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Are You Being Served: E-mail and (Due) Service of Process

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I. INTRODUCTION

In the last few years, developments have occurred in litigation processes that reflect larger revolutionary trends in information processing. These
developments have included movements towards electronic court filings, the admission of electronic documents as evidence, and expanded notions of service of process. This Article focuses on the issues raised in considering the feasibility of electronic or e-mail service of process to give defendants notice of legal proceedings instituted against them in United States courts.

Part II provides a historical overview of due process constraints in giving notice to a defendant. Part III examines the benefits and limitations of traditional methods of service currently prevailing under state and federal law. Part IV details a recent British court's permission of electronic service on a defendant whose whereabouts were unknown. Part V discusses judicial examples in the United States of the integration of electronic technology into the litigation process. Part VI argues that electronic service should be permitted in a particular range of civil cases, namely those in which the defendants have established a connection to an e-mail address such that the electronic service of process is reasonably calculated to apprise defendants of the actions against them.

II. WHAT PROCESS IS DUE?

Historically, service of process on a defendant's person within the territory of the forum state established a court's physical power over the defendant, subjecting the defendant to the court's jurisdiction. This territorial concept of jurisdiction, endorsed by the United States Supreme Court in Pennoyer v. Neff, gave rise to the rule that a court's jurisdiction could be established by service


3. The terms "electronic mail" and "e-mail" are used interchangeably throughout this Article. Electronic mail ("e-mail") is a nearly instantaneous transmission through the Internet. After the sender types the message into a computer, the e-mail message travels to the sender's server, which forwards the message to the Internet. In order to avoid traffic congestion on the Internet, the message is separated into smaller sections, and then reassembled after it reaches the server of the recipient. After arriving at the recipient's e-mailbox, the message may be retrieved. See Preston Gralla, How the Internet Works 78-83 (4th ed. 1998).

4. This notion derived from common law, whereby service of process of a civil lawsuit was obtained by arresting the defendant pursuant to a writ of capias ad respondendum. The defendant could obtain his release from prison only by posting a bond in guarantee of payment of a prospective judgment in the pending action. See Robert C. Casad, Jurisdiction in Civil Actions § 2.02[2][a] (2d ed. 1991).

5. 95 U.S. 714 (1877).
of process on a defendant only within the forum state.\(^6\)

In *Pennoyer* Neff sued in a federal court in Oregon to recover a tract of Oregon land over which he claimed ownership.\(^7\) Pennoyer, who was occupying the land, claimed title to it under a sheriff’s deed issued pursuant to the sale of the land in satisfaction of an Oregon state court judgment against Neff.\(^8\) Neff, who was not a resident of Oregon, received notice of the relevant state court proceedings not by personal service, but through publication.\(^9\) When he failed to appear in Oregon state court, the court entered a default judgment against him.\(^10\)

In the federal court action, Neff asserted that publication did not constitute service adequate to establish the Oregon state court’s jurisdiction over him, and the default judgment entered against him was therefore void.\(^11\) In its analysis of the United States Constitution’s Fourteenth Amendment due process requirement regarding state court jurisdiction over a party, the Court in *Pennoyer* stated:

\[E\]very state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . [N]o State can exercise direct jurisdiction and authority over persons or property without its territory. [citations omitted] The several States are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is . . . that no tribunal established by [a State] can extend its process beyond that territory so as to subject either persons or property to its decisions.\(^12\)

Thus, *Pennoyer* established that a state would have power to adjudicate a claim over a nonresident defendant only if the plaintiff could personally serve the defendant or attach his property within the forum state.\(^13\)

\(6\). *Id.* at 720. In *Pennoyer* the Court stated the principle that a court could not exercise personal jurisdiction when “in an action for money or damages . . . a defendant does not appear in the court, and is not found within the State, and is not a resident thereof . . .” *Id.* Until the middle of this century, courts could exercise personal jurisdiction over a defendant only if the defendant was (1) domiciled or resided in the forum state, (2) consented to jurisdiction, or (3) was served with process in the forum state. 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1064 (2d. ed. 1987).

\(7\). *Pennoyer*, 95 U.S. at 719.

\(8\). *Id.*

\(9\). The circuit court ordered notice of the action by publication of the summons during six successive weeks in the PACIFIC CHRISTIAN ADVOCATE, a weekly newspaper of general circulation published in Multnomah County, Oregon. *Id.* at 717.

\(10\). *Id.* at 720.

\(11\). *Id.* at 721.

\(12\). *Id.* at 722.

\(13\). *Id.* at 723. The Court recognized, however, that a defendant could consent to jurisdiction by waiving his defense to a lack of jurisdiction. *Id.* at 725.
In the years following the Supreme Court's opinion in Pennoyer, advances in transportation and communication technology allowed personal mobility to expand, and absence from one's home state became a more common occurrence.\textsuperscript{14} As a result, the territorial doctrine of personal jurisdiction became increasingly inadequate, and Pennoyer's "physical power" philosophy of jurisdiction pursuant to service of process became restrictive and outdated.\textsuperscript{15} In 1950 the United States Supreme Court relaxed the physical presence standard enunciated in Pennoyer.\textsuperscript{16} In Mullane v. Central Hanover Bank & Trust Co.,\textsuperscript{17} the Court shifted in its interpretation of due process requirements for adequate notice and focused on fairness and reasonableness in giving a defendant notice of a pending legal action.\textsuperscript{18}

The action in Mullane involved judicial settlements by a trustee, Central Hanover Bank ("Hanover"), of a three million dollar common trust fund established under New York banking laws.\textsuperscript{19} The fund, which contained a pool of 113 individual trust estates, had been established in order to facilitate the investment administration of the numerous small trusts.\textsuperscript{20} Approximately one year after establishing the common trust fund, Hanover petitioned the New York Surrogate Court for settlement of its first accounting, as required by state law.\textsuperscript{21} Thereafter, Hanover published a notice of the pending proceedings.\textsuperscript{22} The notice did not contain the names of any of the trust beneficiaries, some of whom were nonresidents of New York.\textsuperscript{23} It appeared in a local newspaper, and was published once weekly during four successive weeks.\textsuperscript{24}

\textsuperscript{14} In McGee v. International Life Insurance Co., 355 U.S. 220 (1957), the United States Supreme Court noted the "transformation of [the] national economy," evidencing an increase in interstate business as well as in individual mobility:

\begin{quote}
Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.
\end{quote}

Id. at 222-23.

\textsuperscript{15} In 1945 the United States Supreme Court in International Shoe Co. v. Washington, 326 U.S. 310, 316, 320 (1945), rejected the physical power theory of personal jurisdiction, and found that a corporation's business contacts with the forum state established a "presence" sufficient to establish the court's personal jurisdiction over the defendant in the forum.

\textsuperscript{16} 95 U.S. at 722.
\textsuperscript{17} 339 U.S. 306 (1950).
\textsuperscript{18} Id. at 314-17.
\textsuperscript{19} Id. at 309.
\textsuperscript{20} Id. at 308-09.
\textsuperscript{21} Id. at 309.
\textsuperscript{22} Id.
\textsuperscript{23} Id. at 309-10.
\textsuperscript{24} Id.
was then appointed guardian of the common trust fund on behalf of all income beneficiaries that were not otherwise represented by legal counsel.\textsuperscript{25} Subsequently, Mullane challenged the New York court's jurisdiction on the grounds that notice to the beneficiaries by publication did not comport with due process requirements.\textsuperscript{26}

In \textit{Mullane} the United States Supreme Court held that notice is sufficient under due process requirements when individuals whose interests are at stake in legal proceedings are provided with notice reasonably calculated to apprise them of an action, thereby affording those persons an opportunity to present a defense.\textsuperscript{27} The type of notice given must be such as to reasonably convey the relevant information, and it must allow the defendant a reasonable time to make an appearance.\textsuperscript{28} Further, the adequacy of notice is determined by balancing the private interest sought to be protected and the need to notify all interested parties against the interest of the notice giver and the difficulty or impossibility of such notification.\textsuperscript{29}

Applying this analysis in \textit{Mullane}, the Court found that notice by publication was not reasonably calculated to notify those beneficiaries whose names and addresses the trustee had or could reasonably ascertain.\textsuperscript{30} Regarding the beneficiaries whose addresses were unknown, the Court deemed notice by publication sufficient because there was no other method of notifying them.\textsuperscript{31} Because each of the beneficiaries had individual interests in the integrity of the fund and in the fidelity of the trustee, the Court reasoned that notice reasonably certain to reach most of those interested in objecting was likely to safeguard the

\textsuperscript{25} Id. at 310. Mullane was charged with protecting the rights of the beneficiaries in the integrity of the fund and ensuring the fidelity of the trustee. Id. at 319.

\textsuperscript{26} Id. at 311. Notice and jurisdiction are separate concepts that should be distinguished. A court's jurisdiction over a party enables it to adjudicate an action affecting that party's rights and to render a judgment which binds that party. Notice effectuated through service of process is distinguishable from personal jurisdiction in that it is a \textit{procedural} requirement imposed on the plaintiff to bring the party under the court's jurisdiction. \textit{See generally} \textit{CASAD}, supra note 4, § 1.01[1]-[2](b) (providing a basic explanation of the concept of jurisdiction). Further, service of process does not preclude a party from objetcting to the jurisdiction of the court over her person. \textit{See, e.g., FED. R. CIV. P. 4(d)(1)} ("A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.").

\textsuperscript{27} \textit{Mullane}, 339 U.S. at 314. The United States Supreme Court noted that the Due Process Clause of the Fourteenth Amendment "at a minimum . . . require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Id. at 313.

\textsuperscript{28} Id. at 314.

\textsuperscript{29} Id. at 313-14.

