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CPLR 308(4): Affixing Summons to Defendant's Former Residence Ineffective to Confer Jurisdiction Notwithstanding Plaintiff's Reasonable Mistake Nor Defendant's Receipt of Process

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ARTICLE 3—JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 308(4): Affixing summons to defendant's former residence ineffective to confer jurisdiction notwithstanding plaintiff's reasonable mistake nor defendant's receipt of process

CPLR 308(4)[23] permits service of process by "affixing the summons to the door of either the [defendant's] actual place of business, dwelling place or usual place of abode" and mailing it to his "last known residence" when service by delivery[24] cannot be ac-

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(1966). Failure to challenge an order of dismissal by direct appeal in the original action may itself be a contributing factor to a finding of neglect to prosecute. *See* Flans v. Federal Ins. Co., 56 App. Div. 2d 615, 618, 391 N.Y.S.2d 659, 662 (2d Dep't 1977) (Martuscello, J., dissenting), *rev'd*, 43 N.Y.2d 881, 374 N.E.2d 365, 403 N.Y.S.2d 466 (1978); Hymowitz v. Soprinsky, 24 App. Div. 2d 750, 263 N.Y.S.2d 822 (1st Dep't 1965). Confronted with such a judicial sentiment, it is submitted that the most effective review of the merits of a dismissal order is upon direct appeal.

[23] CPLR 308(4) (Supp. 1979-1980). CPLR 308 provides for service of process upon a natural person by the following methods:

> 1. by delivering the summons within the state to the person to be served; or
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> 2. by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by mailing the summons to the person to be served at his last known residence; . . . or
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> . . . .
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> 4. where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by mailing the summons to such person at his last known residence; . . . or
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> 5. [i]n such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section.

[24] Under CPLR 308, alternative and independent methods of service by delivery are available. *See* CPLR 308(1), (2) (1972); note 23 *supra*. Personal delivery is one method. "Deliver and mail" service, as an alternative to personal delivery, is of recent origin. Under the Civil Practice Act, service other than by personal delivery, so-called "substituted service," was obtainable only by court order. CPLR 308 as originally enacted permitted "deliver and mail" or "nail and mail" service without a court order, but only if personal delivery could not have been made with "due diligence." *See* CPLR 308, ch. 308, § 308 [1962]N.Y. LAWS 1316 (current version at CPLR 308(2) & 308(4) (1972)); SIXTEENTH ANN. REP. OF THE N.Y. JUD. CONFERENCE A38 (1971) [hereinafter cited as SIXTEENTH ANN. REP.]; SIEGEL § 71. The excessive hardships imposed to process servers attempting to comply with the statute led to an abuse known as "sewer service," the fraudulent practice of serving process in an unauthorized manner and then executing false affidavits of service. SIXTEENTH ANN. REP., *supra*, at A38; *see* Note, *Abuse of Process: Sewer Service*, 3 COLUM. J. L. SOC. PROB. 17, 22 (1967) [hereinafter cited as *Sewer Service*]; Comment, *Sewer Service and Confessed Judgments: New Protection for Low-Income Consumers*, 6 HARV. CIV. RIGHTS - CIV. LIB. L. REV. 414, 422 (1971) [hereinafter cited as *New Protection*].

In an attempt to ease the problem, the service requirements of CPLR 308 were liberal-

complished with "due diligence."[25] This provision, authorizing what is commonly known as "nail and mail" service, traditionally has been construed narrowly to require affixation upon the defendant's *actual* dwelling or place of abode, determined as of the moment of service.[26] Recently, in *Feinstein v. Bergner*,[27] the Court of Appeals affirmed this interpretation,[28] holding "nailing" upon a defendant's *former* residence invalid despite his actual receipt of the summons and the plaintiff's reasonable good faith effort to perfect service.[29]

In *Feinstein*, the plaintiff commenced an action for her personal injuries and her husband's wrongful death arising from an automobile accident. At the accident scene, the defendant, then residing with his parents, gave their address as his.[30] The plaintiff,

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ized by bisecting subsection 3 into the current "deliver and mail" and "nail and mail" subdivisions. *See* SIXTEENTH ANN. REP., *supra*, at A38; CPLR 308, commentary at 206 (1972). Whereas "deliver and mail" service is now permitted without first resorting to personal delivery, "nail and mail" service is authorized only after diligent attempts to effect personal delivery and "deliver and mail" service are unsuccessful. It should therefore be noted that although "deliver and mail" service was substantially liberalized, "nail and mail" service remained virtually unchanged.

