Abuse of Process and Its Impact on the Poor

Elizabeth F. DeFeis
ABUSE OF PROCESS AND ITS IMPACT ON THE POOR

ELIZABETH F. DEFEIS *

INTRODUCTION

The pervasive practice of the improper service of legal process has been the subject of study, comment, investigations and hearings by bar associations,1 governmental organizations,2 community organizations,3 and other interested scholars.4 Nevertheless, the practice known as sewer service has continued apparently without abatement.

An analysis of the elements of sewer service illustrates both the ineffectiveness of disclosure of abuses as a curative device and the inability of governmental institutions to take effective corrective action against widespread evil. This article will attempt to explore the factors which militate against elimination of the practice despite the glare of publicity and vigorous enforcement efforts.


3 LEGAL DEP'T, CONGRESS OF RACIAL EQUALITY, DEFAULT JUDGMENTS IN THE NEW YORK COUNTY CIVIL COURT (Sept. 1965) [hereinafter CORE STUDY]; CORE STUDY (Supp. Dec. 1965); CORE STUDY (Supp. 1966); MOBILIZATION FOR YOUTH, DEFAULT JUDGMENT STUDY (Sept. 1965).

DIMENSIONS OF THE PROBLEM

Sewer service has been defined as "the fraudulent service of a summons or a summons and complaint, either by destroying it, by leaving it under a door or in a mailbox, or by leaving it with a person known not to be the defendant; and then executing an affidavit stating that the summons was personally delivered to and left with the defendant."5

Prior to 1965, neither public attention nor legal talent was focused on the practice, although sewer service is a phenomenon of national proportions6 and virtually permeates the service of legal process of the Civil Court of New York City.7 Attorneys working with the poor have characterized the extent of sewer service as "very widespread," "epidemic" and "pervasive."8

In January 1966, Attorney General Louis J. Lefkowitz stated that:

[T]he problem of default judgments taken against defendants without proper service has been a persistent problem bearing with particular force on the poor and largely the minority poor . . . while the problem has been persistent, it has undoubtedly grown in volume [and] hence in intensity. . . .9

Sewer service has flourished in middle and low income areas and where legal services were, until recently, virtually non-existent. The quality of a neighborhood has a direct impact on the extent of sewer service10 and, irrespective of race, the poor are likely objects for such practices.11

Housing and consumer matters constitute a large portion of the caseload in legal service offices across the country and it is precisely in these areas that sewer service is found to be most prevalent.12

In 1945, outstanding consumer installment debt in the United States amounted to $2.5 billion but by the end of 1969 it had soared to

---

7 Hearings 6.
9 Hearings 1.
10 D. Caplovitz, Debtors in Default, supra note 6, at 11-11.
11 Id. at 11-14.
12 Hearings 11-13 (testimony of Morton Dicker, Legal Aid Society); Hearings 33-44 (testimony of Shyleur Barrack, Director, Sullivan Street Office of the Legal Aid Society).
$97 billion. This figure amounts to about $1,600 of debt per American household.\textsuperscript{13}

Although it might appear that consumer credit is a middle-class phenomenon, it is increasingly utilized by low income consumers who are especially vulnerable to social pressures exerted by mass-media communication. In addition to the lure of "easy credit" exploitive tactics, extensive deceptive advertising, bait and switch techniques and other nefarious sales practices utilized by many merchants in ghetto neighborhoods lead to unwise use of credit and subject the poor to enormous pressures and debts well beyond their means.\textsuperscript{14} Indeed, a brief look at cases docketed in the Civil Court of the City of New York reveals that some of the largest plaintiffs are those companies which, as a practice, sell primarily in ghetto areas with easy credit.\textsuperscript{15} Credit is extended in some instances although the seller does not expect or desire that even a single payment will be made prior to judgment.\textsuperscript{8} Almost invariably, consumer cases result in default judgments, which are for the most part the direct result of improper service of process; yet such judgments represent merely the tip of an iceberg of underlying consumer abuses. Although such judgments may be reopened, due to the lack of available legal assistance, this rarely occurs.\textsuperscript{17} Similarly, in the area of housing, legal representation for low income tenants had been minimal until recently and as a consequence few attacks on the improper service of process were made.\textsuperscript{18}

With the advent of the so-called "war on poverty," the Federal Government, through the Office of Economic Opportunity, has funded

\begin{footnotes}
\item[13] D. Caplovitz, Debtors In Default, at 1-1. This does not include mortgage and non-installment debts.
\item[15] A preliminary print-out of a computer study of court records conducted under the auspices of the Metropolitan New York Coordinating Committee on Consumer Protection (see p. 18 infra) reveals that among the largest volume creditors are Vigilant Protective Systems, Sachs New York, Inc., Caines Furniture Co., and Busch's Credit Jewelry Co.
\item[17] Other factors which militate against efforts to secure judicial relief include, inter alia, ignorance of the law and lack of familiarity with and possible distrust of attorneys generally, lack of financial resources and the high cost of legal services, particularly in relation to the comparatively modest size of most default judgments.
\item[18] Although 120,000 cases were brought in Manhattan Landlord-Tenant Court in 1964, the Legal Aid Society was able to handle only 612. Hearings 38 (testimony of Shyleur Barrack, Director, Sullivan Street Office of the Legal Aid Society). Over 3,000 default judgments are issued by the Landlord-Tenant part of the Civil Court of the City of New York in New York County and 2,000 per month in Kings County. See Complaint at ¶ 54, Velazquez v. Thompson, 321 F. Supp. 34 (S.D.N.Y. 1970).
\end{footnotes}
neighborhood legal service programs to aid indigents in civil litigation and, as a result, many issues and practices which bear most heavily on the poor are being critically scrutinized. Long standing practices have been challenged and rights asserted on behalf of clients such as welfare recipients, migrant workers, juveniles and disadvantaged consumers.

The problem of improper service of process is another area which warrants critical examination and the concerted attention of all persons involved with the administration of the judicial process if far-reaching effects are to be achieved.

In order to illustrate the problem in all of its dimensions, New York has been selected for particular analysis because it illustrates most dramatically the interrelationship of local laws, practices and apathy which combine to support a widespread public evil.

