REPORT ON LEGISLATION BY THE
CONSUMER AFFAIRS AND CIVIL COURT COMMITTEES

A.491   **M. of A. Gibson**

AN ACT to amend the general business law and the civil practice law and rules, in relation to process servers

THIS BILL IS APPROVED WITH SUGGESTED MODIFICATIONS

The Civil Court and Consumer Affairs Committees of the New York City Bar Association submit these comments in support of Bill A.491. The bill's stated purpose is to protect litigants from illegal service of process and to maintain a high level of integrity and professionalism in the third-party process server industry by mandating, among other requirements, that process servers be licensed by the Department of State ("DOS" or "the Department"). Other provisions include the administration by DOS of an application process; providing investigative and enforcement powers to DOS and the Attorney General over process servers and process server agencies; surety bonding requirements for process server agencies; and the maintenance by DOS of a registry of licensed process servers. The bill also provides for a private right of action, injunctive relief, and monetary and punitive damages.

The Committees support this bill. Widespread and systemic abuses involving improper service of process, especially in consumer debt collection matters, have been well documented in New York State. Illegal industry practices violate litigants' due process rights, contribute to overwhelming dockets, and result in long-lasting harm to consumers. The Committees believe that this bill and some additional recommended measures will help ameliorate systemic problems with illegal service of process by increasing regulation and oversight of the process server industry by DOS and the Attorney General.

Background

The process server industry in New York State has long been plagued by systemic abuses in the service of process in actions that affect low- and moderate-income litigants, most notably in landlord/tenant and consumer debt collection matters.[1] "Sewer service" – the practice of

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[1] *See Barr v. Dep't of Consumer Affairs*, 70 N.Y.2d 821, 822-23 (1987) (noting that improper service of process is most often associated with low-income defendants in consumer debt collection and landlord/tenant litigation); *see also* N.Y. Attorney General, N.Y. City Dep't of Consumer Affairs, N.Y. City Dep't of Investigation, *A Joint Investigative Report into the Practice of Sewer Service in New York City* (1986) (detailing abuses in the service of process in New York City); Frank M. Tuerkheimer, *Service of Process in New York City: A Proposed End to Unregulated Criminality*, 72 Colum. L. Rev. 847 (1972) (discussing an investigation of improper service of process conducted by federal prosecutors in 1968). For a discussion of the historic problems of the process server industry

filing fraudulent affidavits of service of process and failing to properly serve litigants – leads to high rates of default judgments and wreaks havoc in the lives of litigants in consumer debt cases, the vast majority of whom are unrepresented.[2]   Creditors collect on default judgments by garnishing wages and seizing bank accounts, causing hardship and damaging consumers' credit. The consequences of these judgments prevent low- and moderate-income New Yorkers from being able to support their families, secure housing, and obtain employment.

The harm of widespread improper service of process has been magnified by the surge in consumer debt collection filings throughout New York City and New York State during the past decade. In March 2009, the then Administrative Judge for the New York City Civil Court, Justice Fern A. Fisher, reported to the New York City Bar's Civil Court Committee that creditors filed nearly 300,000 consumer credit actions in New York City in 2008, triple the number of a decade before.[3] Justice Fisher further reported that default judgment rates for 2008 ranged from 68% to 78% for the City's boroughs (not including Manhattan for which data was not available).[4]   Court data show for 2009 that 241,195 consumer credit cases were filed with a citywide default judgment rate of 66%. For 2010, 201,126 consumer credit cases were filed with a citywide default rate of 58%. Due to the extraordinarily high default rates in New York City, the New York City Civil Court instituted a notice requirement whereby debtor-defendants receive a notice from the Civil Court that a consumer debt collection action has been filed against them; if the notice is returned as undeliverable, the clerk denies the plaintiff's application for entry of default judgment.[5]   While credit card filings have fallen from a peak in 2008, the number of filings continues to be historically high and hundreds of thousands of primarily low- and moderate-income New York City debtors – nearly three in five cases – have default judgments entered against them.[6]

The problem of widespread improper service of process is acute not only in New York City but throughout New York State. In 2009, the New York State Attorney General brought civil and criminal charges against American Legal Process (ALP), a process service agency, and

in New York City, *see Out of Service: A Call to Fix the Broken Process Server Industry*, a report of the New York City Bar Association issued in April 2010, which examined and analyzed the process server industry in recent years (*available at* http://www.abcny.org/pdf/report/uploads/ProcessServiceReport4-10.pdf).

