

Is John Doe invading Germany?

The phenomenon of pseudonym use in civil proceedings and its possible implications

By Dr. Mark C. Hilgard

A significant number of parties to legal disputes in the US carry the name Doe.

This does not refer to a particularly litigious family — rather, it is a pseudonym that can be used by both plaintiffs and defendants. Whereas the German Code of Civil Procedure requires that all parties to a dispute be named and identified in their pleadings, under certain circumstances, US law provides for so-called “Doe” proceedings in which litigants’ names are substituted with a pseudonym, often known as John or Jane Doe. Recent domestic developments — such as the establishment of an English-speaking chamber for commercial disputes at the Higher Regional Court in Frankfurt, as well as the implementation of class action in the German national system — indicate that globalization is leading toward an internationalization of civil procedure. A closer look at both the requirements and consequences of pseudonym use in US proceedings thus provides a necessary introduction to this

procedural phenomenon for international lawyers.

The requirements for John Doe lawsuits in the US

The German Code of Civil Procedure does not provide for a lawsuit “against unknown persons,” nor can the plaintiff keep his or her identity confidential. This is because the naming and exact description of both parties is a prerequisite for the proper filing of a lawsuit. This stems from section 253, paragraph 2, of the German Code of Civil Procedure, which requires that the application show the identity of the parties. Although the Supreme Court of the United States has at least implicitly approved the use of pseudonyms in various decisions, John Doe proceedings continue to be regarded as a controversial phenomenon and an exception to the rule. The party concerned must therefore be able to justify legitimate interest in pseudonymization. US case law has developed the following framework for cases in which this exception can be considered. →



All parties involved in transnational litigation are well-advised to bear in mind the potential hurdles involved in John Doe lawsuits.

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First, the plaintiff can sue Doe if the identity of the defendant is unknown. The use of a pseudonym in the complaint enables the plaintiff to bring a specific action despite incomplete knowledge of the facts. The Doe defendant is then identified as usual during the procedure.

Second, a Doe case can be considered if the plaintiff has a legitimate interest in keeping his or her identity secret. In this case, the party may use the pseudonym instead of his or her name. The court then decides whether the party's interest in pseudonymization is truly legitimate in light of the First Amendment of the US Constitution. Examples of legitimate interest include cases in which a claimant desires to keep his or her identity secret due to the threat of infringement of personal rights and cases in which the claimant him - or herself would be burdened by the action.

Third, Doe may also be used for a defendant if his or her identity is known to the plaintiff but is assumed to be unknown. This applies to particular cases in which the claimant is not yet aware of all facts of the case substantiating his or her action. Furthermore, the plaintiff can bring his or her action against Doe if he or she knows the defendant's identity but does not know if the legal system provides for

a claim against this person and therefore cannot call him or her the "defendant."

Possible domestic implications

Considering the framework above, it is conceivable that a natural or legal person residing in Germany could be sued by a plaintiff in the US either without knowing the plaintiff's identity (legitimate secrecy interest) or without being named in



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the pleading and thus not initially being informed about a pending action and/or not being involved in initial procedural steps (identity unknown or assumed to be unknown). It is therefore necessary to ask what special factors must be taken into account from the defendant's point of view.

Although bringing an action against an anonymous defendant may initiate the proceedings, the defendant must eventually be informed about the action against him or her and therefore must also be located. Traditionally, US civil procedure is subdivided into various parts, each of which provides room for uncovering a party's identity. According to German law, however, the plaintiff must have exhausted all the information available to him or her at the time of bringing the action in order to ascertain the identity of the parties he or she has sued. By contrast, the American procedure provides for pretrial discovery of the case after notice pleading, since through notice pleading the applicant only acquires the knowledge upon which to base his or her action.

Since pleading initially only functions as a means to give notice (notice pleading), evidence held by the other party or a third party must be made accessible to the litigants during the next step, known as pretrial discovery. Discovery enables each party to individually determine facts and limit the scope of the dispute. Because of the principle enshrined in US procedural law that insists the parties operate the process (adversarial system), this part of the procedure takes place largely between the parties themselves.

However, each party can oblige the other party to participate in the discovery process. Actions include depositions (fixed and sworn statements by a party or witnesses in answer to oral questions asked by the other party), written interrogations (written questions), site visits, requests to present documents and other items for evaluation, and filing a confession. Refusal to cooperate can be sanctioned by the court. In cases where the defendant continues to be unknown and therefore has not been informed of the action against him or her, the measures mentioned above take place unilaterally and without cooperation.

Even though pseudonymized action initially appears to be an advantageous possibility, this procedural tool is accompanied by a number of imponderables. The plaintiff, for instance, cannot count on identifying the defendant during discovery. In addition, the chances of the lawsuit being successful are difficult to predict in advance. In a similar vein, the duration of the proceedings may be longer depending on the number of (unknown) defendants and whether they can be identified. In addition, the cost of the dispute is unpredictable and can be a major burden. This is because in American civil proceedings — unlike German civil procedure — each party bears →

its own costs regardless of the outcome of the dispute itself.

In addition, one-sided discovery in a Doe proceeding also means there can be no equality of arms. The purpose of discovery is, in fact, the establishment of an equality of arms between the parties, which is expressed by the right to mutual investigation and the obligation to disclose. However, if a party is unidentified, it is deprived of this right to investigate the facts until after its identity has been disclosed. At the same time, the opposing party is given no opportunity to obtain cooperation in clarifying the facts.

In most US states, the plaintiff is required to disclose the identity of the defendant in the proceedings as soon as he or she learns of it. Notwithstanding, it remains unclear to what degree of certainty the identity of the defendant must be known and to what extent investigations are still permitted in the context of discovery. Furthermore, the question arises whether an action against John Doe already triggers suspension of the statute of limitations if Doe becomes identifiable during the course of procedure. Under the German Code of Civil Procedure, this suspension starts when notice is given to the defendant, whereas in the US, filing the action already has this effect. That said,

US procedure requires that the claim be subsequently delivered to the defendant within a certain period of time (about 60 to 90 days after the filing of the claim). However, plaintiffs are often unable to comply with this short delivery period in John Doe proceedings because they first need to investigate the defendant's identity through discovery, which is time-consuming. Thus, if the plaintiff's claim did not have the effect of suspension during discovery, the defendant would be able to plead the statute of limitations and have the action dismissed.

Conclusion

In summary, considering the structure of US civil procedure, it can be argued that the case-dependent permission to use pseudonyms in order to guarantee the enforcement of the plaintiff's interests is justified, given that the simple bringing of the action is less significant in the US than in Germany. In cases where the use of pseudonyms also persists during discovery, this can cause difficulties, since the unknown defendant is not able to conduct investigations because of a lack of knowledge regarding the claim—thus leaving the defendant with a persistent disadvantage vis-à-vis the plaintiff. As regards cross-border civil cases, this may also apply to natural persons and legal

entities domiciled in Germany who — as defendants without knowledge — can be subject to the U.S. discovery procedure and thus forced to accept adverse consequences. Pseudonym use therefore has the potential to diminish the defendant's right to participate and can violate the principle of equality of arms, especially during pretrial discovery. All parties involved in transnational litigation are thus well-advised to bear in mind the potential hurdles involved in John Doe lawsuits. <—



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