though it succeeds in establishing the plaintiff's "diligence," it may persuade the court that additional efforts, such as publication elsewhere or notice to the defendant's insurance company or others,[83] should be essayed before judgment by default is entered.

Under NCRCP 4(j)(9)(c) the affidavits required in connection with publication and mailing are to be filed when service is completed and not with the application for default judgment. This requirement may serve a useful purpose in in rem type proceedings involving many defendants[84] and thereby justify its presence in a single publication provision applicable to both in rem and in personam proceedings. In most actions based on the special service provisions, however, it serves no apparent purpose; and,

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or by registered mail anywhere. Since these modes are as reliable, at least when used within the United States, as personal delivery within the state, their availability could be made unconditional. Consequently, any failure of plaintiff to use due diligence in making service by personal delivery within the state would seem to be mere error and not suitable grounds to attack a judgment. See note 57 *supra*. Rule 4(j)(9)(e) so provides.

[81] N.C.R. Civ. P. 4(j)(9)(b)-(c).

[82] Uniform Interstate and International Procedure Act § 2.01(5). See text accompanying notes 61 & 62 *supra*.

[83] Note, 48 N.C.L. Rev., *supra* note 29, at 625 nn.47 & 48.

[84] In actions involving numerous defendants, some of whom may be unknown, the failure of some defendants served by publication and mailing to appear will not produce an immediate default judgment since others representing their interests may appear. *Cf.* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). In such cases, it makes sense to file the affidavits required by rule 4(j)(9)(c) immediately after the publication and mailing are completed, because otherwise, years later when the litigation terminates in a decision on the merits, the existence of the default as to the nonappearing defendants and those filing requirements may be overlooked. Although the same situation could arise when defendants are served personally or by registered mail, it is less likely. Furthermore, in that situation nothing would prevent the plaintiff from filing proof of service before entry of final judgment was sought.

therefore, delay in filing the affidavits, which does no apparent harm,[85] should not be penalized, especially since the practice is different when other modes of special service are employed.

Under Federal and North Carolina Rule 55(b)(1), a default judgment may be entered by the clerk of court regardless of the mode of service employed when plaintiff's claim is "for a sum certain or for a sum which can by compilation be made certain." Because of the constitutional problems involved, the clerk may not be the right person to scrutinize the use of service by publication. Consequently, its use should in some way divest him of jurisdiction to enter a judgment by default or at least also involve the court. The latter is effectively accomplished by NCRCP 55(c), which provides that if service is based on publication, no default judgment shall be entered until the plaintiff shall have filed a bond approved by the court, which presumably may then also approve or disapprove the underlying service.

The Mechanics of Using Mail Requiring a Signed Receipt

Both registered and certified mail provide for, but do not require, the use of a return receipt.[86] Both can provide that only the addressee may sign the receipt and receive the letter.[87] But registered mail, which costs fifty cents more than certified mail, is handled more carefully and is slightly less likely to go astray. Does this sole difference justify the exclusion of certified mail service, which is not available outside the country, from the delivery of process domestically? It should not. Proof of service of process by either method would require presentation of the signed receipt or other evidence satisfactory to the court of delivery to the addressee. But if the letter were lost en route, neither delivery nor proof thereof could be made, and defendant could not be harmed or inconvenienced. Consequently, it is for plaintiff, who may be inconvenienced by the loss, and not for the Constitution or the legislature, to decide whether to eschew the potentially false economy of service by certified mail. The IIPA so concludes and requires only "any form of mail . . . requiring a signed

[85] Defendant has forty days to answer or otherwise plead after the first publication of notice. N.C.R. Civ. P. 4(j)(9)(c). Filing the affidavits of service and publication at the beginning or the end of the forty day period seems to make no difference, so long as they are filed before the entry of default.

[86] The post office charges fifteen cents extra for the signed receipt.

[87] This provision, which costs fifty cents extra, is indicated by the legend "addressee only" on the envelope.

receipt."[88] Arizona[89] and North Carolina,[90] however, and nonresident motorist acts[91] allows only registered mail to be used. There is no apparent reason for this restriction today other than the fear that those not familiar with the unimportant differences between the two services might oppose a statute that also authorized the general use of certified mail service. Since such sentiment has not been prevalent in North Carolina, any future amendments to these provisions should authorize the use of either registered or certified mail.