Unlike the practice in federal and most state courts, service of process in New York is delegated by statute to private individuals and may be effected by any person over 18 years of age, not a party to the action. In actual practice, most litigants in other than housing cases utilize the services of a process serving agency which, for a fee, usually arranges for the service of the summons and complaint and the preparation of necessary affidavits. These affidavits, notarized by an employee or officer of the agency, constitute proof of service and the agency then files the papers in the appropriate court. In housing matters, the attorneys for the landlord generally bypass the agencies and distribute process directly to the process servers or to City Marshalls who are then responsible for effecting and proving service. Thus, in contrast to most other states where process serving is carried out by an official of

---

22 See, e.g., In re Gault, 387 U.S. 1 (1967).
24 N.Y. Civ. Prac. § 2103(a) (McKinney 1963). As of April 1, 1970, pursuant to Local Law 80 of the City of New York, Article 43 of Chapter 32 of the Administrative Code (1969) all process servers and process serving agencies operating in the City of New York must be licensed by the New York City Department of Consumer Affairs. See pp. 15-18 infra.
25 The Committee on Municipal Affairs of the Association of the Bar of the City of New York issued a major report concerning many abuses of the judicial system by city marshalls and noted that marshalls are paid on the basis of how many processes they serve and thus it is to their financial advantage that they "disregard legal requirements enacted for the protection of the judgment debtor where this will increase the marshall's income by enabling him to handle a greater volume in a shorter time." Committee on Municipal Affairs, Ass'n of the Bar of the City of New York, New York City Marshalls, 23 Record of N.Y.C.B.A. 129, 137 (1968).
the court, the bailiff or the sheriff’s office, process serving in New York is a private industry responding to the profit motive.

In the New York City area, approximately twenty process serving agencies account for most of the processes served in the state courts in other than the Landlord-Tenant part of the Civil Court. Each of these firms employs about twenty individuals as process servers. The process servers generally work simultaneously for several firms as independent contractors operating in separately assigned geographical areas, receiving, on the average, about $1.50 for each service completed. No payment is made to the process server for an unsuccessful attempt. Similarly, those process servers who work for landlords’ attorneys are simultaneously employed by several firms and are only paid for actual services effected.

Most jurisdictions, including New York, require that personal service be attempted before other methods of service are permitted. Under New York Civil Practice a summons must be served personally or left at the defendant’s home or place of business with a person of suitable age and discretion except where service in such manner cannot be effected with “due diligence.” In such a situation, the process server may resort to substituted service which requires that the summons be mailed to the defendant’s last known address and, in addition, be affixed to his door.

In New York, however, the pressures which operate to compel personal service are great because of advantages which flow both to the plaintiff and to the process server if such service is accomplished. For example, in New York the plaintiff may make application for a default judgment within ten days after personal service rather than 30 days as required in cases of substituted service. Hence, personal service is sometimes insisted upon by the volume plaintiffs.

Further, the Soldiers’ and Sailors’ Civil Relief Act of 1940 requires that before a default may be entered, an affidavit must be filed setting

---

26 The precise amount varies depending on the agency and/or the distance traveled. N.Y. Civ. Prac. § 308(2) (McKinney Supp. 1970). The provision which allows a form of “substituted service” (i.e., with a person of suitable age and discretion) without requiring prior efforts to effectuate personal service, became effective September 1, 1970. The comment which accompanied this amendment when it was proposed to the legislature observed that “it might help to eliminate the escalating evil of ‘sewer service.’” Eighth Report of the Judicial Conference to the Legislature on the Civil Practice Law and Rules, Sixteenth Annual Report of the Judicial Conference of the State of New York A26, A38 (1971).


28 Under section 402 of the New York City Civil Court Act, an individual has ten days to answer if served personally and 30 days to answer where substituted service is made. N.Y.C. Civil Ct. Act § 402 (1963).
forth facts showing that the defendant is not in the military service. In most jurisdictions this affidavit of non-military service is prepared by the attorney for the plaintiff while in New York it is the process server who prepares such an affidavit of his own knowledge. With substituted service, the process server still has to submit an affidavit containing facts sufficient to satisfy the Soldiers' and Sailors' Civil Relief Act, but if personal service is claimed, he can plausibly allege personal knowledge that the defendant is not in military service and collect an additional fee.

For these reasons, process servers in New York claim personal service in over 90% of the cases resulting in default judgments in the New York Civil Court, while in other jurisdictions, where the pressures to effect personal service do not exist, personal service is claimed in only a minority of cases. It would be simplistic to believe that the New York process servers, who are not court officials, and who are paid only for services effected, are more adept at making personal service than their counterparts in other cities. The inescapable conclusion is that the New York process servers falsely claim personal service although no service at all is made or substituted or conspicuous service is effected.

This conclusion is dramatically reinforced when we examine the method of service claimed in landlord-tenant matters where no benefit accrues either to the landlord or to the process server by virtue of personal service. Article 7 of the Real Property Actions and Proceedings Law permits conspicuous service after a reasonable attempt at personal or substituted service has failed. Proof of conspicuous service is complete upon filing and the time to respond to the petition is not enlarged by virtue of conspicuous or substituted rather than personal service. Further, the process server is not responsible for preparing the affidavit of non-military service. Thus, conspicuous service is claimed in the vast majority of the cases filed in Landlord-Tenant part of the Civil

---

31 New York City Civil Court Rules 18(d) requires that unless the affidavit is based upon personal knowledge, it shall set forth the source of the information.
33 While in some instances the process server may indeed leave a copy of the summons and complaint in a mailbox or slip it under a door, such service is objectionable for two reasons. First, such service does not comply with the statute, CPLR § 308. Second, a defendant who receives a summons at his mailbox may be under the impression that he has 30 days to answer, whereas the process server will undoubtedly sign an affidavit of personal service in which case the defendant has only 10 days to answer.
34 N.Y. Real Prop. Actions § 735 (McKinney 1963).
35 Id.
Although process serving agencies generally require that personal service be made in an action for money judgment, it becomes infeasible for the process server to actually serve the summons because of the difficulty and relative lack of remuneration in making personal service. Nevertheless, an affidavit alleging personal service is prepared and filed and the plaintiff is free, after a statutory period has elapsed, to file a default judgment against the defendant.°°

The default judgment is prepared under the supervision of the attorney for the plaintiff and if it conforms to the court rules, it is accepted for entry. Clerks examine the document only for formal variances; the judgment must conform to the complaint, and fees, costs and legal interest must be properly calculated. In view of the volume of default judgments, the extent to which the clerk can be expected to review a case is minimal. At no time is there an inquiry whether the basic contract is valid, whether other requirements were met, or whether the crediting of payments is accurate. Enforcement of the judgment leads to garnishment, repossession and a deficiency judgment sometimes in excess of the original debt.°°

In many instances, a default judgment is sought by the creditor for tax purposes although there is little likelihood that the debt will ever be collected. A corporate taxpayer may take as an ordinary deduc-

---

°° See Velazquez v. Thompson, 321 F. Supp. 34, 39 (S.D.N.Y. 1970). [An independent investigation conducted by the New York City Department of Consumer Affairs tracked the activities of a process server for one day. The study revealed that 93 services in landlord-tenant matters in three boroughs were claimed in one day. All except three were by conspicuous service.].