\textsuperscript{30} Id. at 318. The Court held, however, that newspaper publication alone was insufficient "not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand." Id. at 319; \textit{see also} \textit{Mennonite Bd. of Missions} v. \textit{Adams}, 462 U.S. 791, 800 (1983) (discussing that notice by publication might not be sufficient when the identity of creditors is reasonably ascertainable).

\textsuperscript{31} \textit{Mullane}, 339 U.S. at 317-18.
interests of all. The Court noted in a subsequent case that due process does not require perfection:

[T]he Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible "property" or "liberty" interest be so comprehensive as to preclude any possibility of error. The Due Process Clause simply does not mandate that all governmental decisionmaking comply with standards that assure perfect, error-free determinations.

Although the *Mullane* decision arose in the limited context of proceedings involving a common trust fund, in post-*Mullane* cases the Supreme Court has made it clear that in all types of actions, efforts at giving notice to a defendant must exhibit fundamental fairness and must establish a *reasonable* probability of actual notice. Today, the United States Supreme Court’s decision in *Mullane* continues to provide the standard for what notice is due under the Due Process Clauses of the Fifth and Fourteenth Amendments. Although *Mullane* employs a rigorous standard for compliance with due process in the provision of notice to interested parties, the standard of fairness and reasonableness articulated by the United States Supreme Court provides for a

32. *Id.* at 319.
34. 339 U.S. at 318. *Because Mullane* set forth the requirement that an attempt at notice must be "reasonable under the circumstances," the Court has applied this standard widely in other types of actions, such as (1) condemnation proceedings, Walker v. City of Hutchinson, 352 U.S. 112, 116 (1956) (finding that notice by newspaper publication was insufficient when it was possible to give direct notice to property owners); (2) eminent domain actions, Schroeder v. City of New York, 371 U.S. 208, 210-11 (1962) (holding that publication and posting were insufficient when the names and addresses of riparian owners were discoverable with relative ease); and (3) forcible entry and detainer actions, Greene v. Lindsey, 456 U.S. 444, 452-53 (1982) (finding that posting notice on the tenant’s apartment door was not constitutionally sufficient when only one effort was made at personal service, and notice was not mailed to the tenant).
35. 339 U.S. 306 (1950); see also City of West Covina v. Perkins, 525 U.S. 234, 241 (1999) (holding that the Constitution does not mandate that state or local entities give specific, detailed instructions to owners seeking the return of property lawfully seized, but no longer needed for investigative or prosecutorial purposes); Gray v. Netherland, 518 U.S. 152, 166-70 (1996) (denying that petitioner was deprived of due process by commonwealth’s failure to give him notice of the evidence it would introduce at the sentencing phase of his trial); Richards v. Jefferson County, 517 U.S. 793, 805 (1996) (finding that prior litigation did not, as a matter of federal due process, bar petitioners from challenging a claimed unconstitutional deprivation of their property); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 707 (1988) (finding that the Hague Convention is not implicated when service on a domestic agent is valid under both state law and the Due Process Clause); Tulsa Prof’l Collection Servs., Inc. v. Pope, 485 U.S. 478, 491 (1988) (holding that state’s probate law providing notice by publication did not satisfy the Due Process Clause when creditor’s identity “was known or ‘reasonably ascertainable’”).
flexible and reasonable approach to the determination of what constitutes adequate notice.

III. SERVICE OF PROCESS

Notice of a legal action to a defendant is achieved by service of process and is primarily conducted by mailing or other physical delivery of the complaint and summons to the defendant personally or to someone authorized by law to receive process on behalf of the defendant.36 Posting and publication of notice are also constitutionally sufficient in certain circumstances.37

The presently utilized mechanisms for service of process are often blandly ritualistic and unattended by objection or controversy. Sometimes, however, service of process is not efficient, expedient, or effective in delivering adequate notice, and challenges to the sufficiency of service of process expose shortcomings inherent in traditional methods for giving notice.38 Similarly apparent is the sometimes tedious and reductive judicial focus on whether the service of process demonstrates an actual physical connection between a process server39 and the recipient of the legal documents,40 where and with whom a defendant "resides"41 and whether process servers have properly conducted interrogations to establish the authorization of a party to receive

36. WRIGHT & MILLER, supra note 6, § 1074; see, e.g., FED. R. CIV. P. 4(e) (authorizing service of process either: (1) on an individual personally; (2) at the individual’s home on a person of suitable age residing in the home; or (3) on an authorized agent of the individual); FED. R. CIV. P. 4(h)(1) (authorizing service of process on a corporation, partnership, or other unincorporated association by serving an officer, a managing or general agent of the corporation, or any other agent authorized by appointment or by law to receive service).


38. See discussion supra Part II.

39. The term "process server" as used herein refers to any person authorized by the federal rules or state statutes to perform service of process. See, e.g., FED. R. CIV. P. 4(e)(2) (stating that “[s]ervice may be effected by any person who is not a party and who is at least 18 years of age . . . . [T]he court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose.”).

40. See, e.g., Weiss v. Glemp, 903 P.2d 455, 457 (Wash. 1995) (holding invalid service of process left on windowsill within view of the defendant at his home).

41. See, e.g., Sheldon v. Fettig, 919 P.2d 1209, 1211 (Wash. 1996) (upholding service on defendant’s brother at her parents’ home although defendant had a separate residence, but often used her parents’ address).
service on behalf of the defendant.42 Some factual scenarios and subsequent legal opinions attending plaintiffs' attempts at notice echo the overly restrictive doctrine of *Pennoyer*,43 exposing the need for a method of serving process that avoids the inherent physical limitations of the present scheme.

An aspirational model for service of process is one in which a party, upon her physical, in-person receipt of a summons and complaint, accepts those papers and signs a receipt documenting the transaction, allowing the litigation to proceed without delay. Because personal service on a defendant is not always possible, the law recognizes circumstances in which a defendant is deemed to have received notice through "substituted" or "constructive" service of process. Regardless of how service of process is made, each method requires an actual physical exchange of documents between the notice sender and the intended recipient. This section will examine the various methods available under federal and state practices on effecting service of process and will further explore the benefits and limitations of those models.

A. Personal Service

Personal service is effected by delivery to the defendant of the summons and complaint by a person authorized by law and is deemed the most reliable manner of giving a defendant notice of a legal action in which the defendant has an interest.44 Although plaintiffs favor this type of service because of its certainty, defendants' challenges to plaintiffs' attempts at personal service expose the difficulty of achieving the physical contact between process server and defendant necessary to comply with the requirements of applicable service of process statutes.45

One example is *Weiss v. Glemp*,46 in which the Washington Supreme Court decided that a summons left on the windowsill of a rectory did not comply with

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42. See, e.g., Stull v. Hoke, 957 P.2d 173, 178 (Or. Ct. App. 1998) (holding that receptionist of law firm was not a proper recipient of service on behalf of defendant law firm that was a general partnership when the receptionist was not an authorized agent for the partnership).
43. 95 U.S. 714 (1877).
46. 903 P.2d 455 (Wash. 1995).
the state statutory requirement of personal service to the defendant. There, the process server had attempted service at a rectory where the defendant, a resident of Poland, was staying while visiting Seattle. After twice being rebuffed by two priests at the door of the rectory, the process server spotted the defendant sitting near a window inside the rectory. The process server then approached the window and, holding the documents high in his hand, yelled, "Jozef Glemp, Oficjaline dostarcham [official documents]! Jozef Glemp[,] you have been served!" The defendant looked over his shoulder at the process server, but apparently did not respond. The process server then left the documents on a concrete windowsill about four feet from where the defendant was sitting.

Arguably, the service in Glemp was reasonably calculated to provide notice to the defendant and, thus, was constitutionally adequate. However, the attempt at notice was deemed defective because, regardless of the papers' actual proximity to the defendant, service of process did not meet the state statute's requirements that the papers be delivered to the defendant personally or left with someone of suitable age and discretion at his abode. There, a "phalanx of priests" and a rectory window thwarted the efforts of the process server, who was otherwise within the view and hearing of the defendant. Glemp exemplifies the limitations of personal service in its requirement, as interpreted by that court, of physically leaving process not just near, but with, the defendant.

47. Id. at 457.
48. Id. at 456.
49. Id.
50. Id. The opinion's statement that Glemp was a Polish resident, and an interpreter's presence during the attempt at service, indicate that English was not Glemp's native language. Id.
51. Id.
52. Id.
53. See id. at 457-58.
54. Id. at 459. The court pointed out that adequate notice requires that a plaintiff comply not only with constitutional due process requirements, but she must also meet the requirements of the applicable service of process statute. Id. at 458-59 (citing Thayer v. Edmonds, 503 P.2d 1110, 1113 (Wash. Ct. App. 1972)). In Glemp the applicable Washington service of process statute provided, in pertinent part: "The summons shall be served by delivering a copy thereof . . . to the defendant personally . . . ." WASH. REV. CODE § 4.28.080 (15) (Supp. 2000) (emphasis added).
56. See id. at 457-58. The facts of International Controls Corp. v. Vesco, 593 F.2d 166 (2d Cir. 1979), present another example of the physical challenges posed to process servers in delivering notice of legal proceedings to a defendant. There, the process server encountered a bolted gate and two bodyguards in front of the defendant's home, and the defendant refused to emerge from the house so that he could be served. Id. at 177. Accordingly, the process server attached the papers to a blue ribbon and hurled them over the defendant's fence onto the front lawn. Id. The papers were also mailed to the defendant at his residence. Id. at 182. Finding that the defendant had actual notice of the proceedings against him, the Second Circuit in Vesco
B. Mail Service

The United States Supreme Court has deemed service of process by certified mail to be constitutionally sufficient in providing notice to a defendant, and it is widely permitted under both federal rules and state statutes. Generally, however, in effecting certified or registered mail, a mail carrier must obtain a manually executed signature from the defendant and must mail the return receipt bearing that signature to the plaintiff, who must then file the return receipt with the court. When a mail carrier is unable to secure the signature of the intended recipient (whose physical location may be difficult or impossible to ascertain), this method of service will be unavailable.

upheld the delivery of service therein. Id.