In the past, nonresident motorist statutes and other acts permitting service by registered mail usually required the plaintiff to deliver a copy of the summons and complaint to a public official for dispatch to the defendant by registered mail, return receipt requested. The delivery to the public offiical, who was supposedly the agent of the defendant, constituted service within the state as required by the territorial view of jurisdiction.[92] Such delivery is no longer required, of course, and the plaintiff may now be authorized to mail the letter directly to the defendant.[93] Under this procedure, however, an unscrupulous plaintiff could mail the defendant papers other than copies of the summons and complaint in order to mislead him into defaulting, a scheme that delivery to a public official would prevent. But a default judgment cannot be obtained without swearing "that a copy of the summons and complaint was deposited in the post office for mailing by registered mail, return receipt requested."[94] I doubt that plaintiff or his attorney would commit perjury in this way for so dubious an advantage. One can, of course, imagine horror stories involving the duped secretary who mailed the letter without actually seeing its contents and who is later induced to sign the affidavit. But is the prevention of so unlikely an event really worth the cost, delay, and bother of regularly involving public officials, especially when a judgment based on such a fraud

[88] UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 2.01(a); see ARK. STAT. ANN. § 27-339 (1962) (registered or certified mail to serve certain nonresident defendants). Certified mail, return receipt requested, is also allowed for service in small claims actions in California and Illinois. CAL. CIV. PRO. CODE § 117c (West Supp. 1970); 110A ILL. STAT. ANN. ch. 110A, § 284 (Smith-Hurd 1968).

[89] ARIZ. R. CIV. P. 4(e)(2)(a).

[90] N.C.R. CIV. P. 4(j)(9)(b).

[91] Annot., 95 A.L.R.2d 1033, 1035 (1964).

[92] Hess v. Pawloski, 274 U.S. 352 (1927); 3 MOORE, ¶ 4.41-[2]:

[93] Olberding v. Illinois Cent. R.R., 346 U.S. 338, 340-41 (1953).

[94] N.C.R. CIV. P. 4(j)(9)(b).

can always be opened? The IIPA,[95] North Carolina,[96] and Arizona[97] do not think so and permit the party making service to dispatch the letter himself. For making service in a foreign country, however, FRCP[98] and the similar provisions of Arizona[99] and North Carolina[100] require that the letter be dispatched by the clerk of the court. One may concede, of course, that extra caution and judicial involvement are more desirable in the case of service in a foreign country without concluding that this extra step is necessary for service within the country.

When the addressee of a registered or certified letter is not at home, the postman may allow other individuals found on the premises and authorized to receive the addressee's mail[101] to sign for it. Although the signer must be of suitable age and apparent discretion, he apparently need not then be residing at the defendant's address, as is often required in the case of service of process by personal delivery,[102] and apparently could be a maid, baby sitter, friend, or relative. Thus, there is some risk that defendant will not actually receive the letter or learn of its contents. To avoid this possibility, the statute could require that the receipt be signed by the addressee, a requirement that would virtually compel the use of "addressee only" service whenever the defendant was a natural person. The IIPA and rules derived therefrom for service in a foreign country specifically so require.[103] On the other hand, the basic Arizona and North Carolina provisions[104] for service within this country,[105] as well as most

[95] UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 2.01(a)(3).
[96] N.C.R. CIV. P. 4(j)(9)(b).
[97] ARIZ. R. CIV. P. 4(e)(2)(a).
[98] FED. R. CIV. P. 4(i)(1)(D).
[99] ARIZ. R. CIV. P. 4(e)(6)(a)(iv).
[100] N.C.R. CIV. P. 4(j)(9)(d).
[101] The fiction of agency, which had been adopted by the post office, is one often employed by the courts in accepting a receipt signed by another as proof of service by registered mail. Annot., 95 A.L.R.2d 1033, 1050 (1964). The agency is, however, assumed from the relationship between the addressee and the person signing, rather than proved.
[102] *E.g.*, FED. R. CIV. P. 4(d)(1); N.C.R. CIV. P. 4(j)(1)(a).
[103] UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT § 2.01(b); FED. R. CIV. P. 4(i)(2); ARIZ. R. CIV. P. 4(e)(6)(b). *But see* N.C.R. CIV. P. 4(j)(9)(d), which does not require the signature of the addressee for service in a foreign country. Because foreign mail service is apparently often less reliable, this aberration in the North Carolina version should be regarded as an oversight hopefully to be changed at the first opportunity.
[104] ARIZ. R. CIV. P. 4(e)(2)(a); N.C.R. CIV. P. 4(j)(9)(b).
[105] By contrast, the small claims service provision of California and Illinois require, like the IIPA, that the receipt be signed by the addressee. See note 88 *supra.*

nonresident motorist acts,[106] contain no such specific requirement.