[25] CPLR 308(4) (Supp. 1979-1980). A finding of "due diligence" has been defined as requiring a process server to make several visits on separate occasions and at different times at both the defendant's actual residence and place of business, if known. SIEGEL § 74; *see* Barnes v. City of New York, 70 App. Div. 2d 580, 416 N.Y.S.2d 52 (2d Dep't), *appeal dismissed*, 48 N.Y.2d 630, 396 N.E.2d 475, 421 N.Y.S.2d 193 (1979); O'Connor v. O'Connor, 52 Misc. 2d 950, 277 N.Y.S.2d 424 (Sup. Ct. Suffolk County 1969).

[26] Chalk v. Catholic Medical Center, 58 App. Div. 2d 822, 823, 396 N.Y.S.2d 864, 865 (2d Dep't 1977); Polansky v. Paugh, 23 App. Div. 2d 643, 643, 256 N.Y.S.2d 961, 961 (4th Dep't 1965) (per curiam); Entwistle v. Stone, 53 Misc. 2d 227, 228, 278 N.Y.S.2d 19, 20-21 (Sup. Ct. Onondaga County 1967); Smithtown Gen. Hosp. v. Quinlivan, 88 Misc. 2d 1031, 1034, 389 N.Y.S.2d 776, 778 (Dist. Ct. Suffolk County 1976); CPLR 308, commentary at 97 (Supp. 1979-1980); SIEGEL § 72.

A showing that the defendant has misrepresented his correct address is generally a successful defense to his jurisdictional challenge on the grounds that the process was not affixed upon his actual dwelling or place of abode. In these cases, the defendant may be estopped from raising this challenge. *See, e.g.*, Greenwood v. White, 25 App. Div 2d 73, 73, 266 N.Y.S.2d 1012, 1013-14 (3d Dep't 1966); Cohen v. Arista Truck Renting Corp., 70 Misc. 2d 729, 731, 335 N.Y.S.2d 30, 31-32 (Sup. Ct. Nassau County 1972); *cf.* Schenkman v. Schenkman, 206 Misc. 660, 662, 136 N.Y.S.2d 405, 406 (Sup. Ct. Kings County), *aff'd*, 284 App. Div. 1068, 137 N.Y.S.2d 628 (2d Dep't 1954) (defendant estopped after misrepresenting his identity); Kenworthy v. Van Zandt, 71 Misc. 2d 950, 954, 337 N.Y.S.2d 481, 483-84 (N.Y.C. Civ. Ct. N.Y. County 1972) (defendant estopped after misrepresenting he would await plaintiff).

[27] 48 N.Y.2d 234, 397 N.E.2d 1161, 422 N.Y.S.2d 356 (1979), *aff'g* 62 App. Div. 2d 1049, 404 N.Y.S.2d 153 (2d Dep't 1978).

[28] 48 N.Y.2d at 239, 397 N.E.2d at 1163, 422 N.Y.S.2d at 358.

[29] *Id.* at 241, 397 N.E.2d at 1164, 422 N.Y.S.2d at 359-60.

[30] *Id.* at 237, 397 N.E.2d at 1162, 422 N.Y.S.2d at 357.

unaware that the defendant had moved from his parents' home and had established his own household, attempted service at the parents' home.[31] Having made two unsuccessful attempts to effect service by delivery, the plaintiff's process server affixed the process to the parents' door and mailed a copy of the papers to the same address. The father thereafter forwarded the process to the defendant.[32] The Supreme Court, Kings County, denied a motion to dismiss the action for lack of personal jurisdiction, reasoning that the defendant was estopped from raising the defense of statutory noncompliance because his father's mailing the process to him, rather than returning it to the plaintiff, "effectively concealed" the defendant's departure.[33] Reversing, the Appellate Division, Second Department, found that an estoppel was precluded by the absence of fraud or misrepresentation.[34]

A divided Court of Appeals affirmed,[35] declining to invoke an estoppel, since the defendant had not purposely acted to conceal his new address and had no affirmative duty to inform the potential plaintiff of a change of residence.[36] Judge Gabrielli, writing for the majority,[37] concluded that CPLR 308(4) "clearly requires" affixing at the defendant's actual dwelling or place of abode and not at the defendant's last known residence.[38] While finding support in