57. Certified mail provides the sender with a mailing receipt and a record of delivery to the defendant. U.S. POSTAL SERVICE DOMESTIC MANUAL § 5912 (1999).

58. Registered mail provides more detailed records and procedures than certified mail and is the most secure service that the postal system offers. Id. § 5911; see also id. § 5915 (discussing return receipt); § 5916 (discussing restricted delivery).

59. See Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800 (1983) (stating notice by mail to party whose name and address is reasonably ascertainable and which ensures actual notice is “a minimum constitutional precondition” in a legal proceeding); Hess v. Pawloski, 274 U.S. 352, 354 (1927) (stating service on a nonresident motorist is sufficient when a copy of the complaint is mailed to the defendant by registered mail and is also left with registrar).

60. In 1983 Federal Rule of Civil Procedure 4 was amended to authorize service of process by registered or certified mail. See Fed. R. Civ. P. 4(c)(2)(C)(ii) (1992) (repealed 1993). The purpose of this amendment was to diminish the role of federal marshals as process servers and thus to reduce litigation costs in civil actions. Crocker Nat’l Bank v. Fox & Co., 103 F.R.D. 388, 390 (S.D.N.Y. 1984) (citing David D. Siegel, Practice Commentary on Amendment of Federal Rule 4 (Eff. Feb. 26, 1983) With Special Statute of Limitations Precautions, 96 F.R.D. 88, 91 (1983); see also Neb. Rev. Stat. § 25-505.01(1)(c) (1995) (stating certified mail, return receipt requested, and filing of proof of service with return receipt attached is required); N.C.R. Civ.P. 4(j)(1)(c) (allowing for registered or certified mail, return receipt requested); N.D.R.Civ. P. 4(d)(2)(A) (allowing any form of mail addressed to the defendant that requires a signed receipt and results in delivery to that individual); Or. R. Civ. P. 7(D)(2)(d)(I) (allowing first-class mail; registered or certified mail, return receipt requested; or express mail).

Some statutes hold mail service as the preferred method of giving notice. See, e.g., Ohio R. Civ. P. 4.1(1)-(2) (allowing service of process to be sent by certified or express mail unless court or plaintiff requests personal or residential service).

61. See, e.g., Neb. Rev. Stat. § 25-505.01(1)(c) (1995) (requiring filing with court proof of service with signed receipt attached); N.C.R. Civ.P. 4(j)(1)(c) (requiring mailing a copy of the summons and complaint by registered or certified mail, return receipt requested, and delivering to addressee).

62. David D. Siegel, The New (Dec. 1, 1993) Rule 4 of the Federal Rules of Civil Procedure: Changes in Summons Service and Personal Jurisdiction (pt. 1), 151 F.R.D. 441, 451 (1994). Under federal law, however, someone other than the intended recipient may sign the notice and acknowledgment form evidencing receipt of the mail service in certain circumstances. See Fed. R. Civ. P. 4(d)(2)(A), 4(h) (providing, in pertinent part, that the notice and request “shall be in writing and shall be addressed directly to the defendant, if an individual, or else to
Ordinarily, first-class mail service is recognized by the United States Supreme Court as "an efficient and inexpensive means of communication" and in some cases also meets due process requirements, particularly when used in concert with another method of service. Plaintiffs often utilize first-class mail in the notification process by mailing complaints and requests for waiver of formal service of process to the defendant. Technically, this use of first-class mail does not constitute service of process; rather, the defendant’s waiver of service does away with the requirement of formal service. Federal law rewards a defendant that agrees to waive service by increasing the time from twenty to sixty days within which to answer the complaint. However, the plaintiff must serve a defendant that refuses to provide a waiver through one of the alternative means of formal process available under federal or state law. As a result, the benefit of first-class mail in the waiver of service procedure is dependent on and limited by the defendant’s acquiescence in waiving service of process.

C. "Substituted" Service

"Substituted" service may satisfy constitutional due process requirements if the chosen method for giving notice is the one most likely to reach the defendant. When the defendant is a natural person, leaving the papers at the

an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a [corporation or association]."

64. Id. at 319-20; Greene v. Lindsey, 456 U.S. 444, 453-55 (1982) (finding service by posting eviction notice on defendant’s apartment door accompanied by mail service is constitutionally preferable to posted service alone); Weigner v. City of New York, 852 F.2d 646, 651 (2d Cir. 1988) (holding mailed notice of tax foreclosure action to owner’s last known address in addition to posting and publication was sufficient to meet due process requirements); see also Or. R. Civ. P. 7(D)(2)(d)(i) (allowing first-class mail and registered or certified mail, return receipt requested).
65. See generally Fed. R. Civ. P. 4(d) (allowing for waiver of formal service). A number of state statutes contain waiver provisions similar to that contained in the federal rules. See, e.g., ARIZ. R. CIV. P. 4.1(c); CAL. CIV. PROC. CODE. § 415.30 (a)-(e) (West 1973); 735 ILL. COMP. STAT. ANN. 5/2-213 (West 1992); Me. R. Civ. P. 4(c)(1); Miss. R. Civ. P. 4(c)(3)(A)-(D); Tenn. R. Civ. P. 4.07(1).
68. See Fed. R. Civ. P. 4(d)(2). The plaintiff may impose on the defendant the costs of formal service, and may serve the defendant pursuant to (1) the federal rules, (2) the law of the forum state, or (3) the law of the state where service is effected. Fed. R. Civ. P. 4(e).
69. Mullane, 339 U.S. at 313-14; see also McDonald v. Mabee, 243 U.S. 90, 92 (1917) (stating that summons delivered to defendant’s "last and usual place of abode" might be sufficient if the most likely method to reach the defendant).

Some courts and commentators use the terms "substituted" and "constructive" service
defendant’s home is the most commonly used method of substituted service. Specifically, the federal rules and many state statutes require that the summons be left at the defendant’s “dwelling house or usual place of abode” with someone of “suitable age and discretion then residing therein.”

Unlike the physical proximity issues presented by personal service, service at a defendant’s home poses problems such as identification of the defendant’s residence when the defendant occupies more than one home. Locating a defendant’s center of domestic activity has engaged courts in arduous investigations of defendants’ life patterns, involving microscopic judicial examination of personal matters such as the cost of renovations to a defendant’s apartment, as well as whether and where a defendant and her boyfriend engaged in the habit of sleeping together.

In National Development Co. v. Triad Holding Corp., the defendant argued that service of process on his housekeeper at his New York apartment

interchangeably to mean any form of service of process other than actual personal service. See, e.g., JACk H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 3.20, at 169 (1985) (using both terms to describe state statutes). Others use the terms “substituted service” to mean physical service within the state on someone other than the defendant, and “constructive service” to mean service by publication, posting, mail, or personal service outside the forum state. CASAD, supra note 4, § 1.01[2][b], at 1-10.

The terms “substituted” and “constructive” service are used interchangeably throughout this article to mean any form of service other than personal service on the defendant within or outside the forum state.

70. FRIEDENTHAL ET AL., supra note 69, § 3.20, at 175.

71. FED. R. CIV. P. 4(e)(2). Some states specifically set forth the required minimum age of a recipient of service other than the defendant or require that the recipient be a family member of a certain age. This greater degree of statutory specificity reduces the number of challenges to the sufficiency of service that are born of interpretative uncertainty. See, e.g., COLO. R. CIV. P. 4(e)(1) (stating service at a defendant’s home requires recipient to be eighteen and a member of defendant’s family; service to defendant’s usual place of business must be left with defendant’s secretary, bookkeeper, manager, or chief clerk); FLA. R. CIV. 1.080(b) (stating that recipient must be at least fifteen years of age and informed of contents); MO. SUP. CT. R. 54.13(b)(1) (requiring recipient to be over the age of fifteen and member of the defendant’s family); OKLA. STAT. ANN. tit. 12, § 2004(C)(1) (West 1993) (requiring recipient to reside therein and be fifteen years of age or older); WASH. REV. CODE ANN. § 12.04.040 (West 1993) (requiring recipient to be over twelve years of age).


73. Sheldon v. Fettig, 893 F.2d 1136, 1139-40 (Wash. Ct. App. 1995), review granted, 904 P.2d 300 (1995) (defining usual place of abode as the “center of one’s domestic activity [where] service left with a family member is reasonably calculated to come to one’s attention . . .”).


76. 930 F.2d 253 (2d Cir. 1991).
was improper because he usually lived in Saudi Arabia. In reviewing the defendant’s connection to the New York apartment, the Court of Appeals for the Second Circuit noted that the defendant personally hired and paid contractors over $1 million in remodeling the apartment to fit his lavish lifestyle. The court specifically recounted that the $20-25 million apartment, which “contain[ed] more than 23,000 square feet on at least two floors, . . . [featured] a swimming pool, a sauna, an office and four separate furnished ‘apartments’ . . . requir[ing] the attention of two full-time and three part-time staff persons.” As a result of its findings, the court decided that the defendant’s New York apartment had “sufficient indicia of permanence” to qualify as his usual abode.

A review of a defendant’s sleeping arrangements with her romantic partner has also been subject to scrutiny in determining where she resided for purposes of substitute service of process. In Sheldon v. Fettig, the Washington Supreme Court upheld service of process on the defendant’s brother at her parents’ home in Seattle. The defendant had repeatedly represented her parents’ address as the place where she could be contacted, although she moved to Chicago eight months prior to the service of process. In asserting that service was ineffective because she did not reside with her parents, the defendant testified that she no longer had a designated bedroom at her parents’ home. Rather, the defendant disclosed that when in Seattle, she always slept at her boyfriend’s house, which was next door to her parents.

