

# Client Alert **Product Liability Law**

## *Service of Process through Facebook as a Last Resort*

### **Background**

Who says Facebook is just for posting photos of family and friends? For the past few years, courts across the United States have allowed plaintiffs to effectuate service of process through social media platforms like Facebook. Typically, plaintiffs have been permitted to use social media as a supplemental means of serving complaints, etc. On May 10, 2017, the New Jersey Superior Court's Chancery Division in Morris County, approved the first published decision in New Jersey to allow a plaintiff to effectuate service of process through Facebook. Of particular interest was the fact that the Court allowed service of process through Facebook alone. *K.A. v. J.L.*, Docket No. C-157-15, 2016 N.J. Super. LEXIS 166 (Ch. Div. April 11, 2016).

Like many jurisdictions, New Jersey's court rules give judges the discretion to allow service of process through alternate means when traditional means like personal service, service by mail, or service by publication are not feasible (*R. 4:4-4(b)(3)*). The use of alternate means like social media must protect the parties' due process rights. If a plaintiff wants to use social media to effectuate service of process, plaintiff must establish that service through traditional means was or would be ineffective because the defendant did not live in the forum state, did not have a known address, and would not likely read a newspaper publication. The plaintiff must then establish that service through a particular social media platform would be effective by demonstrating that the defendant is not only active on the particular social media platform, but also that the defendant's account on that platform is authentic.

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***K.A. v. J.L.***

Given the circumstances of *K.A.*, the judge's decision to allow Plaintiffs *K.A.* and *K.I.A.* ("Plaintiffs") to serve process through Facebook alone is not surprising. In *K.A.*, Plaintiffs sought to enjoin Defendant *J.L.* ("Defendant") from contacting them or their adopted son, *Z.A.*, and to compel him to remove all information pertaining to *Z.A.* that he had posted on social media. Defendant had contacted *Z.A.* through Facebook and Instagram purporting to be *Z.A.*'s biological father. Defendant claimed to know the whereabouts of *Z.A.*'s birth mother and biological siblings and used a picture from *K.A.*'s Facebook profile to photoshop *Z.A.* into other pictures with individuals that Defendant claimed were *Z.A.*'s siblings.

Plaintiffs first attempted to effectuate service of process by both certified and regular mail sent to Defendant's two last known addresses, but those addresses proved to be invalid. Because Plaintiffs had no other contact information for Defendant, they determined that the most appropriate means of effectuating service was through Facebook. Defendant responded and appeared by telephone at the hearing to defend the claims against him.

The Honorable Stephen C. Hansbury of the Chancery Division of the Superior Court of New Jersey in Morris County heard the case and decided two issues: (1) whether the court could assert personal jurisdiction over Defendant given the means Plaintiffs used to effectuate service of process; and (2) whether the court should grant Plaintiffs' injunction. Ultimately, the court granted the injunction and held that because the "Facebook and Instagram accounts at issue [we]re the sole conduits of the purported harm, service via Facebook [wa]s reasonably calculated to apprise the account holder of the pendency of this action and afford him or her an opportunity to defend against plaintiffs' claims."

In addressing whether service of process through Facebook was appropriate, the court adopted a three-factor test that analyzed: (1) whether Defendant could have been served through conventional means permitted by the court rules; (2) whether the relief sought was appropriate for service by publication; and (3) whether service by Facebook would still protect Defendant's due process rights.

With respect to the first factor, the court found that serving Defendant through conventional means was ineffective as evidenced by Plaintiffs' failed attempts to serve the Defendant through certified and regular mail. In addressing the second factor, the court found that because the purpose of the action was to immediately enjoin Defendant from contacting Plaintiffs' son, and it was unlikely that Defendant would have read newspapers, service by publication was not appropriate.

The court derived the third factor from *R. 4:4-4(b)(3)*, which provides that if service cannot be made by traditional means, “any defendant may be served as provided by court order, consistent with due process of law.” To determine whether service through Facebook violated Defendant’s constitutional due process rights, the court relied on the New Jersey Supreme Court’s decision in *O’Connor v. Altus*, which found that the “constitutional requirements of service of process” are “notice 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.” 67 N.J. 106, 126 (1975) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The Court found that Facebook was a reasonable means of effectuating service because Defendant was active on Facebook, evidenced by his attempt to “friend” Z.A. on the platform and the fact that Plaintiffs could see Defendant had read their message containing the service of process notice. Additionally, the Court found that Defendant’s Facebook account was authentic because the name on his account matched the name he used to identify himself to Z.A. Defendant’s appearance at the hearing via telephone confirmed that he received the service of process notice. Based on the circumstances in this case, the Court ultimately held that using Facebook alone to effectuate service of process was permissible because it was the only available means to Plaintiffs and it did not violate due process.

### Implications

Given the pervasive use of social media in the United States, it would not be surprising for more courts to allow service of process through social media, as long as those courts have a rule similar to *R.4:4-4(b)(3)*, which allows service through non-traditional means if it comports with due process. However, courts may be hesitant to allow service through social media as the only means of effectuating service because proving a defendant’s activity and authenticity on a social media platform is often very challenging and plaintiffs usually have some traditional way of serving a defendant.

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(Brent McDonough, a summer law clerk, assisted in the preparation of this Client Alert.)