In interpreting nonresident motorist acts, courts have often accepted receipts signed by persons "authorized to receive the addressee's mail."[107] And although there are some contrary decisions,[108] none have suggested that a statute authorizing the acceptance of signatures other than the addressee's would be unconstitutional. Indeed, such a holding seems unlikely in view of the apparent constitutionality of provisions authorizing the leaving of process with persons other than the defendant.[109] And in the absence of substantial difficulty with these provisions,[110] how can much greater caution in the use of registered mail be justified? The fact that the post office may deliver the letter to persons not "then residing therein" admittedly lowers the reliability of the signed receipt by a hair; but the difference does not appear to be of constitutional dimensions. And if it were, the gap could simply be closed[111] without reverting to the unnecessary caution of an "addressee only" requirement. But there is really no cause for concern with the present provisions. The person who signs will probably be a spouse or parent or someone trustworthy enough not only to be allowed on the premises by the defendant, but also to deliver the letter or notice of it to him. In any event, the courts have shown a readiness to protect defendants who have moved or did not receive actual notice.[112] Finally if a letter requiring the addressee's signature is returned "unclaimed"—which will undoubtedly happen more frequently with an addressee only" requirement—this may constitute, if the defendant is not away from home, the "diligent but unsuccessful effort" that permits resort under NCRCP 4(j)(9)(c) to service by publication and mailing. Thus, we may be rejecting a reliable signature in favor of none at all and denigrating the usefulness of registered mail in favor of publication rather than personal delivery. For these reasons, it is preferable not to require the addressee's signature for service within the country and to leave the

[106] Annot., 95 A.L.R.2d 1033, 1050 (1964).
[107] *Id.*
[108] *Id.* at 1052.
[109] *E.g.*, FED. R. CIV. P. 4(d)(1); N.C.R. CIV. P. 4(j)(1)(9).
[110] 2 MOORE, ¶ 4.11.
[111] Although the statute could condition the validity of such service on delivery to someone "then residing therein," there is no direct way of requiring the post office to adopt this requirement. Nevertheless, most persons authorized to receive the addressee's mail probably meet this requirement anyway. Consequently, the service would be valid in most cases. Plaintiff might have to check, of course, to see whether the signature on the receipt meets this requirement, an inconvenience that might drive him to "addressee only" service.
[112] Annot., 95 A.L.R.2d 1033, 1052 (1964).

acceptability of another's to the judgment of the courts and the plaintiff, who may in doubtful or important cases seek the greater security of personal delivery or "addressee only" registered mail service originally or in a second effort as a backstop. This judgment admittedly does not follow what appears to be the current statutory trend. But the trend is, I suspect, more responsive to apprehended political necessity than to the Constitution, consistency and sound public policy.

An undelivered registered mail letter will be returned to the sender bearing a stamped self-explanatory legend affixed by the post office. These legends include the following: refused, unclaimed, moved and left no address, no such street or number, and unknown. All of these indicate that the letter was not delivered, which is ordinarily a prerequisite[113] to proof of service of process. The first, and sometimes the second, legend may permit plaintiff to resort immediately to publication and mailing under NCRCP 4(j)(9)(c); the last three would seem to require a diligent effort to ascertain defendant's correct address or whereabouts.