77. National Dev. Co., 930 F.2d at 256-58. Service of process was effected pursuant to Rule 4(e)(2) of the Federal Rules of Civil Procedure, which states, in pertinent part, that service shall be made “by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual’s dwelling house or usual place of abode . . . .”

79. Id.
80. Id. at 257.
82. Id.
83. Id. at 1214. The applicable Washington service of process statute provides that substitute service is effective when a copy of the summons is left at the defendant’s house of usual abode “with some person of suitable age and discretion then resident therein.” WASH. REV. CODE ANN. § 4.28.080(15) (West Supp. 2000).
84. Id. at 1210.
85. Id.
86. Id.; see also Jaffe & Asher v. Van Brunt, 158 F.R.D. 278, 280 (S.D.N.Y. 1994) (finding a defendant who, when in New York, stayed in an apartment in which he maintained a private bedroom and phone line, to be living in the apartment for purposes of service of process); Cox v. Quigley, 141 F.R.D. 222, 225-226 (D. Me. 1992) (noting that defendant’s parent’s home was not his usual place of abode when defendant moved on board a ship after graduating from school); Capitol Life Ins. Co. v. Rosen, 69 F.R.D. 83, 87-88 (E.D. Pa. 1975) (finding defendant to be properly served with process at his brother’s home when defendant paid rent for room where he stayed occasionally and had kept personal effects in past years).
In addition to the issues presented in determining where a defendant resides, service on a "person of suitable age and discretion residing" in the defendant's home, or on an "agent" of a corporate defendant, creates incertitude in the identification of who is qualified to receive process on behalf of the defendant. Cases involving doormen and receptionists exhibit checkered judicial results in their sometimes liberal, and at other times strict, statutory interpretation of who may accept service on behalf of a defendant.

For example, in Hartford Fire Insurance Co. v. Perinovic, a district court upheld substitute service on the doorman of a defendant's high-security, restricted-access condominium by liberally interpreting the statute allowing service on a resident of the defendant's home. There, the applicable federal rule allowed service "at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . . ." In support of its finding that the doorman fit the resident criteria of the statute, the court relied on precedent liberally interpreting that requirement. The court cited Three Crown Ltd. Partnership v. Caxton Corp. in which a New York district court upheld service on a doorman without reference in the opinion as to whether the doorman resided in the defendant's "dwelling house." The Hartford court also noted a ruling approving service on a defendant's landlady even "without a showing that the landlady delivered the summons and complaint to the defendant."

Like the Three Crown court, the Hartford court did not specify whether the doorman at issue lived on the apartment building premises. Further, the Hartford court considered the doorman's representation to the process server that his duties as doorman included delivering packages and documents to the building residents, and he would accept the papers on the defendant's behalf. The court found the doorman's representation sufficient to support a finding

87. Fed. R. Civ. P. 4(e)(2) and 4(h).
89. Id. at 131.
90. Id. at 130.
91. Id. at 131. Current Federal Rule of Civil Procedure 4(e)(2) states in pertinent part that service "may be effected . . . by leaving copies . . . at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. . . ."
94. Id. (citing Smith v. Kincaid, 249 F.2d 243, 244-45 (6th Cir. 1957)).
95. Hartford, 152 F.R.D. at 129-30. But see Reliance Audio Visual Corp. v. Bronson, 534 N.Y.S.2d 313, 315 (N.Y. Civ. Ct. 1988) (holding service on a doorman at the building where the defendant lived on sixteenth floor was insufficient because the dwelling place of defendant is limited to the confines of the defendant's apartment, not extending to "stairways, public halls or other common areas in the building").
that the doorman satisfied the residency requirement of the statute.\textsuperscript{97} Opinions like \textit{Hartford} expose the dichotomy between courts’ broad interpretations of service of process statutes and the plain language of the statutes, fueling the uncertainty inherent in substituted service.\textsuperscript{98}

Service on organizational entities may be accomplished by delivering process to an authorized corporate officer or agent of the defendant.\textsuperscript{99} This requirement sometimes requires process servers to conduct substantial interrogation to determine whether the person to be served fits the statutory "silhouette of a corporate agent for purposes of service of process.\textsuperscript{100} In \textit{Stull v. Hoke}\textsuperscript{101} an Oregon appeals court found that the process server did not extract sufficient information from the receptionist of a defendant law firm to establish her ability to accept service of process on behalf of the law firm.\textsuperscript{102} There, the process server inquired of the receptionist whether she was at the proper law firm.\textsuperscript{103} After the receptionist assured the process server that she was in the right place, the process server gave the summons to the receptionist.\textsuperscript{104}

The \textit{Stull} court’s finding of defective service rested on the process server’s failure to deeply question the receptionist about her job description.\textsuperscript{105} The court noted, for example, that the process server did not question the receptionist as to whether she was specifically designated to receive service of process or important correspondence for the law firm; she did not ask her about the extent of her duties.\textsuperscript{106} Furthermore, the process server did not ask any

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97. \textit{Id.}
99. Fed. R. Civ. P. 4(h): “[S]ervice upon a domestic or foreign corporation or upon a partnership or other unincorporated association . . . shall be effected . . . by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant . . . .”
100. This issue may arise in situations when service is not made on a person specifically designated pursuant to state statute, but rather when service is effected on someone with implied authority to receive such service.
102. \textit{Id.} at 178-79. The applicable Oregon statute provides that service of process on general partnerships may be made “by personal service upon a partner or any agent authorized by appointment or law to receive service of summons for the partnership.” OR. R. CIV. P. 7D(3)(e).
104. \textit{Id.}
105. \textit{Id.} at 179.
106. \textit{Id.} Testimony of the parties established that the process server saw the receptionist standing by the receptionist’s desk, and the receptionist asked the process server if she needed help. The process server asked the receptionist whether the law firm was “Brownstein
\end{flushleft}
questions about the frequency and nature of the receptionist’s contact with the partners of the firm.\textsuperscript{107} Finally, the court pointed out that the process server did not extract a promise that she would deliver the papers to any of the law firm partners.\textsuperscript{108}

Unlike the \textit{Hartford} ruling, the \textit{Stull} court’s strict interpretation of the applicable statutory language resulted in its finding the service inadequate, in spite of the reasonable expectation that the receptionist would indeed deliver the papers to a firm partner.\textsuperscript{109} The \textit{Hartford} and \textit{Stull} cases expose the difficulty in serving defendants that live and work in locales that render contact with a defendant impossible, or at a minimum, time-consuming and costly.\textsuperscript{110}

\textbf{D. Posting and Publication}

The United States Supreme Court has recognized that service of process through posting or publication often provides less certainty that notice will reach the defendant than other methods of notification.\textsuperscript{111} As such, posting and

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Rask," was informed that it was, then handed the papers to the receptionist, stating "I have something for you." The process server then obtained the receptionist’s name, which she wrote in her records. \textit{Id.} at 178.
107. \textit{Id.} at 179.
109. Although the \textit{Stull} opinion did not address whether, in spite of the alleged procedural insufficiency of process, the defendants actually received notice, courts vary in their requirements of statutory compliance when a defendant receives actual notice of the proceedings. Some states have found service insufficient where the defendant was not served at a designated time or place, even though the defendant received actual notice. \textit{See} Schorsch v. Fireside Chrysler-Plymouth, Mazda, Inc., 527 N.E.2d 693, 697 (Ill. App. Ct. 1988) (holding service invalid when effected by private detective in county that was not authorized by statute); Eisenberg v. Citation-Langley Corp., 471 N.Y.S. 2d 595, 596 (N.Y. App. Div. 1984) (finding service made in contravention of statutory provision prohibiting service on Sunday void). Conversely, other states have upheld service in cases where, despite a deficient form of service, the defendant received actual notice. \textit{See} American Hosp. of Miami, Inc., v. Nateman, 498 So. 2d 444, 445 (Fla. Dist. Ct. App. 1986) (holding defect in summons commanding sheriff to serve summons and complaint on hospital’s resident agent rather than on hospital held not sufficient to invalidate otherwise proper service); Schodack Concerned Citizens v. Town Bd. of Schodack, 544 N.Y.S. 2d 49, 50 (N.Y. App. Div. 1989) (upholding service made by a party to proceedings in contravention of statute).
110. The court in \textit{Hartford} noted that during a six-day period, at least seven attempts were made to serve the defendant. During one attempt at service, the process server waited at the defendant’s building for over five hours in an unsuccessful attempt to serve the defendant as he exited his apartment building. \textit{Hartford}, 152 F.R.D. at 129 n.5.
111. In \textit{Mullane v. Central Hanover Bank & Trust Co.}, 339 U.S. 306, 320 (1950), the Supreme Court stated:
\textbf{Publication may theoretically be available for all the}
\end{verbatim
publication have been deemed constitutionally sufficient only in certain circumstances when the defendant cannot be served personally.\textsuperscript{112} In \textit{Greene v. Lindsey},\textsuperscript{113} for example, the Court struck down as unconstitutional the posting of an eviction notice on an apartment door in a public housing project.\textsuperscript{114} There, the Court found that the notice was not reasonably calculated to reach the occupants, because such notices were often removed by children or other tenants before the defendant could receive the notice.\textsuperscript{115}

Service by publication, like posting, is usually permitted only when personal service cannot be effected with due diligence and is more likely to be upheld if it is supplemented by another method of service.\textsuperscript{116} One example is \textit{Mennonite Board of Missions v. Adams},\textsuperscript{117} where the United States Supreme Court

\begin{quote}
world to see, but it is too much in our day to suppose that each or any individual beneficiary does or could examine all that is published to see if something may be tucked away in it that affects his property interests.
\end{quote}

\textsuperscript{112} See, e.g., \textit{id.} at 317 (finding that service by publication is sufficient when it is the only method of notice available to plaintiff); see also \textit{Greene v. Lindsey}, 456 U.S. 444, 452-53 (1982) (stating that posting may be allowed in some instances when personal service is not possible).

