

From: Jesse M Furman [REDACTED]
To: David Campbell [REDACTED], John D. Bates [REDACTED]
Date: 01/03/2019 02:31 PM
Subject: Two thoughts regarding Fed R Civ P 4

John and Dave:

I hope this finds you well. I'm writing with two thoughts about Rule 4 prompted by our Chief of Pro Se Litigation, Maggie Malloy.

She has tried in various ways to make service more efficient (e.g., by negotiating e-service agreements with repeat defendants, etc.) and, to that end, has worked closely with the USMS. In doing so, she came across a slightly weird anomaly in Rule 4 (perhaps a product of when the Rules were changed so that the Marshals were not required to serve in all cases). Specifically, while a plaintiff can request a waiver of service under 4(d), the court is required to order the Marshals to serve the complaint in IFP cases. See 28 USC 1915(d); FRCP 4(c)(3).

Interestingly, the USMS apparently takes the position that courts cannot order them to request a waiver - they can only require them to serve. See <https://www.usmarshals.gov/process/pauper-seaman.htm> ("Although the U.S. Marshal is required to serve a summons and complaint on behalf of paupers and seamen, waiver of service is not actual service of summons and complaint. Consequently, the U.S. Marshal may not be required to prepare and send the notice of lawsuit and request for waiver forms, along with the complaint, to the defendant. This may be done by the pauper and seaman plaintiff or the clerk of court. The waiver, however, is optional for a plaintiff; thus, the pauper or seaman plaintiff cannot be compelled to initiate the waiver process.").

Perhaps there is a good reason for that difference. But I think it would be worthwhile to consider whether Rule 4(d) should be amended to allow the court or the USMS to ask a defendant to waive service in IFP cases. I suspect it could save a lot of time and money across the country.

Maggie raises one other Rule 4 issue that may be worth considering, concerning Rule 4(c)(3), which reads as follows:

(3) By a Marshal or Someone Specially Appointed. At the plaintiff's request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. §1915 or as a seaman under 28 U.S.C. §1916.

I gather that the majority of courts of appeals interpret this language to require courts to order the Marshals to serve whenever the plaintiff is authorized to proceed IFP. The first sentence allows courts, upon the plaintiff's request, to order the Marshals to serve in non-IFP cases (but does not authorize waiver of the service fee; the Marshals will sometimes send things back when a judge orders them to serve in a non-IFP case). I gather, however, that the Second Circuit - unlike some other Circuits - has read the "request" language to apply as well to the second sentence. *Compare, e.g., Nagy v. Dwyer*, 507 F.3d 161, 163 (2d Cir. 2007) (per curiam) ("Absent a request from the plaintiff, nothing in the text of Rule 4 requires the district court to appoint the Marshals to effect service after granting pauperis status to the plaintiff."), *with Laurence v. Wall*, 551 F.3d 92, 94 (1st Cir. 2008) (per curiam) ("To the extent that some of our sister circuits suggest that the IFP plaintiff must request service of process by the United States Marshal or take other affirmative action to ensure that service is effectuated, e.g., *Romandette v. Weetabix Co., Inc.*, 807 F.2d 309, 311 (2d Cir. 1986), we believe that under the plain language of section 1915(d) and Rule 4(c)(3), it is not necessary for the IFP plaintiff to request service of process by the United States Marshal."). In other words, at least in the Second Circuit, courts can - and sometimes do - dismiss for failure to prosecute if a pro se plaintiff never "requests" that the court order the Marshals to

serve (e.g., if the plaintiff names a new defendant in an amended complaint and has no idea what is supposed to happen next). It's not clear to me that that is a correct reading of the Rule and, in any event, there is some virtue in the Rule being consistently applied across Circuits.

I'm attaching a memo that Maggie wrote to me that summarizes some of the relevant cases in this area in case it is helpful.

Let me know if you want to discuss or have any questions. Otherwise, thanks for considering these thoughts.

Yours,
Jesse



Jesse M. Furman
United States District Judge
United States District Court
Southern District of New York



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