When the addressee or other person authorized to receive his mail refuses to sign for a registered letter, it will be returned stamped "refused." Some would contend that the envelope containing this legend should, like a signed receipt, constitute proof of service of process by registered mail since the addressee has notice or is personally responsible for his lack of it.[114] As appealing as this position seems, it was rejected in NCRCP 4(j)(9)(b) for the following reasons. First, unless the addressee himself refused to sign, which cannot be known unless the letter was sent "addressee only," he would be penalized for the refusal of persons over whom he may lack control. Secondly, the correctness of the legend depends entirely upon the postman's honesty and identification of the person who refused to sign.[115] Thirdly, the defendant's refusal to sign does not prove

[113] The nonresident motorist acts of some states will apparently accept, as proof of service, plaintiff's affidavit that the letter was mailed or delivered to the proper public official for mailing, and courts have approved such service. 2 MOORE ¶ 4.41-1[2]; Annot., 95 A.L.R.2d 1033, 1037 (1964). Whether such service would be approved today is unclear, since the statutes do not require that defendants actual whereabouts be unknown and undiscoverable with due diligence. Nor do they necessarily provide the appropriate safeguards surrounding this final gesture of service as North Carolina does in supervising service by publication and mailing.

[114] Annot., 95 A.L.R.2d 1033, 1048 (1964).

[115] This argument *alone* is admittedly unpersuasive since the same infirmity attends service by personal delivery. Indeed, the problem may be worse there since process servers, who may have to make special trips to a defendant's door until service is effected, clearly have more incentive to feign service than do postmen, who return regularly to a defendant's door, to feign delivery of registered letters.

he knew that he was being sued or that a particular plaintiff was suing him for a particular reason in a particular court. Indeed, the defendant may have believed the contents of the envelope to be entirely different from what they were and may have refused to sign for reasons having little to do with the desire to avoid a lawsuit. Consequently, it appears better that the plaintiff be forced to resort to publication and ordinary mailing than that the "refused" letter itself constitute service. The defendant cannot refuse this second letter, which will give him actual notice, and presumably will be charged with the added cost of service by publication if he loses.

Under NCRCP 4(j)(9)(b), service is complete on the day the letter is delivered, as disclosed on the return receipt. The same result obtains if service is made by personal delivery, even though the papers are left with someone other than the defendant, and there is no reason to add, in the case of service by registered mail, extra days before the period to answer or otherwise plead begins to run.[116] However, the rule provides, in the language of the now repealed North Carolina nonresident motorist act, that the court shall, upon motion of the party served, allow such additional time as may be necessary to afford the defendant reasonable opportunity to defend the action. Presumably plaintiff's attorney will ordinarily consent to such an extension anyway and obviate the necessity of bothering the court.[117]

Attacking Judgments by Default

Service schemes embodying a preference for personal delivery within the state and authorizing the use of publication must of necessity create three sequential levels of availability, each separated from the next by the requirement of due "diligence."[118] Such is the case with NCRCP 4(j), the three levels of which are personal delivery within the state, registered mail and personal delivery outside the state, and publication. A defendant may, of course, appear prior to judgment and successfully complain of any denial of due "diligence." But can he also attack a resulting default judgment? Common sense would preclude an attack if a defendant merely receives actual notice from service on the second level instead of the first and allow it, as due process would seem to require, if he receives only

[116] *But see* Ariz. R. Civ. P. 4(e)(2)(a), which—along with other jurisdictions—does add extra days in this instance.

[117] N.C.R. Civ. P. 6(b).

[118] A fourth level could exist if a process server had to use diligence to serve defendant personally before he could leave the papers with other persons at defendant's residence. *E.g.*, Wis. Stat. Ann. § 262.06(1) (Supp. 1970).

constructive notice by publication when through diligence he could have been located and given actual notice.[119] Arguably, it should not matter that the missing defendant fortuitously learns of the pendency of the action. The initial likelihood that he would not learn is so great that an attack should still be allowed to encourage the plaintiff to exercise diligence in locating him.[120]