\textsuperscript{113} 456 U.S. 444 (1982).

\textsuperscript{114} \textit{Id.} at 453, 455.

\textsuperscript{115} \textit{Id.} at 453 & n.7.

\textsuperscript{116} In limited circumstances, some states allow service by publication. See, e.g., \textit{FLA. STAT. ANN. §§ 49.011 to -041 (West 1994 & Supp. 2000)} (allowing service by publication after diligent search and inquiry to discover name and residence of the defendant, and the plaintiff supplies sworn statement declaring defendant’s age, or that the age is unknown; furthermore, the plaintiff must show that the defendant’s residence is unknown or she is in a state or country other than Florida, or that the defendant has been absent from Florida for sixty days or is concealing herself, and that there is no person in Florida on whom service of process is binding; all of these findings must be set forth in a sworn statement by the plaintiff); \textit{IDAHO CODE § 5-508 (1998)} (allowing such evidence when ‘‘with due diligence’’ the defendant cannot be found); \textit{735 ILL. COMP. STAT. ANN. 5/2 206 (West 1992)} (allowing such service when plaintiff shows by affidavit that the defendant resides or has gone out of state and after due inquiry cannot be found or is concealed, or on diligent inquiry the defendant’s residence is unknown); \textit{R.I. SUPER. CT. R. CIV. P. 4(i)} (allowing service by publication when service cannot be made by another prescribed method).

Several states require affidavits from the plaintiff and a court order before service of process by publication may ensue. See \textit{GA. CODE ANN. § 9-11-4(e)(1)(A) (1993); MD. R. CIV. P. § 2-122; NEB. REV. STAT. § 25-517.02 (1995); NEV. R. CIV. P. 4(e)(1)(i)}. In order to increase the likelihood of receipt of notice by publication, some statutory provisions also require that the papers be mailed to the defendant. See \textit{ALA. CODE § 6-6-563 (West 1993); ARIZ. REV. STAT. ANN. § 4.2(f) (West Supp. 1999); WIS. STAT. ANN. § 799.12(4) (West Supp. 1999)}.

\textsuperscript{117} 462 U.S. 791 (1983), superseded by statute as stated in \textit{Sallie v. Tax Sale Investors, Inc.}, 998 F. Supp. 612, 617 & n.2 (D. Md. 1998); see also Schroeder v. City of New York, 371 U.S. 208, 210-11 (1962) (holding publication of condemnation notice in two New York City newspapers and two county newspapers in small communities many miles from the plaintiff’s property, and posting of notices on trees and poles in general vicinity of vacant property, did not constitute adequate notice when the plaintiff’s name and address were readily ascerturable); Walker v. City of Hutchinson, 352 U.S. 112, 116 (1956) (holding newspaper

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Court found that publication alone was not reasonably calculated to apprise a mortgagee of an impending tax sale, particularly when the mortgagee's address could be easily identified in the public records.\textsuperscript{118} There, the Court ruled that notice by publication must be accompanied by personal service or notice mailed to the mortgagee's last known address.\textsuperscript{119} As a result of their limited effectiveness, posting and publication are generally restricted to use in certain types of cases or when personal service is not feasible.\textsuperscript{120}

The foregoing examples of judicial interpretation of due process and statutory requirements expose the uncertainty involved in determining what constitutes effective notice under existing mechanisms for service of process. Consequently, the feasibility of notice delivered electronically is ripe for consideration.

IV. THE BRITISH CASE

"The Plaintiff do have leave to serve notice of the Writ herein, and to serve the Affidavit and this Order, . . . by E-Mail, at the number and addresses stated on the Writ herein."\textsuperscript{121}

Recently, the use of electronic mail for service figured into the litigation context when a British court allowed service of process of an injunction at a defendant's electronic mail address.\textsuperscript{122} The British case involved initial service of process of an order of injunction.\textsuperscript{123} Although injunctive relief in the United

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\textsuperscript{118} Mennonite, 462 U.S. at 800.

\textsuperscript{119} Id. at 798.

\textsuperscript{120} Posting notice on premises is authorized in some states for specific actions. For example, posting is often used to serve process in actions to quiet title to, or for possession of, real property. See Friedman v. Hofehar, Inc., 424 So. 2d 496, 497-98 (La. Ct. App. 1982); Miebach v. Colasurdo, 670 P.2d 276, 278, 282 (Wash. Ct. App. 1983); see also Conn. Gen. Stat. Ann § 52-68 (West 1991) (allowing such notice in "writs of error and appeals from probate"); D.C. Code Ann. § 13-336(6) (1981) (allowing such service in "actions for the establishment of title to real estate by possession"); Kans. Stat. Ann. § 60-307(3) (1994) (allowing such service "in actions which relate to or the subject of which is real or personal property in this state"). Similarly, publication is allowed in some states only upon a showing that the plaintiff has been unsuccessful in personally serving the defendant. See Olivetti Corp. of America v. Silia Property, Inc., 467 A.2d 321, 321 (N.Y. Civ. Ct. 1983); Ingle v. Whitlock, 282 S.C. 391, 392-93, 318 S.E.2d 367, 368 (1984); cf. Bankers Trust N.Y. Corp. v. Greenberger, 466 N.Y.S.2d 921, 921 (1983) (denying publication when business address of defendant was known).

\textsuperscript{121} Order issued by the Queens Bench Division of the Royal Courts of Justice, London, England on April 11, 1996, in sealed proceedings. The order was obtained by the law firm of Schilling & Lom in London. Paul Lambeth & Jonathan Coad, Serving the Internet: Nowhere to Hide in Cyberspace, CYBERSPACE LAW., Sept. 1996, at 6-7.

\textsuperscript{122} Id.

\textsuperscript{123} Id.
States is governed by federal and state statutes separate from those setting forth notice requirements in actions seeking money damages, the notice requirements in those actions are similar in that they both require notice providing the defendant with an opportunity to present a defense.124

The British case involved a "media personality" plaintiff about whom the defendant had threatened to disseminate defamatory material over the Internet.125 The defendant had delivered a series of e-mail messages to the plaintiff's attorney's office, and had promised to post the information on the Internet within a short period of time.126 The plaintiff's attorney immediately applied to the Royal Court of Justice, Queens Bench Division in London, for an injunction.127 The attorney, however, could not physically serve the defendant through the usual means of service of process because the plaintiff only knew that the defendant was somewhere in Europe.128 The only indications of the defendant's location were postmarks on the envelopes of various letters that he had sent to the plaintiff, and the defendant's fax line, which was in a country different than that from which the letters had been sent.129 However, the defendant had previously provided the plaintiff's lawyer with two e-mail addresses through which he allegedly could be reached.130

Having only one method of notifying the defendant of the injunction, the plaintiff's attorney petitioned the court for permission to serve the defendant at his e-mail address.131 The judge granted the request for substituted service under English Rule 4 of the Supreme Court, and the defendant was served

124. The federal rules prohibit issuance of a preliminary injunction without notice to the opposing party. Federal Rule of Civil Procedure 65 states in pertinent part: "(a) Preliminary Injunction. (1) Notice. No preliminary injunction shall be issued without notice to the adverse party." See also Western Water Management, Inc. v. Brown, 40 F.3d 105, 109 (5th Cir. 1994) (prohibiting modification of injunction in absence of notice); Parker v. Ryan, 960 F.2d 543, 544 n.1 (5th Cir. 1992) (noting that notice of injunctive proceedings should provide opponent with at least a fair opportunity to prepare opposition);
125. Lambeth & Coad, supra note 121, at 6.
126. Id.
127. Id. The proceedings consisted of an "emergency application" to a "Judge in Chambers" conducting closed, nonpublic proceedings. Information is not available as to whether the defendant had been provided notice and an opportunity for hearing during the proceedings for a temporary restraining order prior to the plaintiff's request for an injunction. Id.
128. Id. The Rules of the Supreme Court of England require personal service of an injunction. R.S.C. Order 65, Rules 1-2. An important aspect of the plaintiff's argument for electronic notice was that "[t]he normal means of service provided no means of putting the Defendant on immediate notice of the injunction to ensure that he was bound by it and liable for contempt of court if he breached it." Id.
129. Id.
130. Id. The plaintiff's attorneys did not make clear whether the e-mail addresses utilized to provide the defendant with notice of the action were those used by the defendant in sending the threatening e-mails, or whether the defendant provided the attorneys with other e-addresses where he could be contacted.
131. Id.
electronically with the injunction by the plaintiff's attorney e-mailing a copy of the injunction to the defendant's e-mail address. Subsequently, the defendant responded to the e-mail message incorporating the injunction by sending an e-mail to the plaintiff's attorney. Thus, it was established that the defendant had notice of the injunction.

This British case serves as an example of electronic service of process being effected quickly, efficiently, and inexpensively. Its success in giving notice to the defendant of the action against him raises the question of whether service of process by e-mail is a viable method of service for plaintiffs litigating in United States courts. Underlying this query are the preliminary considerations of whether due process requirements for notice, and presently available electronic technology, will permit adequate notice to a defendant through electronic mail.

V. ELECTRONIC TECHNOLOGY AND THE LITIGATION PROCESS

Electronic mail has become a powerful communication tool in the general population, and its use is growing steadily in the legal profession. Electronic case filing, for example, has been utilized since 1991, when Delaware state courts began electronically tracking asbestos-related litigation. Since then, a plethora of state and federal courts have begun experimenting with e-filing programs. In 1997 the Administrative Office of the U.S. Courts began utilizing electronic filing in four federal district courts and in five bankruptcy courts.