°° See, e.g., Imperial Discount Corp. v. Aiken, 38 Misc. 2d 187, 189, 238 N.Y.S.2d 269, 271 (N.Y.C. Civ. Ct. Kings County 1963), in which the balance due on an automobile battery purchased by the defendant amounted to $11.75. After repossessing the automobile, the plaintiff sought a deficiency judgment of $128.80 representing costs of repossession, storage, etc. The court noted that the Legislature never contemplated such oppressive, confiscatory and unconscionable results. If this is an example of the practical workings of the [Retail Installments Sales Act—section 401 et seq. of the Personal Property Law], then clearly the need for remedial action is manifest.
tion any business debt which becomes worthless within a taxable year and hence the default judgment is worth fifty cents on every dollar to the creditor as a bad debt deduction. This tax benefit appears to be a very strong factor stimulating the volume of default judgments and the nexus between a high incidence of such judgments and sewer service has been made repeatedly and with convincing logic. The experience in New York indicates that once the factors which compel personal service are removed, the claimed incidence of such service is much lower.

It has been argued persuasively that the courts have been co-opted by creditors and serve merely as collection agencies. After an exhaustive examination of legal process in consumer actions in New York, Detroit and Chicago, Professor David Caplovitz concludes that "there is much justification for this accusation."

PUBLIC DISCLOSURE OF ABUSIVE PRACTICES

The first comprehensive study of the practice of improper service of process was undertaken in 1960 by the legal department of the Congress of Racial Equality (CORE). The files of the Civil Court, New York County, for the preceding year were examined and striking statistical evidence of sewer service as well as specific patterns of highly unlikely service of process by individual process servers was developed.

Twelve companies were selected for detailed study including First National City Bank, Consolidated Edison, R.H. Macy, Brand Jewelers, Credit Department, Inc. and Universal Discount. The remaining companies were much smaller in volume of litigation and are engaged in credit sales primarily in Harlem.

The CORE Study data shows that approximately 30,000 cases were brought by the 12 companies in 1964. Twenty-eight thousand went to judgment and 27,500 or 99% of these judgments were by default. Of

40 D. Caplovitz, Debtors in Default, at 11-1.
41 The investigations by CORE, the Attorney General of the State of New York and independent researchers have linked a high ratio of default judgments to the practice of sewer service. Hearings 16; Committee on Legal Assistance, As'sn of the Bar of the City of New York, Does a Vendee Under an Installment Sales Contract Receive Adequate Notice of a Suit Instituted by a Vendor?, supra note 1.
42 D. Caplovitz, Debtors in Default, at 11-73.
43 See note 3 supra.
44 First National City Bank is the largest single litigant in the Civil Court of New York City and R.H. Macy Co. is the largest litigant among retail stores. CORE Study, at 7 (Sept. 1965).
45 Thirty percent of all cases were disposed of by default judgments within fourteen
the total number of cases brought by these twelve companies, 92% resulted in default judgments. Further, over 90% of the default judgments were entered within 30 days of the filing of the summons and complaint. Two of the companies studied had a record of 100% default judgments, a factual improbability of high order.

The original preliminary study was submitted to the Presiding Justice of the Appellate Division and the Bar of the City of New York, the Administrative Judge of New York County Civil Court, the Attorney General of the State of New York and the District Attorney of New York County. At meetings held to discuss the report, CORE was requested to undertake further investigation to develop from public records specific information concerning individual process servers. Although CORE believed that the development of such information was more properly the function of professional investigators, at the specific request of the District Attorney's Office, it undertook this additional investigation.

Accordingly, since all affidavits of service filed in Landlord-Tenant Court of the City of New York contain the precise time of service, investigation of records in that court was undertaken.

Of the five process servers selected for study, all except one were apparently working for city marshalls or attorneys clearly associated with city marshalls. The process servers studied filed affidavits indicating service of between 30 to 90 processes per day and many at the same time but at different addresses. For example, one process server alleged that at 11:30 A.M. he served 13 processes at five different addresses on the west side of Manhattan. At 11:35, five minutes later, he served nine additional processes at two addresses on the east side and at 11:45 he had allegedly returned to the west-side to effect service. Other irregularities were also revealed. For example, practice in Landlord-Tenant Court requires that the summons and notice of petition be filed with the clerk of the court who stamps the notice of petition with the date and time that the petition was filed and the summons is validated. Until the summons is signed by the clerk of the court, it is not valid.

days and nearly all other cases were disposed of by default judgments within sixty days from the time the summons and complaint were filed. CORE Study, at 15 (Sept. 1965).

Over 200,000 actions were instituted in the Civil Court, New York County resulting in an overall disposition of 53% by default judgments. CORE Study, at 7 (Sept. 1965).


CORE Study, Exhibits (Supp. 1965). A review of records of the New York City Department of Consumer Affairs reveals that only one of the process servers involved in the study applied for a license pursuant to the licensing law effective April 1, 1970. The license was issued on stipulation and subsequently, revocation hearings were held. On May 9, 1971, the license was revoked.

N.Y. REAL PROP. ACTIONS § 731(1) (McKinney 1965) provided that a summary pro-
Thereafter, the summons is served by the process server and a copy is returned to the court. Nevertheless, the CORE Study indicated that in some cases alleged service occurred prior to the time stamped on the petition. Since the summonses were not valid at any time prior to that stamped on the notice of petition, service was improper. Nonetheless, the affidavits were accepted by the court.