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[31] *Id.* The defendant neither supplied the Postal Service with a forwarding address nor removed his name from his parents' door. *Id.* at 242, 397 N.E.2d at 1165, 422 N.Y.S.2d at 360. He did, however, notify the Motor Vehicle Bureau approximatly a year and one-half before the action was commenced of his changed address, and he promptly acquired a telephone, with the number listed in the Brooklyn telephone directory. 62 App. Div. 2d 1049, 1050, 404 N.Y.S.2d 153, 154 (2d Dep't 1978), *aff'd*, 48 N.Y.2d 234, 397 N.E.2d 1161, 422 N.Y.S.2d 356 (1979). Whether his new address also was listed is unclear. *See id.*

[32] *Id.* at 238, 397 N.E.2d at 1162, 422 N.Y.S.2d at 357.

[33] *Id.*

[34] 62 App. Div. 2d at 1050, 404 N.Y.S.2d at 154.

[35] 48 N.Y.2d at 244, 397 N.E.2d at 1166, 422 N.Y.S.2d at 361. The Court accepted as not erroneous as a matter of law the lower courts' determinations that "due diligence" has been exercised in the attempts to serve defendant under CPLR 308(1) and (2). *Id.* at 238, 397 N.E.2d at 1162-63, 422 N.Y.S.2d at 358.

[36] *Id.* at 241-42, 397 N.E.2d at 1164, 422 N.Y.S.2d at 360.

[37] Judge Gabrielli was joined by Chief Judge Cooke and Judges Jasen, Jones, Wachtler, and Meyer. Judge Fuchsberg dissented in a separate opinion.

[38] 48 N.Y.2d at 239, 397 N.E.2d at 1163-64, 422 N.Y.S.2d at 358-59. The Court declined to decide whether the parents' home qualified as the defendant's "usual place of abode." *Id.* at 239 n.3, 397 N.E.2d at 1161 n.3, 422 N.Y.S.2d at 358 n.3. Noting that although there may be a distinction between this term and "dwelling place," *id.*; *see* Rich Prods. Corp. v. Diamond, 51 Misc. 2d 675, 678-79, 273 N.Y.S.2d 687, 691 (Sup. Ct. Erie County 1966); CPLR 308, commentary at 207 (1972), the *Feinstein* panel found the defendant's contacts with his parents' home insufficient to establish a "usual place of abode" apart from his actual dwell-

the unanimity of lower court decisions[39] and in the legislature's use of dissimilar terminology in distinguishing between the nailing and mailing requirements,[40] the Court viewed as significant the absence of substantive change in CPLR 308(4) when the legislature liberalized other portions of the statute.[41] Reasoning that such abstinence reflected a legislative determination that additional liberalization of the provision would undermine constitutional notice requirements,[42] the *Feinstein* majority concluded that the distinction in terminology must be preserved and that strict compliance with the statute is required.[43] Finally, the Court observed that the phrase "last known residence" was not a "mere redundancy" but was directed to those situations in which the plaintiff is aware of the defendant's actual place of business while the defendant's actual residence remains unknown.[44]

Judge Fuchsberg, dissenting, found the statute ambiguous and urged its liberal construction "so as not to foreshorten the legiti-

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ing place. 48 N.Y.2d at 239 n.3, 397 N.E.2d at 1161 n.3, 422 N.Y.S.2d at 358 n.3; *see* Smithtown Gen. Hosp. v. Quinlivan, 88 Misc. 2d 1031, 1033-34, 389 N.Y.S.2d 776, 777-78 (Dist. Ct. Suffolk County 1976).

[39] 48 N.Y.2d at 239, 397 N.E.2d at 1163, 422 N.Y.S.2d at 358; *see* note 26 *supra*.

[40] 48 N.Y.2d at 239, 397 N.E.2d at 1163, 422 N.Y.S.2d at 358. Relying on the rule of statutory construction that dissimilar words in a series do not impart the same meaning, the Court reasoned that the legislature must have intended "dwelling place" to be different from "last known residence" by requiring affixation to the former and mailing to the latter. *Id.*; *see* N.Y. STAT. § 231 (McKinney 1971); text accompanying note 44 *infra*.

[41] 48 N.Y.2d at 240, 397 N.E.2d at 1163-64, 422 N.Y.S.2d at 358-59; *see* note 24 *supra*.