132. Lambeth & Coad, supra note 121, at 6. The English Rules of the Supreme Court provide that an order for "substituted service should be granted only where the Court is satisfied that a practical impossibility of actual service exists, and that the method of substituted service asked for by the Plaintiff is one which in all reasonable probability, if not certainty, will be effective to bring knowledge of the Writ or notice of the Writ (as the case may be) to the Defendant." Id. at 7 (quoting R.S.C. Order 65, Rule 4).

The plaintiff electronically served the defendant with a writ, an affidavit, and an order that stated, in part:

1. The Plaintiff do have leave to serve the Writ herein outside the jurisdiction of this Honourable Court;
2. The Plaintiff do have leave to serve notice of the Writ herein, and to serve the Affidavit and this Order . . . by E-Mail, at the number and addresses stated on the Writ herein.

Id. at 6. The plaintiff's attorneys did not disclose the contents of the writ and affidavit.

133. Id. The defendant's confirmation of receipt of the e-mail obviated the court's consideration of whether the absence of such confirmation precludes a finding of actual notice.

134. In 1998, 3.4 trillion e-mail messages were delivered. Scott Laird, Web Wise Sending Out Email Marketing People Bother to Read, INTERACTIVE PR AND MARKETING NEWS, Feb. 5, 1999, available in 1999 WL 5959962.


136. Id.
By the end of 1999, eight additional courts were expected to have joined the e-filing project, and every federal court may be authorized to use e-filing by the close of the year 2000. In fact, some federal judges have suggested that e-filing should be mandatory, and some state courts are making similar moves with great rapidity.

E-mail has also begun to be admitted as evidence in both civil litigation and criminal cases. In *Strauss v. Microsoft Corp.*, the plaintiff sued Microsoft Corporation alleging sexual discrimination in the workplace. There, a federal district court in New York found that sexually oriented e-mail messages, which plaintiff's supervisor circulated among employees of Microsoft, would be admissible into evidence to help establish evidence of sexual discrimination by Microsoft. The court in *Strauss* reasoned that under Rule 401 of the Federal Rules of Evidence, the e-mails were relevant and thus admissible because they could render the veracity of Microsoft's proffered reason for failing to promote the plaintiff "less probable" than it would be without the electronic evidence. In *United States v. Ferber* a Massachusetts federal district court admitted an e-mail message into evidence during the criminal trial of a financial advisor accused of numerous violations of fiduciary duties to his clients. There, the court found that the e-mail, prepared by a party shortly after his conversation with the defendant, qualified as an admissible "present sense impression" under

137. *Id.*

138. *Id.* Indeed, e-filing is mandatory in the 58th Civil District Court of Jefferson County, Texas, for civil cases with ten or more parties, and cases in which all the parties subscribe to the LAWPlus system. Melinda M. Hanson, *State Courts Go Separate Ways in Implementing E-Filing Initiatives*, 67 U.S.L.W. 2563, 2565 (1999).

Several other jurisdictions use or have used e-filing for civil cases. *Id.* at 2564. Pima County, Arizona accepts pleadings and filing fees over the Internet for small-claims cases. The Third Judicial District Court in Shawnee County, Kansas, has allowed e-filing for collections cases since January 1998, and now estimates that a paperless filing saves nine hours compared to traditional methods. *Id.* at 2565.

Other jurisdictions that have initiated e-filing programs include Snake River Basin Adjudication District Court (Idaho), Washtenaw County Court (Michigan), 18th Judicial District (Colorado), Superior Court (Delaware), Los Angeles and Orange County Superior Courts (California), and Prince George's County District Court (Maryland). *Id.*


140. *Id.*

141. *Id.* at *4. The opinion does not specify whether hard-copy versions of the subject e-mail messages would be admitted into evidence.

142. *Id.* Rule 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." *Fed. R. Evid.* 401.

143. 966 F. Supp. 90 (D. Mass. 1997). The e-mail message was admitted into evidence in the form of a hard-copy printout.

144. *Id.* at 98.
the Federal Rules of Evidence. These decisions exemplify the judiciary's acknowledgment that electronic documents, in certain circumstances, may carry the legal recognition historically reserved for more traditional evidence created by typewriters, word processors, or manually written documents.

Service of process in the United States by electronic means is a recent development that has been allowed only in narrow circumstances. In 1980 a New York federal district court broke new ground by allowing service of process through: (1) delivery of a telex message written in the Farsi and English languages and sent to each Iranian defendant, and (2) mailing of a copy of the pleadings to the individual defendants. At the time the lawsuit was filed in *New England Merchants National Bank v. Iran Power Generation and Transmission Co.*, the Iran crisis had caused a disruption of the established relationship between the respective governments of the United States and Iran, and had also caused a breakdown of the Iranian postal service, rendering service by traditional methods impossible. The court explained its view of modern communication methods as follows:

Courts . . . cannot be blind to changes and advances in technology. No longer do we live in a world where communications are conducted solely by mail carried by fast sailing clipper or steam ships. Electronic communication via satellite can and does provide instantaneous transmission of notice and information. No longer must process be mailed to a defendant's door when he can receive complete notice at an electronic terminal inside his very office, even when the door is steel and bolted shut.

145. *Id.* at 99. Rule 803 provides: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (1) Present sense impression. —A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." *FED. R. EVID.* 803(1).

146. *New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co.*, 495 F. Supp. 73, 81 (S.D.N.Y. 1980). The court directed the plaintiffs to include in the telex message the following information: (1) the text of the summons; (2) a notice of suit as provided by the Foreign Sovereign Immunities Act, 28 U.S.C. § 1608(a)(3) (1994); and, (3) a notice that a copy of the pleadings would be mailed under separate cover. *Id.*


148. See *id.* at 75. In *New England Merchants National Bank*, various U.S. banks brought actions in a New York district court against Iran, Iranian agencies, and private Iranian corporate entities. The plaintiffs sought damages for the defendants' repudiation of executory contracts and the nationalization of the plaintiffs' private property in Iran. Subsequently, the defendants' assets were frozen by Presidential order, and the plaintiffs were granted orders of attachment over those assets. Although the defendants had actual notice of the attachment proceedings, the plaintiffs were required under Rule 64 of the Federal Rules of Civil Procedure to give the defendants formal notice within sixty days of the granting of the attachment order. *Id.* at 77.

149. *Id.* at 81.
Eight years later, in *Calabrese v. Springer Personnel of New York, Inc.*, a New York state trial court allowed a plaintiff's attorney to fax to the defendant's attorney an order rendered by that court. There, the plaintiff's attorney faxed to the defendant's attorney a court order requiring the defendant to respond to the plaintiff's interrogatories within twenty days of service of the order. Eight days after the twenty-day period expired, the defendant's attorney mailed to the plaintiff's attorney the responses to the interrogatories. The plaintiff rejected the interrogatory responses as untimely, and the parties then addressed the validity of service of process by fax in a subsequent hearing. In support of its finding that delivery of notice by fax was a reasonable method of service, the court in *Calabrese* stated:

[T]here could now ensue controversy as to whether the recipient's office is open, whether anyone is in charge, and whether the fax machine is in a conspicuous place. I refuse, however, to engage in such Augustinian folly. Of course the office is open when the fax machine is receiving. If an operator is present, of course there is delivery. If no operator is present, of course the fax machine, which is visited regularly, is in a conspicuous place.

The court's ruling in *Calabrese* constitutes the first published opinion considering the use of fax machines in litigation.

In 1996 a federal district court in Massachusetts for the first time upheld notice delivered by e-mail and through the Internet to potential plaintiffs in a class action. In *Greebel v. FTP Software Inc.*, notice of a class action was sent via the Internet to print publications and to wire services for circulation.

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151. *Id.* at 84.
152. *Id.* In June of 1988, Judge Lane issued an order striking the defendant's answer to the complaint unless the defendant responded to the plaintiff's interrogatories within twenty days of service of the order. *Id.* at 83-84.
153. *Id.* at 84.
154. *Id.*
155. *Id.* In spite of the court's finding that the twenty-day responsive period began when the order was properly served by fax, it nonetheless utilized its discretionary power to admit the defendant's interrogatory responses.
156. *Id.* at 83. *See generally* Murphy Bros. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999) (holding that the defendant's receipt of a complaint faxed by the plaintiff did not trigger thirty-day removal period under 28 U.S.C. § 1446(b) (1994), because fax transmission is not formal service); Hendricks County Bank & Trust Co. v. Guthrie Bldg. Materials, Inc., 663 N.E.2d 1180, 1185 (Ind. Ct. App. 1996) (concluding that a fax transmission did not constitute service of notice of adverse claim by a nonjudgment creditor, because fax transmission cannot provide proof that notice was actually delivered to a person authorized to accept service).
158. *Id.* at 59, 62-63.
There, the federal statutory publication provision required that “the plaintiff . . . shall cause to be published . . . in a widely circulated national business-oriented publication or wire service, a notice advising members of the purported plaintiff class . . . .”

The lead Greebel plaintiff supplied the press release to “Business Wire,” a service which electronically disseminates news releases to news media, online services and databases, and the Internet. The district court in Greebel found that because publication on Business Wire was reasonably calculated to reach an adequate number of potential plaintiffs who were sophisticated and institutional investors, the electronic delivery and circulation of the press release satisfied the federal statute’s requirement of publication.

Resisting the modern approaches to electronic notice employed by the courts in the British case and in New England Merchants National Bank, Calabrese, and Greebel, on March 8, 1999, a federal district court in California held that service of process by e-mail to a defendant’s electronic address, when the plaintiff did not know the actual identity of the defendant, was improper. In Columbia Insurance Co. v. Seescandy.com, the plaintiff insurance company owned the federally registered trademarks “SEE’S” and “SEE’S CANDIES.” The defendants registered the Internet domain names “seescandy.com” and “seecandys.com,” and subsequently sent the plaintiff thirty-one e-mails informing the plaintiff that confused customers had attempted to order candy from their web sites. The defendants indicated in the e-mails that they would be willing to sell the two domain names to the plaintiff.