A further investigation revealed that, over a 15-day period, one process server claimed to have served 150 processes and in each and every case, personal service and a personal conversation with the defendant to determine military status was alleged, and in each case judgment was entered by default. According to the original default judgment study, two of the plaintiffs for whom this individual served process had a record of 100% default judgments based on total cases brought to judgment. More shocking, however, is the fact that one attorney was involved in all of these cases. As stated in the study:

It should be clear from the First Supplemental Study that it is virtually impossible for one man to serve 70 pieces of process at widely scattered addresses in one working day . . . . If a process server returns 70 affidavits to the lawyer that employs him, it should be incumbent upon the lawyer to check those affidavits. If he finds that the process server has claimed personal delivery in all 70 cases in one day, it is the duty of that lawyer as an officer of the court to reject those affidavits.

Yet, it appears that no disciplinary action has yet been taken by the Grievance Committee of the Bar Association.

As the magnitude of the practice was uncovered, the United States Attorney’s office for the Southern District of New York and the United States Postal Service commenced an investigation of possible violations of federal laws in connection with the entry of default judgments in the state courts. In July 1969, Postal Inspectors seized at the offices of one proceeding for nonpayment of rent can be commenced by an attorney, clerk of the court or judge. However, New York City Civil Court Act § 401(c) (McKinney 1963) provides that in New York City such summary proceedings can only be commenced by a judge or clerk of the court.

In one instance, service was allegedly made in Harlem two minutes after the summons was validated at Landlord-Tenant Court in downtown Manhattan. CORE Study, at 2 (Supp. 1966).

In one day the process server claimed to have made seventy personal services at addresses dispersed widely throughout the boroughs of Manhattan and the Bronx. Id. at 3 (Supp. 1966).


of the largest process serving agencies approximately 5,300 affidavits of service, signed in blank, and approximately 1,000 "non-military" affidavits. Of these blank affidavits, about 150 were notarized in blank as well as signed in blank. In addition, it was claimed that although the agency charged various attorneys for obtaining judicial signatures on certain subpoenas, the signatures were placed there by the agency itself and were never submitted to a judge for signature.\textsuperscript{55}

Indeed, individual process servers have testified that, in fact, they signed as many as 7,000 affidavits of service in blank each year and that it was the practice in the business to sign such affidavits in blank.\textsuperscript{56}

The Postal Inspectors also seized a box of correspondence of approximately 2,000 envelopes returned for reasons such as "addressee unknown," "addressee moved" or "no such address." Subsequently many affidavits were completed alleging a conversation as to non-military status with the defendants in the action at the address set forth on the return envelope and default judgments were subsequently entered on the basis of those affidavits.

Both criminal and civil actions resulted from the information developed from the materials obtained.

**Efforts To Eliminate Abusive Practices**

**A. Criminal Enforcement**

The United States Attorney's office for the Southern District of New York has utilized the broad investigatory power available to it and is the only law enforcement agent which has successfully prosecuted any process server.\textsuperscript{57} Since 1968, five process servers have been indicted and four have been convicted.\textsuperscript{58} Generally, the indictments charge

\textsuperscript{55} United States v. Tauber, No. 70 Cr. 25 (S.D.N.Y. Feb. 23, 1971) [Charles Tauber, former President of Attorney's Service Co., recently pleaded guilty of mail fraud in connection with falsifying judges' signatures on subpoenas].


\textsuperscript{57} On July 7, 1970, four process servers were indicted by the Bronx District Attorney's Office. However, no trial has been had in the matter and the indictments are still pending. N.Y. Times, July 8, 1970 at 52, col. 1; Indictment Nos. 2233-1970, 2263-1970, 2307-1970 and 2308-1970. Interview with Bronx District Attorney's Office.

\textsuperscript{58} United States v. Bialo, No. 68 Cr. 888 (S.D.N.Y. Feb. 3, 1971) [one year suspended sentence], appeal dismissed, No. 71-1406 (2d Cir. July 15, 1971; see also United States v. Barr, 295 F. Supp. 889 (S.D.N.Y. 1969) [constitutional issues raised on motion to dismiss indictment]; United States v. Wiseman, No. 68 Cr. 994 (S.D.N.Y. May 16, 1969) [one year on sixteen counts to run concurrently, suspended sentence], aff'd, No. 35286 (2d Cir. June 30, 1971), petition for cert., No. , filed September 7, 1971; United States v. Rick, No. 68 Cr. 994 (S.D.N.Y. Dec. 12, 1969) [one year on three counts to run concurrently, suspended sentence], aff'd, No. 35636 (2d Cir. June 30, 1971); United States v. Nathan Lindsay, No. 68 Cr. 994 (S.D.N.Y. filed and entered noble prosegu June 30, 1971); United States v. Kaufman, No. 70 Cr. 406 (S.D.N.Y. Jan. 15, 1971) [one year suspended sentence], appeal pending, No. 71-1423 (2d Cir. March 25, 1971); United States v. Tauber, No. 70 Cr. 25
that under color of state law, the process servers willfully subjected persons to deprivation of their property by the State of New York without due process of law. The gravamen of the charge is that each defendant caused default judgments to be entered in state courts against specified persons by signing affidavits of service of summons and complaint when, in fact, they had not served such process.\textsuperscript{59}

In denying a motion to dismiss an indictment based on this theory, Judge Edward Weinfield stated:

Due notice to a party of the commencement of suit against him and the opportunity to respond and to be heard is the very essence of the administration of justice, and the deprivation of those fundamentals is clearly a deprivation of one’s constitutional right to due process of law under the 14th Amendment. Thus, if defendants had properly served process they would have put into motion the judicial machinery of the State, just as the indictment charges that they triggered the judicial machinery by filing false affidavits which resulted in State action by the entry of default judgments.\textsuperscript{60}

Although criminal prosecution might have some deterrent effect, it has proved ineffective as a solution. Apart from the very difficult task of establishing proof of specific intent to deprive a person of a specific right guaranteed by the Constitution or laws of the United States as required by statute, the government is severely hampered in such cases by the requirement that it prove the defendant had requisite intent toward a particular individual. Proof of a pattern or practice of sewer service is not enough absent unusual circumstances. Another impediment to successful criminal prosecution is the fact that the misfortunes, \textit{e.g.}, loss of employment, which the debtor may have suffered because of the triptych of sewer service, default judgment and garnishment, are not germane to the criminal charge and juries are thus not made aware of the true gravity of the offense. They may also well be influenced by the fact that the alleged victim of sewer service had, indeed, failed to make payments on the underlying debt.\textsuperscript{61} In addition, judges have shown a reluctance to impose any but minimal fines for those convicted and no prison sentences have been imposed.\textsuperscript{62}

\textsuperscript{59} An alternate charge is based upon \textit{18 U.S.C. \textsection 1341} (1964), the so-called mail fraud statute which requires that a scheme to defraud be established. Charles Tauber, former Chairman of the New York Process Servers Association, has recently pleaded guilty of this charge. See note \textsuperscript{57} supra.