[42] 48 N.Y.2d at 240, 397 N.E.2d at 1164, 422 N.Y.S.2d at 359. Although the Court recognized that affixation upon the defendant's last known residence would facilitate service of "hard-to-find" defendants, it found such a rule to be unacceptable because adequate notice to be "readily accessible defendant" would not be guaranteed. *Id.* (citing Mullane v. Central Hanover Bank and Trust Co., 399 U.S. 306 (1950)).

[43] 48 N.Y.2d at 240, 397 N.E.2d at 1164, 422 N.Y.S.2d at 359. The Court dismissed the contention that the use of different locations for "affixing" and for "mailing" created an "inherent inconsistency." *Id.* at 241, 397 N.E.2d at 1164, 422 N.Y.S.2d at 359; *see id.* at 243, 397 N.E.2d at 1165, 422 N.Y.S.2d at 361 (Fuchsberg, J., dissenting). Reasoning that the last known residence is identical to the actual residence where the latter is known and that service would be "literally impossible" without mailing to the former when only the actual place of business is known, the *Feinstein* Court concluded that the legislature's use of the different terms was deliberate. *Id.* at 241, 397 N.E.2d at 1164, 422 N.Y.S.2d at 359.

[44] *Id.* at 241, 397 N.E.2d at 1164, 422 N.Y.S.2d at 359. The Court also reaffirmed that subsequent actual receipt of notice by the defendant does not cure the defect caused by deviation from the statutory scheme. *Id.* (citing McDonald v. Ames Supply Co., 22 N.Y.2d 111, 114-15, 238 N.E.2d 726, 728, 291 N.Y.S.2d 328, 331-32 (1968)); *see* Isaf v. Pennsylvania R.R., 32 App. Div. 2d 578, 579, 299 N.Y.S.2d 231, 233 (3d Dep't 1969); Ives v. Darling, 210 App. Div. 521, 522, 206 N.Y.S. 493, 494 (3d Dep't 1924); Loeb v. Star & Herald Co., 187 App. Div. 175, 179, 175 N.Y.S. 412, 414-15 (1st Dep't 1919).

mate claims and expectations of litigants."[45] Noting that CPLR 308 had been revised to overcome prior difficulties in securing jurisdiction over "hard-to-find" defendants,[46] the dissent argued that the majority decision subverted the legislature's intent.[47] As consistent with this intent, Judge Fuchsberg suggested that the word "actual" should be understood to limit "place of business" only and that "dwelling place" and "usual place of abode" should be deemed equivalent to "last known residence."[48]

While the result reached in *Feinstein* comports with a strict construction analysis of CPLR 308(4),[49] the decision fails to protect adequately some plaintiffs who endeavor to avail themselves of the provision. Since satisfaction of the "due diligence" requirement of CPLR 308(4) apparently does not determine whether the subdi-

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[45] 48 N.Y.2d at 242, 397 N.E.2d at 1165, 422 N.Y.S.2d at 360 (Fuchsberg, J., dissenting) (citing CPLR 104 (1972); N.Y. STAT. § 325 (McKinney 1971)).

[46] *Id.* at 243, 397 N.E.2d at 1165, 422 N.Y.S.2d at 360 (Fuchsberg, J., dissenting); *see* note 24 *supra.*

[47] 48 N.Y.2d at 243-44, 397 N.E.2d at 1166, 422 N.Y.S.2d at 361 (Fuchsberg, J., dissenting). Judge Fuchsberg, however, agreed that an estoppel was unjustified. *Id.* at 242, 397 N.E.2d at 1165, 422 N.Y.S.2d at 360 (Fuchsberg, J., dissenting).

[48] *Id.* at 243, 397 N.E.2d at 1166, 422 N.Y.S.2d at 361 (Fuchsberg, J., dissenting) (citing N.Y. STAT. § 254 (McKinney 1971)).