On February 22, 1999, the plaintiff filed an action in federal court seeking injunctive relief and money damages for trademark infringement and unfair trade practices occasioned by the defendants’ registration of domain names similar to those owned by the plaintiff. The plaintiff, however, did not know the actual identities of the defendants and could identify them only by their

161. Id. at 63-64.
162. See supra notes 121-133 and accompanying text.
164. 185 F.R.D. 573 (N.D. Cal. 1999).
165. Id. at 576. The plaintiff Columbia Insurance Company was an assignee of the trademarks “SEE’S,” “SEE’S CANDIES,” and “FAMOUS OLD TIME” from See’s Candy Shops, Inc. Id. at 575-76.
166. Id. at 575, 580. The defendants registered the subject domain names with Network Solutions, Inc., a database containing domain names that have been reserved by individuals or firms for use on the Internet. Id. at 575-76.
167. Id. at 579.
168. Id. at 575. For a good discussion of the legal issues raised by domain-name litigation, see Vincent Chiappetta, Rules of the Road: Traffic Control at the Trademark-Internet Intersection, 60 OR. ST. B. BULL. 21 (1999).
Internet pseudonyms, which were aliases that had been listed by the defendants in registering the domain names at issue.169

In an effort to serve the defendants with the motion for temporary restraining order, preliminary injunction, and the complaint, the plaintiff sent those documents by e-mail to the electronic addresses that had been provided by the defendants to the domain-name registration service. The plaintiff received no response from the addressees.170 In Columbia Insurance Co. the court briefly explained that notice by electronic delivery did not comply with the federal rules because the plaintiff must ascertain the defendant’s name and address to serve the defendant with the summons and complaint in compliance with Rule 4 of the Federal Rules of Civil Procedure.171

Unlike the Columbia Insurance Co. opinion, the courts’ endorsement of electronic transmissions of notice in the British case and in New England Merchants National Bank, Calabrese, and Greebel embody a judicial recognition that in some instances, electronic delivery is indeed a reasonable method of serving certain forms of notice on interested parties. To date, however, no United States court has found that e-mail may serve as an adequate method of delivering initial notice of litigation to an individual defendant or business entity.172

170. Id. at 575-76.
171. Id. at 577. Federal Rule of Civil Procedure 4(e)(2) states, in pertinent part, that “service upon an individual . . . may be effected . . . by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.”

The district court also denied the plaintiffs’ request for injunctive relief, stating that even if it granted the temporary restraining order under Federal Rule of Civil Procedure 65(b) without serving the defendant with process, once that order expired, under the federal rules the plaintiff could not obtain a preliminary injunction without prior notice to the defendant. Id. at 576-77.

Federal Rule of Civil Procedure 65(b) states, in pertinent part: “A temporary restraining order may be granted without written or oral notice to the adverse party or to that party’s attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party’s attorney can be heard in opposition, and (2) the applicant’s attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.”

172. Soon, however, e-mail may provide an acceptable method of service of process on pleadings filed subsequent to the original complaint in federal court. In April 1999 the Civil Rules Advisory Committee recommended amendments to Federal Rule of Civil Procedure 5(b). The amendment would allow electronic service of every pleading subsequent to the original complaint, so long as the prospective recipient agrees to be served by subsequent pleadings electronically. The Advisory Committee further recommended that if local court rules allow it, and consent is given by the parties, a party may file a document with the court and use the court’s transmission facilities to serve all parties. ADVISORY COMMITTEE ON CIVIL RULES, REPORT
VI. INITIAL SERVICE OF PROCESS THROUGH E-MAIL

E-mail presents an option that is potentially superior to mechanisms for service of process presently available. E-mail’s advantage is in its ability to hasten communication of notice by circumventing physical restrictions inherent in the traditional methods of its delivery. Whether e-mail is a viable option for serving process, however, depends on two factors. The first rests on its ability to meet constitutional due process requirements for the delivery of adequate notice. The second depends on whether present-day electronic technology is sufficiently sophisticated to provide the sender with a reliable confirmation of receipt by the served party.

Due process requires that a reasonable effort be made to ensure that a defendant receives notice of a pending legal action through personal service, or by an alternate method most likely to reach the defendant. Successful service through e-mail thus presupposes a reasonable expectation that the defendant may be found at his or her e-mail address, and must provide reasonable confirmation that the defendant received the notice.

One scenario allowing a plaintiff to easily deliver notice to a defendant at a particular electronic address involves a corporate defendant that is statutorily required to accept service through a designated registered agent that has specified an e-mail address for receipt of service. Another illustration is in


173. See supra note 3 describing the process of transmitting a message via e-mail.
174. See Rowley v. Cleaver, 598 N.W.2d 125, 126-27 (N.D. 1999) and Hanson v. Venditelli, 712 N.E.2d 1212, 1213 (Mass. App. Ct. 1999) for state rule requirements that plaintiff confirm service of the summons and complaint by filing with the court proof of service by affidavit and return receipt, or by written attestation of serving officer.
176. Although the Court in Mullane set forth a requirement of reasonable notice, the opinion acknowledged that in certain circumstances, the unlikeness that a defendant will receive actual notice does not render the service unconstitutional. "Undeniably, there are situations in which insistence on actual notice, or even on the high probability of actual notice, would be both unfair to plaintiffs and harmful to the public interest." Dobkin v. Chapman, 236 N.E.2d 451, 458 (N.Y. 1968) (citing Mullane, 339 U.S. at 317, 319); see also Walker v. City of Hutchinson, 352 U.S. 112, 115-16 (1956) (stating that the type of notice required will vary with circumstances and conditions, and in some cases it might not be reasonably possible to give personal notice, for example, when people are missing or unknown). Defendants whose whereabouts are known, however, may seek reversal of a default judgment entered against them upon proof that they did not receive actual notice of the proceedings against them. Roper v. Dailey, 393 So. 2d 85, 88 (La. 1981).
177. In most states, service on a corporation may be accomplished by delivering a copy of the summons and complaint to the registered agent of said corporation named on the records of the secretary of state. See, e.g., MONT. R. CIV. P. 4D(2)(e)(ii). Statutory provisions such as this could easily be amended to accommodate electronic service of process by requiring that the registered agent provide the secretary of state with an e-mail address for service of process.
the delivery of an electronic summons and complaint pursuant to a waiver of service provision, in which a response from the defendant agreeing to waive service conclusively establishes receipt of notice.\textsuperscript{178} E-mail also presents a viable method of notification in breach of contract actions if the parties have incorporated into the contract a provision for electronic service of process and an e-mail address for such purpose.\textsuperscript{179} Lastly, the British case exemplifies successful delivery of electronic notice, because the defendant's electronic address was the only place where he could be found, and when a subsequent response to the plaintiff's e-mail confirmed receipt of service of process.\textsuperscript{180}

As individuals and businesses increase their use of electronic communications, statutory and judicial movement toward legal recognition that a defendant may be found at his or her e-mail address for purposes of service of process may be reasonably expected.\textsuperscript{181} Currently, the appearance of e-mail addresses on business cards is nearly ubiquitous.\textsuperscript{182} Similarly, in an effort to facilitate and enhance customer contact, business advertising very frequently includes the web page and e-mail address of the advertiser. Individuals' use of e-mail for personal communication renders it increasingly reasonable to attach legal reliance that a person may be successfully contacted through her electronic address. Indeed, courts' findings that a defendant has established an electronic presence in a forum sufficient to establish personal jurisdiction are now commonplace.\textsuperscript{183}

\textsuperscript{178} See, for example, Federal Rule of Civil Procedure 4(d)(4), which provides a waiver of service provision that obviates the need for formal service upon the defendant's response to plaintiff's request that the defendant waive service.

\textsuperscript{179} When a defendant contractually consents to the jurisdiction of a court, service of process that is imperfect under the Federal Rules of Civil Procedure, but that meets due process requirements, will be upheld. Lawn v. Franklin, 328 F. Supp. 791, 794 (S.D.N.Y. 1971); see also AAMCO Automatic Transmissions, Inc. v. Hagenbarth, 296 F. Supp. 1142, 1143 (E.D. Pa. 1963) (holding service valid that was contractually consented to although imperfect under federal rules).

\textsuperscript{180} See supra Part IV.

\textsuperscript{181} One study predicts that by the year 2000, 108 million people will utilize e-mail. Gary Burnett, \textit{IT World: Electronic Mail: The Fax of Life}, Belfast Newsletter, July 7, 1998, available in 1998 WL 27606988. This estimate represents twice the number of e-mail users in 1998. Id. Another trend that will enhance the connection between an individual and her e-mail address is the use of "kneetop" personal computers, which may be easily carried and stored. The PCs, which are less than an inch thick, weigh less than three pounds, and contain batteries that will remain charged for eight to twelve hours, are likely to become ubiquitous accompaniments for many individuals. Joshua Quittner, \textit{New Kneetop PCs}, \textit{TIME}, Mar. 1, 1999, at 83.