Suppose, however, that the defendant is served by publication and mailing to a correct address. If he were away from home at that time and were denied timely actual notice because the plaintiff failed to exercise diligence in locating him elsewhere, the judgment is clearly void. But if he received actual notice at home from service by publication and mailing, the judgment should not be void simply because service by personal delivery or registered mail was also possible. The denial of due "diligence" here is not of constitutional dimensions because the method of service was reasonably calculated to give actual notice and in fact succeeded. But the defendant can argue as a matter of policy that registered mail and personal delivery are superior and should be forcibly encouraged, not because they alone can give actual notice, but because they alone permit immediate verification of its receipt. One is inclined to reject this argument because the defendant can appear before the entry of default and challenge service on this ground. But so can a missing defendant who learns fortuitously of service by publication, and it was previously suggested that he need not appear. It is difficult to distinguish between the two situations, as is evident if we assume the defendant was away from home legitimately and also learned of the pendency of the action fortuitously. The dilemma can be resolved in a practical manner by distinguishing between defendants who are at home and those who are not. The former are likely to receive actual notice from the mailing and would probably be guilty of contributory fault if the initial service by personal delivery or registered mail was unsuccessful. The latter are not likely to receive actual notice and probably are not guilty of contributory fault if their whereabouts are reasonably ascertainable. Thus, in the former situation the exercise of due "diligence" should not be regarded as a condition precedent to the validity of service; in the latter, it should.[121]

[119] *Cf.* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). If the missing defendant could not have been located and actually notified, he has received the only service possible under the circumstances. Thus, even though a search for him was never commenced, the default judgment should not be void.

[120] *Cf.* Wuchter v. Pizutti, 276 U.S. 13 (1928).

[121] RESTATEMENT OF JUDGMENTS § 8, Comment b (1942). Such a deficiency

Most states would probably reach the same results under general common law principles of judgments[122] or the conflict of laws,[123] which are summarized in the Restatement of Judgments as follows:

> Where a method of service of process is provided for by a statute of the State, but there is a failure to comply with the requirements of the statute as to the method of service, a judgment will be void or merely reversible, depending upon whether there has been a failure to comply with a requirement which is a condition precedent to the exercise of jurisdiction. . . . In construing statutes providing for methods of service of process upon the defendant, the present tendency is to hold that failure to comply strictly with the requirements of the statute does not make the judgment void if the failure does not deprive the defendant of notice and an opportunity to be heard. Where, however, a statute is not fully complied with, with the result that there is substantially less likelihood that the defendant will receive notice, the judgment may be void even though the notice actually given would have been sufficient if the statute had so provided.[124]

Paragraph (e) of North Carolina Rule 4(j)(9) codifies these principles in their effect upon the due "diligence" requirements as follows:

> No party served under this subsection (9) may attack any judgment by default entered on such service on the ground that service, as required by this section (j), should or could have been effected, with or without due diligence, under some other subsection of this section (j) or under a different paragraph of this subsection (9).

The codification was intended to make it clear that "due diligence" was not a condition precedent to the exercise of jurisdiction if, despite its denial, there resulted service reasonably calculated to give defendant actual notice. Unfortunately the articulation of this purpose is perhaps lacking. Thus, one reader has wondered whether paragraph (e) seeks to preclude even an attack of constitutional dimensions when the lack of due "diligence" results in service by publication.[125] Obviously, it cannot bar such an attack and does not seek to do so, as the words "as

renders the judgment void and subject to collateral attack. *Id.* at §§ 8, 11. See the text accompanying notes 58-60 *supra.*

[122] See note 58 *supra.*

[123] RESTATEMENT OF CONFLICT OF LAWS § 429, comment g (1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 92(d) (Proposed Official Draft, 1967).

[124] RESTATEMENT OF JUDGMENTS § 8, comment b (1942).

[125] M. ROSENBERG, J. WEISTEIN & H. SMIT, ELEMENTS OF CIVIL PROCEDURE 334 (1970).

required by this section (j)" were intended to signify.[126] Furthermore, paragraph (e) could be read to bar even a direct attack under rule 60(b)[127] when "diligence" is lacking and, as a result, the registered letter is signed for by another and the defendant never receives notice or when "diligence" is lacking and the mailing that accompanied publication has gone astray. Again this was not the purpose of the paragraph. The gist of paragraph (e) is that an attack will not be allowed simply because due diligence was not accorded. But where this failure unexpectedly also results in a denial of actual notice, a direct attack should certainly be possible and paragraph (e) should not be viewed as seeking to bar it.

[126] The problem here is that the statutory and constitutional requirements of due "diligence" coalesce in the case of a missing defendant and that language waiving the former would seem to intend to waive the later. The phrase "as required by this section (j)" sought to limit the waiver to the former only.

[127] Note, 48 N.C.L. REV., *supra* note 29, at 623.