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Keeping Pro Se Litigants At Bay

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Pro se litigation can be a time-consuming cost of doing business, particularly for large, well-known companies. Pro se complaints come in all shapes and sizes.


Michael Walden

Some are handwritten, while others are carefully typed. Some complaints are short and cryptic, while others are lengthy diatribes addressing numerous alleged grievances. Some are copied largely from complaints filed by attorneys in other cases, while others assert unique or difficult-to-discern theories of liability. Though pro se cases occasionally include interesting, even amusing, claims, like all litigation, they must be taken seriously.

In our prior article, Prevent Pro Se Litigation From Becoming A Problem Per Se,[1] we discussed a number of issues that an attorney should consider and evaluate when a pro se case comes in the door.


David Northrip

As covered more fully in that article, an attorney should consider the following questions when facing a new pro se complaint:

1. Was the complaint properly filed and served?
2. Does the complaint fail to state a claim for some reason?
3. Is the pro se plaintiff purporting to represent others, such as an estate in a wrongful death case, or a group of class members in a purported class action?
4. Does the complaint include a 42 U.S.C. § 1983 claim?
5. Is the pro se plaintiff a serial filer of lawsuits, especially ones that have been deemed to be frivolous?
6. Are there any common sense affirmative defenses that would bar the claim?
7. Can and should the case be removed to federal court?


David Swaney

The vast majority of pro se cases we face can be resolved by asking these seven questions, and following through on a plan of action based on the answers.

Since publishing that article, we have continued to defend pro se litigation

successfully, using the same approach of carefully evaluating each case and responding accordingly. Below are a few examples of some of the quirkier cases we have seen, but where we followed the above approach to prevail quickly and efficiently.

Service

Rule 4 of the Federal Rules of Civil Procedure governs service and the form of the summons in federal court. The rule is designed to give defendants proper notice of the claims alleged against them, and it imposes a number of requirements to achieve its purpose.

While meeting Rule 4's requirements is a perfunctory task for most attorneys, many pro se plaintiffs have trouble complying with the service requirements. And although most courts hold pro se plaintiffs to less stringent standards than attorneys, they still must comply with the basic requirements of Rule 4.[2]

In a recent case we defended in the U.S. District Court for the District of Utah, the pro se plaintiff had significant trouble meeting Rule 4's requirements.[3]

First, the plaintiff attempted to serve our client with a summons from the U.S. District Court for the District of Nevada. Because the summons identified the wrong court, it failed to provide proper notice and violated Rule 4(a)(1)(A), which requires a summons to "name the court" where the claim is pending.

The summons was further deficient because it was not signed by the clerk of the District of Utah as required by Federal Rule 4(a)(1)(F). Plaintiff creatively sought to amend his summons by erasing the word "Nevada" in the initial summons and typing in "Utah." He still, however, failed to obtain a signature from the clerk of the District of Utah.

Finally, the plaintiff acquired the proper summons — but this time, he attempted to serve the complaint on defense counsel, as opposed to the defendant. We had previously informed the plaintiff that we were not authorized to accept service on behalf of our client. That being the case, this summons failed to comply with Federal Rule 4(h)(1)(B).

Upon our motion, the district court quashed the summonses. Ultimately, the plaintiff failed to properly serve any defendant in the time required by the court, and the case was dismissed pursuant to Federal Rules of Civil Procedure 12(b)(4) (insufficient process) and 12(b)(5) (insufficient service of process).[4]

While it is rare to obtain a dismissal under 12(b)(4) and (5) against a represented party, this pro se plaintiff apparently had exhausted the patience of the court.

Failure to State a Claim

Cases can fail to state a claim for a number of reasons. Sometimes they simply fail to provide sufficient information about what otherwise might be a well-pleaded claim, as illustrated by a recent complaint we received that consisted of a single, solitary word: "Fraud."

Other complaints may lay out information in excruciating detail, yet simply not entitle the claimant to any relief. We defended the latter type of case recently in the U.S. District Court for the Central District of California.

The allegations, in a nutshell, were that the plaintiff developed gluten intolerance due to eating Ritz crackers and Cheerios over the years. The plaintiff's complaint was well-written and provided a fair amount of detail, including product use, injury, causation and damages. Ultimately, however, the complaint did not entitle him to any relief.

This type of complaint offers several potential opportunities to seek dismissal. The most striking of those options was the fact that our clients are not in the food business. In addition to physical discomfort, he alleged that gluten-free products "are more expensive and do not taste as good as regular wheat products. ..."

We must confess that our own experience with gluten-free products has led us to a similar conclusion. Despite our empathy, the plaintiff's qualms with gluten-free products did not entitle him to any recovery from our clients. After giving the plaintiff a chance to support his allegations with factual assertions, the district court dismissed the case with prejudice for failure to state a claim.

When the plaintiff appealed, he left our clients out of the case, apparently believing us when we (correctly) told him that our clients could never be liable for any damages arising from his experience eating Ritz crackers and Cheerios.

Serial Filers (From Prison)

The majority of pro se complaints we see emanate from people incarcerated in one of the United States' penal institutions. Many of the prisoners who file pro se complaints could fairly be considered serial filers.

A prisoner-plaintiff's past (mis)use of the court system is important in two key ways: (1) the in forma pauperis (IFP) screening process[5] in federal court disallows a prisoner from proceeding IFP if he has "has, on 3 or more occasions ... brought an action or appeal ... that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim ..."[6] and (2) important evidence that can strengthen your motion to dismiss often can be found in previous filings.

