Contact: Maria Cilenti - Director of Legislative Affairs - mcilenti@nycbar.org - (212) 382-6655

REPORT ON LEGISLATION BY THE COMMITTEE ON CIVIL COURT AND COMMITTEE ON CONSUMER AFFAIRS

A.6640 **M. of A. Brennan**
S.6649 **Sen. Schneiderman**

AN ACT to amend the civil practice law and rules, in relation to the validity of service of process in certain circumstances.

THIS BILL IS OPPOSED

Introduction

The Civil Court and Consumer Affairs Committees of the New York Cit Bar Association oppose S.6649/A.6640, which amends CPLR Section 308 and provides that when two certain acts of service of legal process have been attempted and one of the two acts has been validly effected, it shall be sufficient to sustain the service if it is shown that the defendant actually has received the papers.

Current Law and the Existing Problem

The Civil Court and Consumer Affairs Committees believe that this legislation is a big step backwards that will undermine longstanding efforts to combat "sewer service" -- the practice of failing to serve court papers and filing false affidavits of service with the courts. In recent years, New York courts have been deluged by a massive wave of consumer credit litigation. Sixty-six percent of the 241,195 consumer debt proceedings initiated annually in New York City Civil Court result in default judgments, often after sewer service. The victims of these cases are overwhelmingly low- and moderate- income New Yorkers, many of whom are elderly or disabled and nearly all of whom are unrepresented by counsel. As a result, each year hundreds of thousands of New Yorkers are deprived of their due process right to be heard before judgments are issued against them. The consequences are devastating, as these New Yorkers are often left unable to support their families, secure housing, and obtain employment.

Based on our experience as practitioners, we believe the reason for the high rate of defaults is consumers' lack of notice of a lawsuit that has been commenced against them. The severity of the sewer service problem is underscored by the recent civil and criminal charges brought by the New York State Attorney General against a process serving agency that allegedly failed to serve New Yorkers in tens of thousands of cases, one of many such cases, and by the lawsuit brought by the Chief Administrative Judge against 37 debt collection law firms and debt collectors alleged to have improperly obtained 100,000 default judgments against New Yorkers by failing to notify them that they were being sued. In April, 2010, the Civil Court and Consumer Affairs Committees of the Bar Association issued a report entitled "Out of Service; A Call to Fix the Broken Process Service

Industry," which recommends increased regulation of process service to address routine due process violations.[1] The proposed legislation would exacerbate the due process deficiencies addressed in the report.

Current relevant law provides for service of a summons as follows:

- Handing the summons to the defendant (CPLR 308(1)). This is known as "individual service" and is the most preferred method of service.
- Handing the summons to a person of suitable age and discretion at the defendant's actual residence or place of business, and mailing the summons to the defendant's last known residence or actual business (308(2)). ("Substituted service.") This is the second most preferred method of service.
- After using due diligence (several attempts) but failing to serve under (1) or (2), the process server may also serve by attaching the summons to the door of the defendant's actual residence or business, and mailing the summons to the defendant's last known residence or actual business (308(4)). ("Nail and mail service.") This is the least preferred method of service.

The proposed legislation would permit a finding of valid service if a server successfully completes *only one* of the two forms of service under CPLR 308(2) or 308(4) - that is, service of process can be completed by simply mailing the summons, apparently without attempting to undertake a more reliable form of service. This weakened requirement will lead to increased inaccuracies, shoddy practices, abuses and "sewer service," as many servers will simply mail a summons without complying with the additional requirements, increasing the likelihood that defendants will not receive timely notice or understand the critical importance of responding to a summons and complaint because they only receive court papers in the mail. To upend longstanding New York law concerning the due process rights of defendants to receive proper service of an action against them at a time when process service abuses are only increasing, is insupportable.

Conclusion

We oppose passage of this legislation because it would increase sewer service in consumer debt cases and other litigation, resulting in an increase in the rate of default judgments entered against unsuspecting consumers and other defendants. The New York City Council recently passed groundbreaking legislation to eliminate widespread fraudulent practices in the process server industry. The Committees believe that passage of A.6640/S.6649 would undermine this new law, as well as extensive recent enforcement actions by the New York State Attorney General, and efforts by the Bar, the Office of Court Administration, the New York City Department of Consumer Affairs and advocates to ensure that service of process is properly effectuated.

Respectfully submitted,

Janet Ray Kalson, Chair
Committee on Civil Courts

Annie Ugurlayan, Chair
Committee on Consumer Affairs

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[1] *See*, http://www.nycbar.org/pdf/report/uploads/ProcessServiceReport4-10.pdf.