[2] *See* The Legal Aid Society et al., *Debt Deception: How Debt Buyers Abuse the Legal System to Prey on Lower-Income New Yorkers* 1 (May 2010) (reporting that "only 1% of people sued by debt buyers in New York City are represented by counsel") (*available at*
http://www.nedap.org/pressroom/documents/DEBT_DECEPTION_FINAL_WEB.pdf). Justice Fern A. Fisher, Deputy Chief Administrative Judge for New York City Courts and the Director of the New York State Courts Access to Justice Program, has reported that only 1% of debtor-defendants were represented by counsel in consumer credit cases in New York City in 2009, and that the numbers were much the same throughout New York State.

[3] MFY Legal Services, *Justice Disserved* 2 (June 2008) (reporting that in 2007, 597,912 civil cases were filed in New York City Civil Court, almost three times the number filed in 2000) (*available at* http://www.mfy.org/wp-content/uploads/reports/Justice_Disserved.pdf).

[4] *Id*. at 4 (reporting that, on average, only 8.57% of defendants appeared in consumer debt collection actions brought by seven of the largest debt collection law firms in New York City).

[5] Uniform Civil Rules for the New York City Civil Court § 208.6(h)(2011).

[6] The New York State Unified Court System does not yet track consumer credit filings outside of New York City.

its owner, alleging that ALP failed to serve New Yorkers in tens of thousands of cases.[7] The investigation uncovered systematic fraud in the service of process in consumer debt collection actions and led the Attorney General to file a civil action against the largest debt collection law firms to set aside 100,000 default judgments.[8] The Committees believe that the practices uncovered by the Attorney General are far from unique, and instead are too frequent in consumer credit actions.

The establishment of proposed licensure requirements, along with a comprehensive statutory framework for regulating process servers and process server agencies, will bring New York State in line with a number of other states. Currently, among states that permit private individuals to serve civil service of process,[9] at least thirteen states require licensure or some form of registration or appointment of process servers and/or process server agencies.[10] Other

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[7] *See* Press Release, Office of the Attorney General of New York, *Cuomo Announces Guilty Plea Of Process Server Company Owner Who Denied Thousands Of New Yorkers Their Day In Court* (Jan. 15, 2010) (*available at* http://www.ag.ny.gov/media_center/2010/jan/jan15a_10.html).

[8] *See* Press Release, Office of the Attorney General of New York, *Attorney General Cuomo Sues To Throw Out Over 100,000 Faulty Judgments Entered Against New York Consumers In Next Stage Of Debt Collection Investigation* (July 23, 2009) (*available at* http://www.ag.ny.gov/media_center/2009/july/july23b_09.html).

[9] Notably, a number of states limit, as a general rule, civil process of service primarily to law enforcement personnel. Conn. Gen. Stat. § 52-50(a) (usually requiring "state marshal, constable, or other proper officer" to serve civil process); Fla. Stat. ch. 48.021 (service of process by sheriffs except in certain circumstances service by special process servers and certified process servers); Fla. R. Civ. P. 1.070(b) (service of process by officer authorized by law or appointed by the court); 735 Ill. Comp. Stat. 5/2-202 (limiting service of process to sheriffs and in some instances civilian personnel employed by sheriffs and private detectives; upon motion, the court may also appoint private process server); Ind. R. Trial P. 4.12 (summons to be served by sheriff, deputy, or court-appointed person); La. Code Civ. Proc. Ann. art. 1293 (requiring service of process by a sheriff in the first instance and, under certain circumstances, by others upon motion to the court); Me. R. Civ. P. 4(c)(2) (limiting service of process to sheriffs, deputies, and persons authorized by law or appointed by the court); Mass. R. Civ. P. (4(c) (limiting service of process to sheriffs, deputy sheriffs, special sheriffs and persons authorized by law or appointed by the court); Neb. Rev. Stat. § 25-506-01 (summons to be served by sheriff or other person authorized by law); N.H. Rev. Stat. Ann. § 510:2-a (service by sheriff, deputy sheriff, or other person authorized by law); N.C. Gen. Stat. § 1A-1, Rule 4(a) (service of summons by sheriff or other person duly authorized by law); Ohio R. Civ. P 4.1(B) (service of process by sheriff or bailiff unless other person is authorized by the court); Pa. R. Civ. P. 400 (service of process by sheriffs and, in certain circumstances, by "competent adults"); R.I. Gen. Laws § 9-5-6 (service of process by sheriffs, deputies, or town sergeants); Tex. R. Civ. P. 107 (service of process by sheriff, constable, person authorized by law or court order, or person certified pursuant to Supreme Court order); Vt. R. Civ. P. 4(c) (service of process by sheriff, deputy sheriff, constable, or other person authorized by law or specially appointed by a court).