\textsuperscript{183} See, e.g., Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316, 1321-22 (9th Cir. 1998) (holding that an Illinois resident who registered the "Panavision" trademark on the Internet as his domain name was subject to personal jurisdiction in California under the "effects test," because he engaged in extortion from the California company, the injury would be felt in California, and the plaintiff's claim arose out of defendant's conduct); CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1264-65 (6th Cir. 1996) (holding that actively using the Internet to
Assuming that the plaintiff knows the defendant's e-mail address, various concerns arise regarding its use for serving process. One consideration in deciding whether e-mail notice complies with due process requirements

contract and solicit business subjected the defendant to personal jurisdiction in the customer's state; Bochan v. La Fontaine, 68 F. Supp. 2d 692, 701-02 (E.D. Va. 1999) (holding that court had personal jurisdiction over a defendant that solicited business through an Internet site accessible by Virginia residents); GTE New Media Servs., Inc. v. Ameritech Corp., 21 F. Supp. 2d 27, 38-39 (D.D.C. 1998) (holding that defendant's highly interactive and commercial "yellow pages" website from which defendant derived revenue provided sufficient minimum contacts with the forum state); VitoZio v. Velocity Powerboats, Inc., No. 97-C8745, 1998 WL 246152, at *6 (N.D. Ill. Apr. 27, 1998) (holding that defendant's website expressly soliciting forum state residents' business established contact with forum state for specific jurisdiction); Thompson v. Handa-Lopez, Inc., 998 F. Supp. 738, 744 (W.D. Tex. 1998) (holding that California corporation with website had sufficient contacts with Texas to establish jurisdiction when it entered into contracts with Texas citizens over the Internet); Digital Equip. Corp. v. Altavista Tech., Inc., 960 F. Supp. 456, 462 (D. Mass. 1997) (holding that court had personal jurisdiction over the defendant when the defendant advertised its business through its website, sold goods to forum state residents, and entered into contract governed by law of forum state); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1126 (W.D. Pa. 1997) (holding that a company satisfied minimum contacts requirement for personal jurisdiction when it offered a news service over the Internet, had more than three thousand paying customers in the forum state, and entered into contracts with multiple Internet service providers in that state); Maritz, Inc. v. CyberGold, Inc., 947 F. Supp. 1328, 1333-34 (E.D. Mo. 1996) (holding that an interactive website providing users with information and ability to join mailing list established minimum contacts with the forum); Inset Sys., Inc. v. Instruction Set, Inc., 937 F. Supp. 161, 165 (D. Conn. 1996) (holding that the court had personal jurisdiction over defendant company which solicited business through toll-free number listed on website). But see Mink v. AAAA Dev., Inc., 190 F.3d 333, 337 (5th Cir. 1999) (holding that the court did not have personal jurisdiction over a Vermont company that advertised in the forum state through the Internet, but did not accept customers' orders through its website); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 419 (9th Cir. 1997) (holding that a Florida corporation was not subject to personal jurisdiction when the defendant posted a "passive" web page and conducted no commercial activity over the Internet); Molnlycke Health Care AB v. Dumex Med. Surgical Prods. Ltd., 64 F. Supp. 2d. 448, 451-52 (E.D. Pa. 1999) (holding that general jurisdiction over defendant does not exist when defendant's Internet contacts not found to be purposefully directed at forum); Hurley v. Cancun Playa Oasis Int'l Hotels, No. CIV.A.99-574, 1999 WL 718556, at *3 (E.D. Pa. Aug. 31, 1999) (holding that the court does not have personal jurisdiction when the defendant did not make deliberate contact through its website with the forum state); Fix My PC, L.L.C. v. N.F.N. Assocs., 48 F. Supp. 2d. 640, 643-44 (N.D. Tex. 1999) (holding that the defendants' "passive" website accessible in the forum state, toll-free number displayed on the website, and unrelated business transactions in the forum state did not establish minimum contacts sufficient for personal jurisdiction in the forum state); Millennium Enters., Inc. v. Millennium Music, LP, 33 F. Supp. 2d. 907, 910 (D. Or. 1999) (holding that the defendant's maintenance of a website, purchase of a compact disk by a customer in the forum state, and sporadic purchases from forum state company are not sufficient to establish personal jurisdiction); Shapiro v. Santa Fe Gaming Corp., No. 97-C 6117, 1998 WL 102677, at *2 (N.D. Ill. Feb. 27, 1998) (holding that the court did not have personal jurisdiction even though the defendant's website posted toll-free numbers because the purpose of the website was to provide information, not to solicit business); Bensusan Restaurant Corp. v. King, 937 F. Supp. 295, 301 (S.D.N.Y. 1996) (stating New York court did not have jurisdiction over Missouri restaurant for trademark infringement when website for restaurant was not interactive and not designed to attract New York residents).
involves whether the plaintiff can prove that the defendant received the electronic complaint and summons. The United States Postal Service has developed a method for document delivery that enhances the certainty involved in the confirmation of receipt of electronic documents. A person wishing to send an electronic "package" through the postal service may do so through the electronic document delivery service available on their web page. The service, known as "Post E.C.S.," confirms that the transmission was successful and electronically informs the sender as to when the message was received. Additionally, the service allows a sender to use a document format technology enabling a recipient to read an e-document regardless of whether the software application (the e-language) used to create the document was different from that on the computer of the recipient.

In addition to the United States Post Office, private companies offer software that allows "return receipt" confirmation of document delivery to an electronic addressee by tracking not only when the message is delivered, but when the recipient "opens" the e-mail. The software carries out this function by electronically posting to the original e-mail in the sender's mailbox a confirmation of the date and time of the e-mail's delivery, as well as when the addressee opened the message. A plaintiff that serves the defendant electronically, and receives a confirmation that the defendant opened the message, could then file with the court an affidavit along with a copy of the electronic return receipt, thus establishing delivery of the summons and complaint. The current availability of electronic services confirming a defendant's receipt of electronic notice weighs persuasively towards application of a presumption of trustworthiness that has been historically granted to notice delivered only by traditional methods of service.

186. See supra note 184.
187. Id.
189. Id.
190. This procedure is similar to the requirement in most jurisdictions that the plaintiff file with the court the return receipt evidencing delivery of the legal papers to the defendant. See, e.g., NEB. REV. STAT. § 25-505.01(1)(c) (1995) (allowing service of summons by certified mail with a return receipt requested and requiring filing of proof of service with return receipt attached); N.C. R. CIV. P. 4(j)(1)(c) (allowing service of process by registered or certified mail, return receipt requested); N.D. R. CIV. P. 4(d)(2)(A) (allowing service of process by any form of mail addressed to the defendant that requires a signed receipt and results in delivery to that individual); OR. R. CIV. P. 7(D)(2)(d)(i) (allowing service of process by first-class mail and by registered or certified mail, return receipt requested).
Although confirmation that the electronic notice has been successfully delivered or opened does not establish that the recipient has actually read the contents of the message, due process does not require confirmation that the defendant has read the notice; due process requires only that the notice was delivered. The law’s presumption that papers delivered are deemed read is illustrated in substituted service. When substituted service is properly effected on an authorized recipient, the defendant is presumed to have received the notice. Accordingly, a defendant’s assertion that she did not read an electronic notice that was otherwise properly delivered may be rebuffed by the legal presumption that the defendant will read the contents of notice properly served. In fact, e-mail provides greater assurance than some methods of service that the defendant will be apprised of notice. Unlike documents delivered by substituted service of process to someone other than the defendant, notice sent to a defendant’s e-address has no potential for post arrival physical movement and will remain in the defendant’s mailbox until retrieved, thereby eliminating the risk of misplacement.

One writer has envisioned a future model of litigation in which, in order to facilitate electronic service of process, corporations and government agencies would be required to register their electronic addresses. Similarly, individuals that do not make their e-mail addresses public through the registration process would be assessed the cost of service. Indeed, this vision of the legal profession’s embrace of electronic communication at the very inception of litigation would facilitate, and perhaps revolutionize, traditional

192. There is a duty to check for mail, and a letter properly sent is considered received, even if it does not reach the hands of the addressee or is not read by the addressee. RESTATEMENT (SECOND) OF CONTRACTS § 68 cmt. a (1981); see also Logan v. Corinth-Alcorn County Joint Airport Bd., 665 F. Supp. 506, 511 (N.D. Miss. 1987) (holding that a letter hand-delivered to recipient’s secretary is deemed received); Holmes v. Myles, 37 So. 588, 589 (Ala. 1904) (holding effective as an acceptance a letter left at the house of an offeror before expiration of the option period, but not read until after expiration of the option period).
193. The return of the process server’s citation is prima facie evidence of service. Roper v. Dailey, 393 So. 2d 85, 86 (La. 1981). This presumption may be rebutted, however, by clear and convincing evidence establishing that service of process did not result in delivery of papers to the defendant. Id.
194. This scenario assumes that the defendant maintains a private password to ensure sole access to her e-mailbox.
195. Paul D. Carrington, Virtual Civil Litigation: A Visit to John Bunyan’s Celestial City, 98 COLUM. L. REV. 1516, 1534 (1998). Although Mr. Carrington does not specify where the electronic addresses should be registered, the corporate or governmental entities could easily include that information along with the statutorily required name of an agent for service of process in their filings with the secretary of state. See supra note 177 and accompanying text.
196. Carrington, supra note 195, at 1534. Such an assessment could mirror the model provided by the Federal Rules of Civil Procedure, which allow a plaintiff to impose on the defendant the costs of formal service when that defendant refuses to provide a waiver of service of the complaint. Fed. R. Civ. P. 4(d)(2).
methods of serving process.

VII. CONCLUSION

As methods of communication improve and individual mobility increases, mechanisms for serving process should evolve to allow for more convenient methods of serving process on a defendant while complying with constitutional due process and statutory requirements. Presently, service of process on an individual defendant can be accomplished only through methods reliant on a physical connection with the defendant or defendant's agent. The advent of electronic service of process, however, makes clear that the requirement of the physical connection may be arbitrary and unnecessary.

Due process requirements, which ensure that a defendant receives adequate notice of a pending action, may already accommodate electronic notice to a defendant in enumerated situations. As electronic technology advances and e-mail provides increased certitude in confirming actual receipt of notice by a defendant, it is reasonable to expect that electronic service of process will present an additional and effective option for serving process. Therefore, developments in that direction should be encouraged and welcomed.