Judge Fuchsberg's dissent has been described by one commentator as "interesting." McLaughlin, *Jurisdiction,* N.Y.L.J., Dec. 14, 1979, at 1, col. 1. Although one sympathizes with his apparent desire to avoid a harsh result, there appears to be little legal foundation for his suggested construction of CPLR 308(4). Initially, by finding ambiguous the use of different terms for the "nailing" and "mailing" locations, *see* note 45 and accompanying text *supra,* Judge Fuchsberg apparently failed to perceive both the logic of the majority's rationale, *see* note 43 *supra,* and that the ambiguity, if any, instead lies in the distinction between "dwelling place" and "usual place of abode," *see* note 38 *supra,* and not between these locations and "last known residence." *See id.*

Additionally, the liberalization of CPLR 308 in 1970 had no substantive effect on the original "nail and mail" provision. *See* note 24 *supra.* Thus, Judge Fuchsberg's suggestion that the legislative history serves as a foundation for permitting liberal construction of CPLR 308(4), *see* note 46 *supra,* seems unsupported. Similarly, it is submitted that his reliance on CPLR 104 as supportive of such a construction is misplaced. *See* note 45 *supra.* Although CPLR 104 provides for the liberal construction of the civil practice laws and rules, *see* CPLR 104 (1972), as a general provision it is subservient to the command of the specific provisions of CPLR 308. *See* N.Y. STAT. § 238 (McKinney 1971); E. CRAWFORD, THE CONSTRUCTION OF STATUTES § 167 (1940).

Finally, the suggestion that the "last antecedent" doctrine, *see* Foote v. People, 56 N.Y. 321, 328 (1874); N.Y. STAT. § 254 (McKinney 1971), requires that the word "actual" modify only the term "place of business" is apparently a misapplication of the rule. Since the doctrine is only applicable to qualifying words in the middle of a sentence or clause, *see id.,* it does not govern an introductory qualifying term, which here is "actual." *Cf.* Budd v. Valentine, 283 N.Y. 508, 511, 29 N.E.2d 65, 66 (1940) (subsequent general words, not within rule, modify entire sentence, not merely last antecedent).

[49] *See* notes 39 & 42 accompanying text *supra.*

vision has been complied with properly,[50] and since a defendant generally owes no duty to inform a potential plaintiff of address changes,[51] *Feinstein* indicates that a plaintiff must seek conclusive verification of a defendant's actual location or risk dismissal. Although in most instances extensive verification may be accomplished by checking with the Motor Vehicle Bureau,[52] and Postal Service,[53] *and* the defendant's insurer,[54] the plaintiff whose verification attempts unknowingly fail because the defendant has not registered his address change with these sources is apparently without a remedy.[55]

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[50] That "due diligence" was found notwithstanding that the plaintiff attempted delivery only twice and not at the defendant's actual location, *see* 48 N.Y.2d at 238, 397 N.E.2d at 1162, 422 N.Y.S.2d at 357-58, may indicate a retreat from the generally stricter requirements for such a finding. *See* note 25 *supra*. At minimum, the *Feinstein* decision suggests that a process server attempting "nail and mail" service cannot relax in his attempts to verify the defendant's actual premises once he believes that he has met the "due diligence" standard.

[51] *See* note 36 and accompanying text *supra*. In contrast to its position in *Feinstein*, the Court of Appeals, in Dobkin v. Chapman, 21 N.Y.2d 490, 236 N.E.2d 451, 289 N.Y.S.2d 161 (1968), intimated that in automobile accident cases, the defendant may be required to inform the plaintiff of address changes "until [the defendant] is reasonably assured that no claim will be asserted against him." *Id.* at 504, 236 N.E.2d at 451, 289 N.Y.S.2d at 172-73.

[52] *See* [1980] 15 N.Y.C.R.R. § 160.1; Department of Motor Vehicles Form MV 15 (1977) (Registration Information Request Form). All persons who are licensed to drive or who own automobiles in New York have a statutory duty to inform the Motor Vehicle Bureau of address changes. N.Y. VEH. & TRAF. LAW §§ 401 (3), 501 (1) (McKinney 1970).

[53] The Postal Service will forward mail for 1 year only. U.S. POSTAL SERVICE, POSTAL SERVICE MANUAL 158.2 (1978). Had the *Feinstein* defendant notified the Postal Service of his new address when he moved, therefore, the summons would have been returned to the plaintiff marked "forward expired," U.S. POSTAL SERVICE, DOMESTIC MAIL MANUAL 159.14 (1979), thereby putting her on notice of improper service. Similarly, had the defendant's entire family departed from their home, the Postal Service, even if not formally notified, probably would have become aware of the move because of the vacant house. In such a case, the summons would have been returned marked "moved, left no foward," *id.*, and the plaintiff would have been put on notice. Under the peculiar facts presented in *Feinstein*, however, the Postal Service apparently never became aware of the defendant's move. Thus, if the plaintiff had requested a verification by the Postal Service that the defendant still resided at his parents' address, *see* 39 C.F.R. § 265.6(d)(1), (7) (1979), she would have received an affirmative answer.