[10] Alaska R. Civ. P. (4)(c)(1) (service of process by a peace officer or person specially appointed by the Commissioner of Public Safety); Alaska Admin. Code, tit. 13, Ch. 67 ("Civilian Process Servers") (requiring licensure); Ariz. Rev. Stat. § 11-445(I) (private process servers duly appointed or registered pursuant to rules established by the supreme court may serve process); Ariz. Sup. Ct. Admin. Order No. 2002-110 § B (requiring certification of process servers); Ar. Sup. Ct. Admin. Order No. 20 (requiring appointment by the court of private process servers); Cal. Bus. & Prof. Code § 22350 (process servers serving more than 10 papers per year must register with county clerk of county in which process server has principal place of business); Fla. Stat. ch. 48.021(2) (special process servers appointed by sheriffs); Fla. Stat. ch. 48.29(2) (certified process servers appointed by court); Ga. Code Ann. § 9-11-4.1(a) (requiring certification of process servers); Ky. Civ. R. Rule 4.01(1)(b) (service permitted by "authorized" person); Ky. Rev. Stat. § 454.145 (court may appoint process server "for good cause"); Mont. Code Ann. § 25-1-1101 (requiring private process servers to be registered); Nev. Rev. Stat. § 648.060 (requiring licensure); Okla. Stat. Ann. tit. 12, § 158.1(A) (requiring private process servers to be licensed); Tex. R. Jud. Admin. 14 (creating a statewide Process Server Review Board and certification requirement). In Delaware and

mandates include qualifications for process servers,[11] bond or insurance coverage,[12] fee provisions,[13] and education requirements.[14] New York City requires licensure and bonding of individual process servers and process serving agencies as well as training.[15]

Highlights Of The Bill

Some highlights of the proposed legislation are:

1. <u>Licensure of Process Servers and Process Server Agencies</u>: The bill requires the licensure of process servers and sets out an application process to be administered by DOS. Notably, process server applicants must provide a detailed description of the business practices or methods to be used to ensure conformance by employees with applicable laws and DOS can consider the "character, competency and integrity of the applicant," including prior criminal history. Process servers will be required to communicate their license number upon request and to display their license number in any printed material. Licensees will not be able to transfer or assign their license. DOS will be required to maintain and publish a registry of all licensed process servers and make it available on its website.

Kansas, requirements for process servers vary by court. For example, the Court of Chancery has a standing order requiring registration. *See, e.g.,* Del. Chancery Ct. Standing Order In re: Special Process Server Requirements; Kan. Ct. Rule 3.122 (Third Judicial District).

[11] Alaska Admin. Code, tit. 13, § 67.020 (setting out process server qualifications); Ariz. Rev. Stat. § 11-445(I) (requiring criminal background check); Ar. Sup. Ct. Admin. Order No. 20 (setting out process server qualifications); Fla. Stat. ch. 48.021(2)(b) (setting out qualifications for special process servers appointed by sheriffs); Fla. Stat. ch. 48.29(3) (setting out qualification for certified process servers appointed by court); Ga. Code Ann. § 9-11-4.1 (setting out qualifications, including criminal background check); Mont. Code Ann. § 37-60-303 (setting out requirements for licensure and registration of process servers); Nev. Rev. Stat. § 648.110 (setting out qualification requirements); Tex. Sup. Court R. of Jud. Admin. 14.4(a)(2) (requiring that application contain information regarding criminal background).

[12] Alaska Admin. Code, tit.13, § 67.920 (bond requirements); Fla. Stat. ch. 48.29(3)(g) (certified process servers appointed by court required to take out a $5,000 bond); Ga. Code Ann. § 9-11-4.1(b)(1)(D) (setting out bond requirement); Mont. Code Ann. § 25-1-1111 (requiring a bond of $10,000 for individual process server and of $100,000 for process server agency); Neb. Rev. Stat. § 25-507 (requiring $15,000 for person authorized by the court to serve process of service in counties without a constable); Okla. Stat. Ann. tit. 12, § 158.1(F) (requiring $5,000 bond for private process servers to be licensed).