So even if the court (typically a magistrate) initially permits the prisoner-plaintiff to proceed IFP, you should try to track down his or her litigation history as soon as possible.

For example, we recently defended a case filed in the United States District Court for the Southern District of Georgia that touched upon both points (1) and (2). Perhaps due to oversight, the magistrate judge granted the plaintiff's application to proceed IFP despite the fact that he had filed no fewer than 12 meritless pro se complaints from prison during the previous decade. The frequency of his filings, footnoted in our motion to dismiss, may have helped the court to decide to pour him out of court.

Further, the plaintiff resisted the statute of limitations argument set out in our motion to dismiss by citing to discovery and tolling case law and muddying the factual assertions he previously made.

But because we had obtained some of the plaintiff's filings from other litigation, we were in possession of affidavits previously executed and filed by the plaintiff that conclusively demonstrated that the plaintiff was taking different sides on an issue in different courts.

Demand Letters

One issue we did not raise in our earlier article relates to demand letters. On occasion, we receive letters from potential pro se plaintiffs stating that they will, or are considering, filing a lawsuit against one of our clients.

Often they demand that someone contact them or pay them a certain amount of money in 30 or 60 days, with the threat of a lawsuit to follow. Other times, they simply air grievances they have with the company. On some occasions, they attach a potential complaint or an affidavit to their correspondence.

Under most circumstances, we do not recommend responding to such letters. In our experience, the vast majority of potential plaintiffs do not follow up on their initial correspondence.

As always, the decision whether to respond should be addressed on a case-by-case basis. There may be times where it is in the best interest of your company or your client to contact these potential plaintiffs.

But engaging a pro se plaintiff tends to invite further, and sometimes more passionate, correspondence from the plaintiff and further costs in addressing the matter.

Conclusion

Although pro se litigants generally lack the training and experience that attorneys possess, underestimating them can be a costly mistake.

All litigation must be taken seriously. By following the steps laid out above, you can manage pro se litigation for your company or your clients in a thorough and efficient fashion.

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[1] http://www.law360.com/articles/453679/prevent-pro-se-litigation-from-becoming-a-problem-per-se.

[2] See, e.g., Pederson v. Mountain View Hosp., et al., No. 1:11-CV-16-CW, 2011 U.S. Dist. LEXIS 153114, at *5 (D. Utah Aug. 31, 2011) (unpublished) ("All litigants are required to follow the basic requirements of Rule 4, including pro se litigants.") citing DiCesare v. Stuart, 12 F.3d 973, 980 (10th Cir. 1983).

[3] Rule 4(a)(1) provides, inter alia, that the summons must:

(A) name the court and the parties; (B) be directed to the defendant; (C) state the name and address of the plaintiff's attorney or – if unrepresented – of the plaintiff; (D) state the time within which the defendant must appear and defend; (E) notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint; (F) be signed by the clerk, and (G) bear the court's seal.

Fed. R. Civ. P. 4(a) (emphasis added).

[4] A Rule 12(b)(4) motion is proper to challenge noncompliance with the provisions of Rule 4(a) regarding the content of the summons. See, e.g., Fed. R. Civ. P. 12(b)(4); Pederson, 2011 U.S. Dist. LEXIS 153114, at *5 (D. Utah Aug. 31, 2011); Ericson v. Pollack, 110 F. Supp. 2d 582, 584 (E.D. Mich. 2000); United States v. Nat'l Muffler Mfg., 125 F.R.D. 453, 455 (N.D. Ohio 1989) (noting that the "failure to serve defendant with a signed and sealed summons cannot be regarded as a mere oversight that warrants perfunctory amendment"); Gianna Enters. v. Miss World (New Jersey) Ltd., 551 F. Supp. 1348, 1358 (S.D.N.Y. 1982) ("[A] defendant should not be made to answer a summons and complaint without first being given proper notice of the nature of the suit and being assured that the summons properly issues from a court.") (emphasis in original).

Similarly, Rule 12(b)(5) authorizes a motion to dismiss on grounds of insufficiency of service of process. See Wright & Miller, Federal Practice & Procedure, § 1353, p. 334 (3d ed. 2004). "Service is insufficient where a party serves the wrong person or serves an individual not permitted to accept service." U.S. v. La Familia Corp., et. al, No. 10-02400-EFM, 2011 U.S. Dist. LEXIS 67599 (D. Kan. June 24, 2011). Federal courts routinely grant motions to dismiss under 12(b)(5) for failing to serve the right person or entity. See, e.g., Hukill v. Oklahoma Native Am. Domestic Violence Coal., 542 F.3d 794, 801-02 (10th Cir. 2008); Schaeffer v. Village of Ossining, 58 F.3d 48, 50 (2d Cir. 1995); Tso v. Delaney, 969 F.2d 373, 377 (7th Cir. 1992); Adams v. AlliedSignal Gen. Aviation Avionics, 74 F.3d 882, 885 (8th Cir. 1996); Allison v. Utah County Corp., 335 F.Supp.2d 1310, 1313 (D. Utah 2004).

[5] In forma pauperis literally means "in the character or manner of a pauper" and is the designation given to those without the funds to pursue litigation. In federal court, plaintiffs with IFP status are exempt from service and filing fees.

[6] 28 U.S.C. § 1915.