[54] *See* Dobkin v. Chapman, 21 N.Y.2d 490, 504, 236 N.E.2d 451, 459, 289 N.Y.S.2d 161, 172 (1968); Gilbert v. Lehman, 73 App. Div. 2d 793, 423 N.Y.S.2d 712 (4th Dep't 1979). In *Gilbert* the court indicated it would be reasonable to expect a potential defendant to keep his insurance carrier informed as to his whereabouts. *Id.* at 794, 423 N.Y.S.2d at 713-14. Where the plaintiff was supplied with an incorrect address by the carrier, however, service attempted under CPLR 308(4) at the address provided will nevertheless be invalid unless there is proof that the insurer provided the incorrect address to frustrate the service. *Id.* at 793, 423 N.Y.S.2d at 714.

[55] Clearly, where verification indicates that the defendant has moved but that his present address is unknown, service pursuant to CPLR 308(5) is possible. *See, e.g.*, Van Dunk

It is suggested that in such cases, where service under CPLR 308(4) was "impracticable" in retrospect, court-ordered service should be approved nunc pro tunc.[56] Such relief is supported by legislative intent[57] and would neither prejudice the defendant[58] nor promote the fraudulent service practices which led to revision of

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v. Lazrovitch, 50 Misc. 2d 649, 270 N.Y.S.2d 803 (N.Y.C. Civ. Ct. N.Y. County 1966); note 56 *infra*. It is ironic that where verification produces inaccurate information, there is no basis for court-ordered service under CPLR 308(5).

It is suggested that in the absence of guidelines on the manner and extent of verification procedures necessary to escape the hardship demonstrated in *Feinstein*, the plaintiff at minimum should check with the Motor Vehicle Bureau, the Postal Service, and the defendant's insurer and perhaps should complete the "mailing" requirement by use of registered or certified mail with delivery restricted to the defendant. *See* U.S. POSTAL SERVICE, DOMESTIC MAIL MANUAL 153.17 (1979). Such an extensive effort appears to be necessary since reliance on information from any one of these sources may not prove sufficient, *see The Pitfalls of Substituted Service Under CPLR 308* N.Y.S. LAW DIG. No. 239 (Nov. 1979), and the defendant's failure to promptly notify these sources apparently will not give rise to an estoppel, *see* note 36 and accompanying text *supra*.

[56] *See* CPLR 308(5) (Supp. 1979-1980). Resort to court-ordered service pursuant to CPLR 308(5), under which the court can fashion any reasonable method of service which comes within the boundaries of due process, is permitted only after the court determines that service under subdivisions one, two, and four of CPLR 308 is "impracticable." *See* CPLR 308(5) (Supp. 1979-1980); SIEGEL § 75.

Nunc pro tunc orders entered under CPLR 308(5) have been used in analogous situations. *See, e.g.*, Rodgers v. Rodgers, 32 App. Div. 2d 558, 300 N.Y.S.2d 275 (2d Dep't 1969); Totero v. World Telegram Corp., 41 Misc. 2d 594, 245 N.Y.S.2d 870 (Sup. Ct. N.Y. County 1963), *discussed in* CPLR 308, commentary at 215 (1972). Clearly, where a defendant has left no trace of his current location and the sources checked by the plaintiff indicate that he still resides at his old address, realistically, the defendant's location is undiscoverable, a fact justifying CPLR 308(5) treatment. *See, e.g.*, Van Dunk v. Lazrovitch, 50 Misc. 2d 649, 270 N.Y.S.2d 803 (N.Y.C. Civ. Ct. N.Y. County 1966).

Furthermore, there would appear to be more compelling reasons for approving such an order in the *Feinstein* situation in which the plaintiff acts out of unavoidable ignorance than in *Totero* where the plaintiff was aware of the "impracticability" before he fashioned his own "substituted" service. *Compare* 41 Misc. 2d at 595, 245 N.Y.S.2d at 872 *with* note 53 *supra*. It is unclear, however, if the *Feinstein* plaintiff attempted such verification.