[13] Alaska Admin. Code, tit. 13, § 67.220 (stating that "[a] fee charged by a process server must be reasonable"); Ariz. Rev. Stat. § 11-445 (setting out fee schedule for private process servers); Neb. Rev. Stat. § 33-117 (setting out fees allowed to be charged by sheriffs, including for service of process).

[14] Alaska Admin. Code, tit. 13, §§ 67.100-160 (setting out examination requirements); Ariz. Sup. Ct. Admin. Order No. 2002-110 §§ E(3) & F(7) (setting out examination and continuing education requirements); Fla. Stat. ch. 48.021(2)(b)(6) (special process servers must submit to an examination); Fla. Stat. ch. 48.29(3)(f) (certified process servers appointed by court may be required to take an examination); Ga. Code Ann. §§ 9-11-4.1(b)(1)(B) & (C) (requiring education course and examination); Mont. Code Ann. § 25-1-1104 (requiring publication of handbook for process servers and an examination for process server applicants); Nev. Rev. Stat. § 648.100(1) (requiring written examination and permitting oral examination);Texas Sup. Court R. of Jud. Admin. 14.4(a)(3) (requiring process server applicants to attend a certified course within the prior year).

[15] NYC Administrative Code §§ 20-406 (licensing), § 20-406.1(bonding), and § 20-406.4.

2. <u>Enforcement Powers</u>: The bill gives DOS and the Attorney General investigative and enforcement authority to ensure that process servers and process server agencies comply with licensure and related requirements. The Attorney General can file an action and seek injunctive relief, restitution, and civil penalties when a process server violates the law, even without a showing of harm. The court can impose civil penalties of not less than $100 and not more than $10,000 for each violation.

3. <u>Penalties for Noncompliance</u>: DOS can deny an application for a new or renewal license and revoke or suspend a license due to noncompliance with the statute. In addition, DOS can impose a civil fine of not less than $100 and not more than $2,000 per violation as well as reprimand noncompliant process servers and penalize process servers who operate without a license with a fine of up to $500 per attempt to serve process.

4. <u>Bonding Requirement</u>: The bill requires process server applicants who employ process servers to obtain a bond, as follows: process server agencies employing one to four employees must obtain a $10,000 bond; those employing five to nine employees must obtain a $25,000 bond; those employing ten to 20 employees must obtain a $50,000 bond; and those employing more than 20 employees must obtain a $75,000 bond.

5. <u>Private Right of Action</u>: The bill creates a private right of action so that any person can bring an action to enjoin violations of the law and recover actual damages or $1,000, whichever is greater. In addition, the court may increase the award of damages to three times actual damages, up to $10,000, and award attorneys' fees.

6. <u>Pleading Requirement</u>: The bill amends CPLR Rule 3015, which requires plaintiffs in cases filed against consumers who are required to obtain a license by state or local law to plead that they are duly licensed and their license number. The bill, as amended, adds DOS to the list of governmental agencies that require licensure.

Suggested Modifications

The Committees suggest the following modifications to the proposed legislation:

1. <u>Definition of Process Server</u>: The bill amends Section 89-t of the General Business Law, which defines "process server" as "a person other than an attorney or a party to an action acting on his own behalf who: (a) derives income from the service of papers in an action; or (b) has effected service of process in five or more actions or proceedings in the twelve-month period immediately preceding the service in question." The bill adds the following language: "For the purposes of this chapter the service of five or more process in any one year shall be deemed to constitute doing business as a process server." This language does not explicitly apply to process server agencies and may cause confusion. The Committees recommend making sure that any new statutory language includes both process servers and process server agencies employing process servers or retaining process servers as independent contractors to serve process.

2. <u>Denial of Applications Due To Criminal Convictions</u>: The bill permits DOS to refuse to issue or renew a license to any person who has been convicted of any crime defined in

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Article 155 of the penal law or Article 22-A of the general business law. The Committees note that Correction Law § 752 prohibits denying licenses to individual previously convicted of a crime, except under certain circumstances. The Committees recommend that language be added to the bill providing that any evaluation of an applicant's criminal history be conducted in accordance with New York's Correction Law.

