

**YOU'VE GOT MAIL:
NINTH CIRCUIT
APPROVES SERVICE BY EMAIL**
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Effecting service of process is the first step in the long march of litigation. Most of the time, this can be accomplished with minimal effort. Legitimate and law-abiding businesses and individuals do not hide from the law. Occasionally, however, and especially in the case of foreign entities, effecting service can be a more difficult chore. With the advent of the Internet, where business can be conducted exclusively through the computer, an elusive international defendant can easily thwart service by conventional means.

The Ninth Circuit recently addressed the issue of how to effect service of process on international defendants who lack a physical presence in the United States and otherwise play cat-and-mouse with the federal courts. In Rio Properties, Inc. v. Rio International Interlink, 284 F.3d 1007, 2002 WL 431915 (9th Cir. March 20, 2002), a case of first impression at the federal appellate court level, the Ninth Circuit held that court-ordered service of process by email on a foreign defendant is constitutionally permissible and within the sound discretion of the district court.

In Rio Properties, Inc., plaintiff Rio Properties, Inc. ("Rio"), a Las Vegas hotel and casino operator, sued defendant Rio International Interlink ("RII"), a Costa Rican internet business, alleging various statutory and common law trademark infringement claims for RII's use of the name "Rio" in connection with its internet sports gambling operation. Rio attempted futilely to serve RII in the United States. Rio next attempted unsuccessfully to locate an address in Costa Rica for RII through various international databases. It also hired a private investigator who was unable to find a physical presence for RII, although he did learn that it preferred communication through its email address, email@betrio.com.

Thwarted in its attempt to serve RII by conventional means, Rio filed an emergency motion for alternative service of process. The district court granted the unopposed motion pursuant to Federal Rules of Civil Procedure 4(f)(3) and 4(h)(2) and ordered RII served by, among other methods, email. The district court eventually entered a default judgment against RII, which then appealed the sufficiency of the court-ordered service of process.

The two issues confronting the Ninth Circuit were (1) whether Rio had to exhaust every permissible means of effecting service under the Rules before petitioning the district court to craft alternative service under Rule 4(f)(3); and (2) whether the email service ordered by the district court was constitutionally firm. The Ninth Circuit first turned to the Federal Rules of Civil Procedure to determine what limitations, if any, were placed on the district court's ability to craft an order for alternative service under Rule 4(f)(3). In answering that question, the Court found that the plain language of Rule 4(f)(3) placed only two limitations on service of process outside of the United States: (1) that it be directed by a district court; and (2) that it not be prohibited by an international agreement.

The Ninth Circuit rejected RII's argument that Rule 4(f) be read to create a hierarchy of preferred methods of service of process such that a party would need to attempt service by those methods set forth in Rule 4(f)(1) and (2) before seeking court relief under Rule 4(f)(3). The court found no support for this interpretation either in the language or structure of Rule 4(f), which separates its various subsections by the disjunctive "or" and which contains no qualifiers or limitations on a party's ability to invoke any particular subsection, or in the accompanying advisory committee notes, which state that, in cases of "urgency," Rule 4(f)(3) may allow the district court to order alternative service even if other methods of service remain available.

In so holding, the Ninth Circuit disapproved of the statement in Graval v. P.T. Bakrie & Bros., 986 F. Supp. 1326, 1330 (C.D. Cal. 1996), that service under Rule 4(f)(3) was "intended as a last resort, only to be employed when there are no other feasible alternatives." Instead, the Ninth Circuit found that Rule 4(f)(3) is merely one means among several of effecting service of process on an international defendant.

As to whether the district court properly exercised its discretion in ordering email service under Rule 4(f)(3), the court found that the record fully supported that decree. Specifically, the Ninth Circuit cited Rio's unsuccessful attempt to serve RII by conventional means in the United States; its unsuccessful attempt to locate RII in Costa Rica through international databases; its unsuccessful attempt to have RII's lawyer accept service on RII's behalf; and its unsuccessful use of a private investigator to discern the whereabouts of RII in Costa Rica. These facts were sufficient to allow the district court to order email service under Rule 4(f)(3).

The Ninth Circuit next moved to the question of whether the email service ordered by the district court comported with constitutional due process. To be constitutionally

proper, the alternative service of process ordered by the district court had to be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950). The email service ordered by the district court was found to meet this standard. The Ninth Circuit noted that RII had eagerly embraced the Internet and the modern e-business model. Indeed, RII had structured its business in such a fashion that it could be contacted *only* at its email address. Given that RII did not conduct business the old-fashioned way, traditional methods of effecting service were somewhat anachronistic. Embracing the technological advances of the e-revolution, the Ninth Circuit found email service on RII was not only reasonably calculated to apprise it of the pendency of the lawsuit but actually was the method of service most likely to reach it.

It bears emphasizing that the Ninth Circuit's decision in Rio Properties, Inc. represents a departure from other cases considering the issue of email service and may signal the start of a trend on the part of courts to expand the available methods of service to reflect advances in technology. In WAWA, Inc. v. Christensen, 44 Fed. R. Serv. 3d 589, 1999 WL 557936 (E.D. Pa. 1999), a U.S. company attempted to serve a Danish citizen by email. Although the district court ultimately determined that service was effected by the direct mailing of the complaint to the defendant, it found that email "is not an approved method of service under Federal Rule of Civil Procedure 4," and that service by this method is invalid.

The Ninth Circuit was careful in Rio Properties, Inc. to note that it was not endorsing email service of process for all occasions. It pointed out that service of process by email on a plaintiff's own initiative likely would not be legal. But if approved by a district court after balancing the limitations of email service (system compatibility, confirmation of receipt, etc.) against the benefits of such service under the circumstances, email service of process is a permissible method of effecting service on those elusive foreign entities that conduct business in the United States not within the four walls of an office, but rather through a computer terminal.

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