[57] The legislative advisors to the CPLR stated that the aim of Article 3 was "[t]o make it possible . . . to take full advantage of the state's constitutional power over persons." SECOND REP. 37. Moreover, the existence of "nail and mail" service is evidence of a legislative attempt to liberalize the methods of service, particularly as reflected by the deletion of its court-ordered requirement when the CPLR replaced the CPA. *See* note 24 *supra*. Thus, under a recognized legislative policy of permitting in personam jurisdiction where constitutionally sound, *see* FIFTH REP., 264-65, use of a nunc pro tunc order, since it is not prejudicial to a defendant, *see* note 58 and accompanying text *infra*, would be permissable to avoid unjustifiable hardships on a plaintiff. *See* notes 53 & 55 and accompanying text *supra*.

[58] *See* Dobkin v. Chapman, 21 N.Y.2d 490, 504-05, 236 N.E.2d 451, 459, 289 N.Y.S.2d 161, 172 (1968). Where a plaintiff, therefore, unaware of the "impracticability" of service a defendant has created, attempts service in such a manner as a court would have directed had it been petitioned, the defendant stands no worse off than had the petition been made at the outset.

the statute.[59] It is submitted that in the absence of court-ordered relief or of sufficient verification guidelines,[60] the use of CPLR 308(4) under *Feinstein* is perilous at best.

Bruce Pearl

CPL § 330.20: Persons involuntarily committed pursuant to CPL entitled to procedural and substantive safeguards guaranteed involuntary civil detainees

CPL § 330.20 requires that a person acquitted of criminal charges by reason of mental disease or defect be committed to a mental institution.[61] A person committed pursuant to this section

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[59] *See* note 24 *supra*. Moreover, the ease with which the plaintiff's verification attempts could be proved should militate against fraudulent proof of such efforts.

[60] The necessity for verification criteria may be more imperative in non-automobile injury cases where the possibility of checking with either the Motor Vehicle Bureau or the liability insurer is removed.

[61] CPL § 330.20(1) (1971) provides in pertinent part:

> Upon rendition of a verdict of acquittal by reason of mental disease or defect, the court must order the defendant to be committed to the custody of the commissioner of mental hygiene to be placed in an appropriate institution in the state department of mental hygiene. . . . Such defendant is entitled to the assistance of the mental health information service.

Acquittal by reason of mental disease or defect is governed by N.Y. PENAL LAW § 30.05 (McKinney 1975) [hereinafter cited as PENAL LAW § 30.05], providing in pertinent part:

> 1. A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or defect, he lacks substantial capacity to know or appreciate either:
>
> (a) The nature and consequence of such conduct; or
>
> (b) That such conduct was wrong.
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> 2. In any such prosecution for an offense, lack of criminal responsibility by reason of mental disease . . . is a defense.

Prior to 1960, under the Code of Criminal Procedure § 354, commitment was within the discretion of the trial judge. One court, however, while finding the discretionary commitment statute constitutional, held that it could be invoked only if an acquitee was found so insane at the time of acquittal as to be a menace to the public. People *ex rel.* Peabody v. Chanler, 133 App. Div. 159, 117 N.Y.S. 322 (2d Dep't), *aff'd mem.*, 196 N.Y. 525, 89 N.E. 1109 (1909); *see* Morris, *The Confusion of Confinement Syndrome Extended: The Treatment of Mentally Ill "Non-Criminal Criminals" in New York*, 18 BUFFALO L. REV. 393 (1969). More recently, the Court of Appeals held that mandatory commitment for testing does not offend constitutional guarantees. People v. Lally, 19 N.Y.2d 27, 23, 224 N.E.2d 87, 91, 277 N.Y.S.2d 654, 659 (1966). Notwithstanding the finding of validity, CPL § 330.20 has undergone frequent "judicial amendment," *see* note 92 *infra*, leaving judges free to interpret the statute in any way that conforms to the constitution and resulting in a lack of uniformity of construction. *See* People v. McNelly, 83 Misc. 2d 262, 371 N.Y.S.2d 538 (Sup. Ct. N.Y. County 1975); R. PITLER, NEW YORK CRIMINAL PROCEDURE LAW § 12.66 (1972 & Supp. 1979); Pasewark, Pantle & Steadman, *The Insanity Plea in New York State, 1965-1976*, 51 N.Y.S.