\textsuperscript{61} Interview with David Paget, Assistant United States Attorney (S.D.N.Y.), April 6, 1971.

\textsuperscript{62} See note \textsuperscript{58} supra.
B. Civil Actions with Respect to Sewer Service

It is manifest that criminal prosecution for the filing of false affidavits is not a broad enough remedy. Even if successful, such prosecutions would not redress the wrongs suffered by the individual victims of the defendants' criminal conduct. For this reason, an imaginative civil suit has been commenced on behalf of the United States against Brand Jewelers, Inc., a retail seller of watches, jewelry and other consumer goods, its president, attorney and various process serving agencies and individual process servers.\(^{63}\)

The defendant, Brand Jewelers, Inc., had been the subject of a number of studies\(^{64}\) which exposed it as engaging in high pressure door-to-door sales techniques to sell overpriced watches and rings to ghetto residents exclusively on “easy credit” installment plans. The predatory sales and credit practices allegedly employed by Brand Jewelers are legion. As observed by Professor Caplovitz, “It is almost as if this firm prefers to rely on garnishment rather than to instruct its customers on payment arrangements.”\(^{65}\) Through civil actions filed in the New York County Civil Court, it secured 5,360 default judgments in 1964 — 97.7% of the total actions filed by the corporation.\(^{66}\) The first notice that most debtors receive of an action against them by Brand Jewelers is through garnishment of their wages.\(^{67}\)

The government charged that default judgments were obtained through a scheme to eliminate personal service of process and based its suit, \textit{inter alia}, on an alleged interference with interstate commerce and a denial of due process of law.\(^{68}\) In addition to injunctive relief, the government asked that default judgments unlawfully obtained be vacated and that restitution be made to the alleged debtors.

A motion to dismiss the complaint premised upon the government’s


\(^{64}\) D. Caplovitz, Debtors In Default, at 7-21-7-24; Karpel, \textit{Ghetto Fraud on the Installment Plan, Part II}, \textit{NEW YORK MAGAZINE}, June 2, 1969, at 41; CORE STUDY.

\(^{65}\) D. Caplovitz, Debtors in Default, at 7-23.

\(^{66}\) Over 99%, of these default judgments were entered within 30 days of commencement of the action; 89% in 14 days. CORE STUDY, at 17 (Sept. 1965).


\(^{68}\) The complaint alleged that as a matter of long standing and systematic practice, the process serving defendants understand that the account of defendant, Brand Jewelers, Inc., like that of many other major volume creditors, is one for which proper service is neither expected nor desired, and . . . the process serving defendants . . . fail to make proper service of process, or prepare . . . false . . . affidavits of service or process or both [for Brand and other volume creditors], knowing that such affidavits will be used to obtain default judgments . . . .

lack of standing to bring the suit was denied by the court which found the complaint sufficient on its face to give standing "because of the character and extent of the alleged wrongs as burdens upon interstate commerce." Alternatively, the court held

that the United States may maintain this action because it has standing to sue to end widespread deprivation (i.e., deprivations affecting many people) of property through the relief sought in the complaint.

In the area of landlord-tenant matters, the notorious abuses prevalent in service of process have recently been the basis of a class action to declare unconstitutional Article 7 of the Real Property Actions and Proceedings Law of the State of New York which provides for special or summary proceedings to recover real property. Each of the four named plaintiffs was evicted from his home without prior notice of a pending law suit and joined as a class are all residential tenants in the City of New York who have been or may be evicted from their apartments under RPAPL Article 7.

The gravamen of the complaint is that the procedure for notifying a non-paying tenant of the landlord's commencement of summary proceedings is constitutionally defective because, as a result of sewer service, the tenants were denied adequate notice and opportunity to prepare the proceedings.

Extensive evidence was marshalled to substantiate the contention that conspicuous service, as authorized by statute combined with the fraudulent practices resorted to by process servers, resulted in a denial of due process.

The court denied an application for a three-judge court and stated:

Due process does not require a state to adopt the optimum method of service; only that the minimum standard be satisfied. The procedure under review (affixing to the door and mailing) is reasonably calculated to inform. . . .

The true evil is not the state statutory procedure but its alleged flagrant abuse by the pernicious process server. The appropriate remedies are vacating the default judgment in accordance with

---

69 Id. at 1299.
70 Id. The court cited the case as a proper one for immediate appeal under 28 U.S.C. § 1292(b) (1964) and, although the decision was handed down on October 8, 1970, no briefs on appeal have been filed to date.
72 Id.
state procedure and tightening of court administration over the process serving industry.\textsuperscript{73}

The case has been appealed to the Second Circuit Court of Appeals and final disposition must await that decision.\textsuperscript{74}

In addition to civil actions of such broad scope, individual actions based upon 42 U.S.C. § 1983 which authorizes actions to redress conduct under color of state law that is violative of rights under federal law might be brought by a person upon whom alleged service was made. As noted above, however, the difficulty of obtaining proof with respect to activities of an individual process server is an awesome one for the individual practitioner or the legal services attorney with limited resources and a heavy caseload. Unless a means can be devised which will facilitate the necessary investigation, such attempts will be futile.

C. Licensing Requirement

Licensing is a regulatory technique used to control occupations, businesses and other activities. An occupational license, \textit{i.e.}, a personal non-transferable authorization to carry on an activity, is usually based upon educational or experience qualifications to insure competence. In some instances, the inherent sensitivity of the activity to abuse rather than competence is the basis of the requirement.\textsuperscript{75} It is because process serving falls within the latter category that various reform proposals have suggested licensing as a regulatory device.\textsuperscript{76} Previously, a license requirement had been proposed at the state level\textsuperscript{77} but because of inaction by the State Legislature and the continued abuses in the industry, the New York City Council enacted local legislation which requires the

\textsuperscript{73} Id. The court also noted that: "Plaintiff's suggested alternatives of imposing requirements of due diligence or registered-certified mail are preferable but cannot be mandated by this federal court." \textit{Id.}

\textsuperscript{74} Velazquez v. Thompson, No. 35,556 (2d Cir. Sept. 22, 1971).