3. <u>DOS Registry of Licensed Process Servers</u>: The Committees recommend that in addition to the publication of the names of all licensed process servers in the DOS registry, which the agency will maintain on its website, the bill require DOS to publish the names of any licensed process servers whose license has been suspended or revoked following final determinations by DOS. Given the prevalence of illegal practices in the process server industry, such information is critical to the courts and litigants.

4. <u>Fines</u>: The bill provides that DOS may revoke or suspend a license or, alternately, impose a civil fine of not less than $100 and not more than $2,000 per violation. The minimum fine level is too low. In order to ensure that the civil fines provided for in the bill serve as an effective deterrent to illegal service of process, the Committees recommend increasing the fines to not less than $500 and retaining the maximum fine level at not more than $2,000 per violation.

5. <u>Bond Requirements</u>: As noted previously, the bill sets out bond requirements for process server agencies of varying amounts depending on the number of process servers employed. The Committees believe that the bond amounts required are too low; that individual process servers not employed by process server agencies should be required to obtain bonds; and that the bill's grouping of process server agencies by the numbers of employees is unnecessarily complicated. The Committees recommend that the bill be revised to adopt the bonding requirements set out in New York City Administrative Code § 20-406.1. This local law requires individual process servers, who are not employed by process server agencies, to obtain a bond of $10,000. The local law also requires all process server agencies, regardless of the number of employees, to obtain a bond in the amount of $100,000.

6. <u>Damages for a Private Cause of Action</u>: The bill enables an injured person to bring an action to enjoin unlawful acts and practices and to seek recovery of actual damages or $1,000, whichever is greater. In order to ensure that the law has a deterrent effect, the Committees recommend increasing the amount prevailing plaintiffs can recover to actual damages or $7500. The bill also empowers courts to impose an award of damages not to exceed three times the actual damages up to $10,000. The Committees recommend increasing the amount courts can impose in punitive damages to three times the actual damages up to $25,000.

7. <u>Amendment of Pleading Requirement</u>: The bill amends CPLR Rule 3015 to include DOS as one of the licensing agencies that subjects a plaintiff filing a suit against a consumer to plead that the plaintiff is duly licensed and to plead its license number. The Committees note that it is unlikely that plaintiffs will be licensed as individual process servers or process server agencies are, and thus will be unlikely to have to plead this information. Instead, the Committees recommend that the bill require licensees to

include their license numbers on all affidavits of service signed by them as is currently required in New York City pursuant to § 2-235 of the Rules of the City of New York.

8. <u>Education Requirements</u>: The Committees recommend that the bill include education requirements for process servers. New York City has adopted an examination requirement for process servers who apply for new and renewal licenses. N.Y.C. Admin. Code § 20-406 (requiring examination to "test the knowledge of the applicant concerning proper service of process . . . and familiarity with relevant laws and rules"). A number of states require some form of education requirements – training, continuing legal education, and/or testing – of process servers.[16]

9. <u>Fee Suggestions</u>: At present, process servers who serve process in consumer debt cases are paid very little for their services, often at piece rates at or below minimum wage.[17] Consequently, they have every incentive to cut corners in their effort to earn a living. It is likely that the quality of process service will be improved in consumer debt cases if process servers are paid more. We suggest that legislation be enacted to require process service companies to charge no less than 75 percent of the fee charged by the Sheriff's Office for both attempted and completed service of process. Based on the Sheriff's current fee of $42 per service, this would work out to $31.50 per service, which is in line with prevailing rates for reputable process serving firms in New York.[18]

Thank you for the opportunity to comment on this proposed legislation, A.491. Should you have any questions, please do not hesitate to contact us.

Respectfully submitted,

Janet Ray Kalson   Annie Ugurlayan
Chair   *Chair*
Civil Court Committee   Consumer Affairs Committee

June 2011

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[16] *See infra* n. 14.

[17] *See* New York City Dep't of Consumer Affairs, Exploratory Public Hearing on Process Server Practices in New York City, June 13, 2008 (transcript on file).

[18] The New York City Department of Consumer Affairs, in testimony before the Federal Trade Commission, noted that "service of process can improve by . . . ensuring process servers are paid enough to motivate them to do their jobs properly." Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* 10 n.31 (July 2010) (available at http://www.ftc.gov/os/2010/07/debtcollectionreport.pdf).