\textsuperscript{75} M. CARROW, THE LICENSING POWER IN NEW YORK CITY 6 (1968).


\textsuperscript{77} S.I. 4618, Pr. 5316, A.I. 5926 (1966). The most recent bill was introduced on January 13, 1971. S.1872, A.1903. The New York State Association of Process Serving Agencies, Inc., had previously proposed legislation which would require state licenses for all process servers S.2617, A.2362 (1969). The bill is a virtual litany of protective provisions designed to insulate the agency from the illegal acts of the process servers with whom they contract for service. The proposal also suggests an advisory board of seven members; five members must be persons who have conducted process serving agencies for more than three years. It is incredible that with the wide-spread abuses in the industry, a board composed primarily of those most clearly responsible for the abuses and not those who have exposed or have been victimized by abuses should be seriously proposed.
licensing of process servers who operate within the boundaries of New York City by the Department of Consumer Affairs. The law which became effective April 1, 1970 defines process server as:

[a] person engaged in the business of serving or one who purports to serve or one who serves personally or by substituted service upon any person, corporation, governmental or political subdivision or agency, a summons, subpoena, notice, citation or other process, directing an appearance or response to a legal action, legal proceeding or administrative proceedings.

Shortly before the effective date of the Act, an action was brought by the major process serving agencies in the City of New York challenging the validity of the Act. They contended that they did not come within the purview of the Act since they were not actually process servers and urged further that the statute was in conflict with the applicable federal and state law. The court held the law applicable to agencies as well as individuals and noted that:

In enacting the statute, herein under attack, the City Council was motivated by what it deemed a desire to combat the systematic and widespread abuses so prevalent in the field of process serving. While a state-wide law would undoubtedly make for more uniformity, the fact remains that there is no conflict.

In compliance with the local law, approximately 1,027 individual process servers and 23 process serving agencies have applied for and have been granted a license for 1970. However, on advice of counsel, the majority of the individual applicants have refused to answer certain questions pertaining to past activities on the grounds of self-incrimination. These questions related to such matters as the preparation of affidavits in blank and prior traverses with respect to alleged service.
The Department has received numerous complaints of improper service, among them complaints that affidavits of personal service were filed in cases wherein the defendant was dead, or was out of the country at the time of the alleged personal service. In connection with practices in Landlord-Tenant Court, it has received a complaint that an entire family was actually evicted without prior notice of a legal proceeding, although the subsequent traverse on the service was sustained. In addition, its own investigation revealed that one process server filed affidavits of service of over 90 processes in one day in three different boroughs.\textsuperscript{83}

The work of the Department has been hampered from the outset because of several challenges which have been made both to the law itself and to the Department's authority to hold hearings and revoke licenses.\textsuperscript{84} Although the authority to hold hearings was affirmed, there is much speculation as to a final determination of this issue.

Perhaps the most significant step taken by the Department to regulate the industry has been the promulgation of regulations, effective April 29, 1971, which require each process server to keep logs of the services made as well as other descriptive matter pertaining to each service.\textsuperscript{85} Individual process servers must keep records on a daily basis; agencies on the basis of the individuals to whom they distribute process to be served. These records are subject to inspection and will be available to other parties. Although it is still too soon to evaluate the effect of these regulations, the informational and widespread value of such records is readily apparent.\textsuperscript{86}

\textsuperscript{83}A revocation hearing was held in the matter and the license was revoked.

\textsuperscript{84}In a challenge to the authority of the Department of Consumer Affairs to hold hearings in connection with complaints against process servers, petitioner argued that the preparation of false affidavits of service is a crime and hence, a hearing would infringe on his right against self-incrimination. The court found this contention untenable. Bialo v. Department of Consumer Affairs of the City of New York, No. 738/71 (Sup. Ct. N.Y. County, March 4, 1971); 165 N.Y.L.J. 44, at 17, col. 3 (1971).

\textsuperscript{85}The regulations were first published in the City Record and all interested parties were invited to comment. Representatives of the major process serving agencies appeared at the Department to discuss the regulations with Susan J. First, General Counsel to the Department.

\textsuperscript{86}On June 19, 1970, Administrative Judge Edward Thompson, in his capacity as Administrative Judge of the Civil Court of the City of New York, promulgated Directive No. 118. This directive bars the clerks of the Civil Court from accepting for filing purposes an affidavit of service prepared by a licensed process server which does not bear the license
It is clear that licensing by the Department of Consumer Affairs, although a first step towards eliminating the problem of sewer service in New York, can only be a limited one. The Department, although vigorous in its enforcement of all complaints that it receives with respect to the activities of process servers, is hampered by the limited manpower and funds at its disposal. Indeed, because of the current fiscal crisis, the personnel of the Department has been curtailed rather than expanded to meet its increased responsibilities. If enforcement is to be effective, extensive investigation into the practices of each process server against whom a complaint is received is needed.

D. Metropolitan New York Coordinating Committee for Consumer Protection

The Metropolitan New York Coordinating Committee on Consumer Protection (herein called the Coordinating Committee) was formed on September 1, 1970 for the purpose of coordinating the efforts of all the various governmental agencies in Metropolitan New York which are separately charged with one or more aspects of consumer protection.87

While the ultimate goal of the Coordinating Committee is to computerize all consumer complaints made in the New York area, because of the seriousness and pervasiveness of the practice of illegal service of process, the Committee selected as an initial project the area of sewer service for detailed examination and possible reform.

On December 28, 1970, the Fund for the City of New York provided financing in the amount of $6,500 for a pilot study into the extent of default judgments and sewer service in the Civil Court of New York City. Full time researchers were employed to audit the records of the Civil Court in each of the five boroughs.88

87 Among the members are the District Attorneys for Bronx, Kings, New York, Queens and Richmond Counties, the United States Attorneys for the Eastern and Southern Districts of New York, the New York Department of Consumer Affairs, the Nassau County Department of Consumer Affairs, the New York State Bureau of Consumer Frauds and Protection, the Food and Drug Administration, the Post Office Department, the New York State Attorney General, and the Federal Trade Commission.

88 In addition, the Federal Trade Commission donated the use of a computer program and $3,000 worth of computer time. The records audited were pulled on a selective basis and the numbers audited corresponded proportionately to the total number of cases filed.
While only preliminary print-outs are available, the utility of the data collected to any enforcement effort is considerable. The mere enormity of the numbers involved has served in the past as a deterrent to law enforcement.\textsuperscript{89} In addition, archaic and confusing court recording procedures have further complicated the task of investigating the activities of specific process servers. From the computer-organized information, however, it is possible to determine where any process server claims to have been on any particular day and for whom he worked. It is possible to isolate those businesses and finance companies which have an abnormally high percentage of default judgments. In addition, those lawyers who use process servers whose affidavits suggest improbable, if not impossible, numbers of summonses served, will no longer be obscured by the massive numbers of documents in the widely separated branches of New York City Civil Court. Once information of enforcement interest is discovered, cross-references can be made from one print-out to another.

While the court audit was progressing, a random sampling of the subjects of the default judgments were interviewed. These interviews disclosed that many people are completely and totally bewildered by the court process and are profoundly skeptical of the treatment they will receive at any of the offices which give free legal advice.\textsuperscript{90}

The data obtained from the print-out and from the interviews reinforced information gleaned from other sources. It is clear that the Civil Court is utilized extensively by creditors who deal almost exclusively with the minority poor; that such cases result in a disproportionate number of default judgments; and that the same process servers and attorneys appear repeatedly in connection with these default judgments.

\textbf{Evaluation and Analysis}

The abusive and illegal practices which surround notification of legal proceedings should be viewed not only as an evil per se, but

\textsuperscript{89} There are five branches of the Civil Court in New York City with over 100,000 judgments entered each year in Manhattan alone. CORE Study, at 7 (Sept. 1965).

\textsuperscript{90} Some of those who qualified for free legal services were unaware of their rights. Thus, only one of the initial interviewees had gone to a Legal Aid office. Interview with Susan J. First, General Counsel, Department of Consumer Affairs, April 14, 1971.
also as a microcosm of the malfunctioning of the judicial process. Despite curative legislation, civil and criminal litigation and widespread public awareness, the practices continue to plague the courts. The reasons for this persistent malfunction are many, ranging from a type of cynicism on the part of the legislature to apathy on the part of the Bar and bar associations. It is shocking to view the morass that ensues as each agency or individual charged with responsibility will not or is unable to perform the function entrusted to it.

For example, enforcement of state criminal laws with respect to false affidavits of service has been inadequate primarily because of failure to allocate the resources necessary for effective prosecution in this area. However, with problems of overcrowded jails and court congestion, it would be difficult to question the soundness of decisions made with respect to priorities by prosecuting attorneys.\(^1\) In the civil courts it has been alleged that some clerks have apparently failed to perform their statutory duties by entering default judgments on the basis of service patently invalid.\(^2\)

While licensing, if adequately funded, might well prove to be a powerful regulatory force in the industry, the action by the legislature in entrusting this important function to a city department already overburdened and understaffed without a concomitant increase in funds, can only reflect a gross naivete or cynicism. Despite the forceful efforts of an imaginative and energetic staff to administer the law, the license requirement might well prove to be a deterrent to effective regulation unless additional funds are allocated for this function. Certainly, it has been demonstrated in other areas that a complaint to a regulatory agency militates against pursuing other areas of redress.\(^3\) Moreover, there is the possibility that other law enforcement agencies will minimize efforts to stem the problem once the activity is licensed.

Perhaps the area of greatest concern in an analysis of the problem of sewer service has been the response of the organized bar to public disclosures of abuses by fellow attorneys. The *CORE Study* of 1965 and other subsequent studies have compiled records which indicate that certain volume creditors obtain default judgments in 100% of their cases on the basis of affidavits of service prepared by a few process

\(^1\) It has been previously demonstrated that the difficulty of obtaining proof of sewer service in a particular case is extremely burdensome due, in part, to court record-keeping procedures.

\(^2\) *CORE Study*, at 2 (Supp. 1966).

\(^3\) In the licensing of laundries and dry cleaning establishments, *e.g.*, processing of complaints has resulted in a type of small claims tribunal which obviates the necessity for further court action.
servers. The matter was referred to the Grievance Committee of a Bar Association but the Committee took the position that the problem of proving the element of knowledge was insurmountable. Nevertheless, lawyers working with the poor have termed the Committee's attitude hostile and false. More recently, however, the Committee was contacted with respect to disciplinary action regarding attorneys who utilize sewer service and it indicated an interest in reactivating certain investigations. However, no definitive action has yet been taken.

The responsibility for the enforcement of standards of professional conduct lies generally with the bar associations and ultimately with the courts. Authority has generally been delegated to bar associations to receive complaints and to conduct hearings, investigate charges and, in some instances, to issue complaints on its own initiative. The shortcomings of this self-regulatory system are well documented and the professional disciplinary process has proven lax. As stated by one commentator:

The organized bar through the operation of its formal disciplinary measures seems to be less concerned with scrutinizing the moral integrity of the profession than with forestalling public criticism and control.

Bar associations must be encouraged to act upon the information already available to them and to cooperate with other agencies or interested groups who wish to initiate and participate in disciplinary action against certain attorneys. In addition, the Metropolitan Coordinating Committee should be expanded not only to include a full scale court audit but also to encompass the function of prosecuting abuses of our court system before the courts, bar association and the regulatory agency charged with licensing process servers. The preliminary

---

97 The Appellate Division of the Supreme Court in New York State has the principal responsibility for disciplining lawyers. Complaints against lawyers in New York City are almost all (98%) referred initially to the Grievance Committee of the Association of the Bar of the City of New York. After an initial inquiry, unsettled cases with sufficient merit and evidence are heard before a panel of the Committee, which may drop the charges, admonish the lawyer, or recommend prosecution. The final decision on recommendations to prosecute rests with the Executive Committee of the Association. N.Y. JUD. LAW § 90(2) (McKinney 1948).
100 In addition, the initial study should be expanded to include a more extensive
results of the initial court audit conducted by the Metropolitan Coordinating Committee on Consumer Protection have confirmed the value of easily retrievable and pre-sorted data. However, the facts are not sufficient to combat improper and illegal practices.

It seems fair to say that just a few cases, successfully resulting in disbarment or other disciplinary action, would have a far-reaching effect on all lawyers who are in any way involved in such practices.

CONCLUSION

In conclusion, the whole operation of process serving in New York should be re-examined and the profit motive eliminated. In a comparative study of the process serving industry, the nexus between the entrepreneurial character of process serving and abusive practices has been forcefully demonstrated. Indeed this has been proven by a comparison of the claimed methods of service at the Landlord-Tenant part and Civil Court. Proposals have been advanced which would entrust service of process to court officials who would be paid a salary not contingent upon the number of processes actually served. In view of the great volume of litigation in the Civil Court however, it would appear more desirable to permit service of process by registered mail in the first instance followed by personal service if registered mail is not effected. If registered mail is not accepted and ordinary mail returned by the post office, both the court and the creditor will be put on notice that personal service is quite unlikely at the same address.

Finally, because of the pressure in New York to effect personal service, the advantages accruing to the plaintiff and the process server by reason of alleged personal service should be eliminated. Indeed, the experience in New York indicates that once the factors which operate to compel personal service are eliminated, the alleged incidence of such service is significantly reduced.

Even if the problem of sewer service were to be successfully eliminated, the abuses resulting from a system patently oriented toward the creditor or the landlord would remain. Thus, a broad program of

review of court records, particularly the records maintained in the Landlord-Tenant part of the Civil Court.

101 D. Caplovitz, Debtors in Default, at 11-28.


103 Defendants who are served personally are more likely to appear in court than those who received the summons in any other fashion. However, service through the mail is almost as effective. D. Caplovitz, Debtors in Default, at 11-52.
remedial legislation, education and information concerning available services must be provided.

It has been demonstrated that an overwhelming majority of defendants who are apprised of a pending suit fail to respond.104 Consumer defendants, many of whom are poor and have never had any contact with lawyers and courts, cannot and should not be expected to respond properly to confusing and complex forms and procedures which were created for businessmen and sophisticated individuals and the lawyers representing them.105 Thus, legislation should be enacted which would eliminate the confusion, fear and inconvenience surrounding both the summons and complaint procedure and the actual trial of the action. It is, therefore, recommended that the legislation adopt a legal notification form which would be simplified to clearly apprise the defendant of his rights, advise him of the availability of legal services106 and provide a form on which the defendant could answer the complaint and demand a trial if he desires. Recognizing the harsh results that flow from broad venue statutes which accommodate the judgment creditor to the detriment of the debtor, legislation should require that suits against consumers for failure to pay be brought in the place where the purchase was made or where the consumer resides. In addition, civil courts which hear complaints should be situated in local communities so that consumers who wish to contest a proceeding against them can conveniently appear without confusion or loss of wages.

While the proposals set forth above might reduce the incidence of default judgments in consumer actions, such judgments will continue to occur in substantial numbers. In addition to the factors outlined above, many defendants fail to respond because they mistakenly believe, sometimes upon the advice of the creditor, that the debt has been

---

104 It has been established that only 4% of New York City defendants who were actually served a summons answered it compared with 56% in Chicago and 34% in Detroit. The result is attributable in large measure to the archaic and confusing form used in New York as compared to the noticeably simpler and easier to understand forms used in the other jurisdictions. D. Caplovitz, Debtors in Default, at 11-35, 11-36.

105 The most common reason for not appearing in court is that the debtor has arranged for some kind of settlement with the creditor's attorney and is under the impression that the court action has been discontinued. Other reasons, however, include ignorance or fear of the law. D. Caplovitz, Debtors in Default, at 11-35, 11-36.

106 Governor Rockefeller's legislative package includes a proposal which would require that the summons and income execution in suits arising from consumer credit transactions contain a statement advising the defendant as to the address and telephone number of a nearby Legal Aid office or, absent such an office, of a nearby bar association through which legal assistance could be secured. S.I. 5271; A.I. 6545 (1971).

In addition, the New York City Department of Consumer Affairs has proposed a simplified form of summons and complaint for consumer credit transactions which would permit the defendant to answer the complaint by mail on a form provided by the court and attached to the summons.
Those debtors who are not served with legal process are most likely to be apprised of the default judgment by their employer prior to garnishment of their wages.\(^{108}\) Thus, it is suggested that the legislature take cognizance of the pervasiveness of sewer service and other predatory practices prevalent in consumer transactions and permit the debtor-defendant to interpose an answer to the complaint at any time prior to actual execution on the default judgment. Such a proposal, if enacted would remove from the alleged debtor the burdensome and costly task of formal court proceedings to reopen the default judgment and would go far toward assuring the defendant of his right to be heard. While the creditor may assert undue prejudice as a result of such legislation, it will be without basis. For, in more than 90% of consumer matters, default judgments are entered within thirty days of filing the summons and complaint.

Initially, such remedies might appear drastic. However, the desirability of perpetuating a legal system whereby default judgments are mechanically obtained must be re-evaluated.\(^{109}\) It cannot be seriously contended that the judicial process is in any sense involved in creditor-debtor disputes. Rather, it has been used to legitimatize creditors' claims, irrespective of merit against the debtor.\(^{110}\) Post-judgment creditor remedies to enforce collection should be severely limited and proposals contained in recent consumer codes considered for enactment by state legislatures.\(^{111}\)

Finally, adequate legal representation must be provided to assure that the disadvantaged as well as the affluent are guaranteed the basic right to a day in court.\(^{112}\)

It has been suggested that respect for the law among the disadvantaged is waning. It is clear that until access to a court system equal to all, in fact as well as in theory, is a reality, the legal system will continue to be received with hostility and contempt.

\(^{107}\) D. Caplovitz, Debtors in Default, at 11-75.

\(^{108}\) Id. at 11-8.

\(^{109}\) See, e.g., CORE STUDY.

\(^{110}\) D. Caplovitz, Debtors in Default, at 11-75.

\(^{111}\) See proposals for limiting deficiency judgments and garnishment contained in the Uniform Consumer Credit Protection Act (1968) and the National Consumer Credit Protection Act (1968).

\(^{112}\) The Committee on Civil Rights of New York City Association of the Bar has proposed that the right to counsel be extended to defendants in civil as well as criminal cases. Committee on Civil Rights, Ass'n of the Bar of the City of New York, The Right to a Day in Court and the Consumer Defendant, 23 RECORD OF N.Y.C.B.A. 586-87 (1968).