MFY
LEGAL
SERVICES
INCORPORATED

299 Broadway
New York, NY 10009
Phone 212-417-3700
Fax 212-417-3891
www.mfy.org

Testimony of Carolyn E. Coffey
before the
New York City Department of Consumer Affairs
Public Hearing on Process Server Practices
June 13, 2008

My name is Carolyn Coffey, and I am a staff attorney in the Consumer Rights Project at MFY Legal Services, an organization dedicated to providing legal services to low-income New Yorkers. I am here today to address an important issue: the number of default judgments entered in New York City civil court in consumer debt cases as a result of improper, inadequate, or illegal service of process, and the devastating effect this denial of notice has on vulnerable New Yorkers, many of whom are our clients.

It is well established that due process requires that people are provided with notice of a lawsuit when a case is filed against them. The Civil Practice Law and Rules (CPLR) clearly identifies how notice must be provided, and the Department of Consumer Affairs is fundamental to ensuring that those who assume this task of providing notice do so properly and legally.

As more clearly explained in our written submission, which is a preliminary report MFY conducted on the low rate at which defendants appear in civil court cases, the number of defendants that appear in consumer cases points to a serious, systemic problem of notice. Our investigation determined that more than 90 percent of defendants failed to appear to defend themselves in 2007. Those in the debt collection and service industries may argue that this low response rate is attributable to various factors, including that people ignore court papers, or throw them away, or that debtors choose not to respond to creditors' complaints because they actually owe the debts alleged.

However, in practice, our experience shows that when defendants receive court papers, they generally seek assistance, either at the court, or from an attorney, because they wish to defend themselves or counter the claims alleged in the complaint. In almost 100 percent of the consumer cases we see, the defendant was not served properly. Distressingly, more often than not, the first time the client knows that a lawsuit has been filed against them is after judgment has been entered and their bank account is frozen or their wages garnished. Time after time, our clients contact us as soon as they discover there is lawsuit, and when we review the affidavit of service with them, the information included on the affidavit is erroneous. When service is on a person of suitable age and discretion, the person described is inevitably not someone the defendant knows, much less lives with. Other times, the defendant is served at an address he or she has not lived at in years. While in other cases, the affidavit of service states that several attempts were made to find the defendant before attaching the court papers to his or her door, but the defendant never receives such papers, either attached to their door, or in the mail, as is also required.

The effects of improper service are profound. If a defendant is not notified of a pending lawsuit and fails to respond to the complaint, a default judgment is entered against them. In New York State, creditors' attorneys are able to use a judgment to freeze and seize the contents of a person's bank account, to garnish wages, and to take personal property. When people of limited means, in particular, lose access to their bank accounts, they are unable to pay their bills and their rent, they are unable to pay for food or medicine, and they are unable to pay for transportation to their jobs. For New Yorkers who live paycheck to paycheck, and who do not have a network of family and friends to whom they can turn for financial assistance, having a judgment enforced against them means they face eviction and other life-altering calamities. These serious ramifications are precisely the reason why notice of lawsuits is so important in our system of justice.

Further, in our experience, many consumer cases are brought against the wrong defendants, for debts that they do not owe, on claims for which the statute of limitations has run, and for incorrect amounts. If a defendant is properly notified of a lawsuit, he or she has the opportunity to defend himself or herself against the accusations in the complaint, and possibly have the case dismissed, or he or she has the opportunity to work out an affordable payment plan with the plaintiff that does not endanger all of the Defendant's limited income. Without notice of a lawsuit, however, a defendant has no opportunity whatsoever to assert defenses to the action or to force the plaintiff to prove its case with admissible evidence. When default judgments are entered unknowingly against consumers, their lives are thrown into chaos: they must go to court to attempt to undo the harm imposed, using up valuable court resources, and, in the limited times when a traverse hearing is scheduled and actually held to determine the question of service, the process uses up valuable attorney time and the time and resources of the process server.

The effects of improper service and the imposition of default judgments can be seen in some real-life examples of my own clients:

George M., 57, of Manhattan, became disabled and unable to work approximately four years ago; he is now homebound because he is unable to walk without great difficulty. He discovered that a judgment had been entered against him by a debt buyer when his bank account was frozen. The affidavit of service states that the process server served Mr. M. via substitute service by delivering the summons and complaint to a woman in his home. However, Mr. M. does not know of anyone with the woman's name, or who fits the physical characteristics described in the affidavit. Because he is homebound and rarely leaves his apartment, Mr. M. is fairly certain he was home on the day he was allegedly served. As a result of this improper service and subsequent freezing of his bank account, Mr. M. had to borrow money from his son to pay his rent and bills. MFY represented Mr. M. and scheduled a traverse hearing to contest service, however, the morning of the hearing, the plaintiff agreed to dismiss the case.

Violet S., 49, of Atlanta, Georgia discovered when her joint bank account was restrained in March of 2008 that a judgment had been entered against her in civil court in Manhattan in a case filed against her in 2007. The affidavit of service indicates that the server served her by affixing a copy of the Summons and Complaint on the door of her actual place of residence in New York, New York, and later mailed her copy to that same address. Mrs. S. has lived in Georgia for the past 20 years. As a result of the default judgment that had been improvidently entered against her, Mrs. S. had to seek legal assistance in both Georgia and New York. When MFY appeared in the case on her behalf, the plaintiff agreed to vacate the judgment and dismiss the case with prejudice.

Terry E., 51, of the Bronx, discovered that he had been sued on an old credit card debt for which the statute of limitations had run out, when his bank account was frozen. Supposedly Mr. E. had been notified of the lawsuit when a process server served a summons and complaint on a person of suitable age and discretion who allegedly lived with Mr. E. Mr. E. is a working single father who lives with his two young children and does not recognize the description of the woman to whom service had supposedly been made. While his bank account was frozen as a result of the default judgment obtained through improper service, Mr. E. was unable to pay his bills, including children's tuition, for over two weeks. With MFY's assistance, Mr. E. asserted the defense of improper service, and the plaintiff agreed to dismiss the case.

The Department of Consumer Affairs is the best positioned to address the prevalent problem of improper service. As the regulatory agency in charge of licensing process servers and their employers, it is incumbent upon DCA to ensure that those who receive this license—and with it the imprimatur of legitimacy by the City of New York—comply with all the legal requirements of such a privilege. DCA has the power to audit process server records, to impose educational requirements, to investigate questionable practices, and, most importantly, to revoke licenses.

This is why DCA should implement the following solutions to address the extraordinarily high rate of defaults in civil court, which we at MFY believe is inextricably linked to the fact that defendants are not notified when lawsuits are filed against them. Specifically, DCA should:

- Conduct comprehensive audits of process server companies and licensed individuals prior to renewal of their license every two years.
- Require process servers to designate DCA as agent for service pursuant to CPLR 318.
- Require record keeping for seven years rather than two years.
- Require process servers to record in their record book how they determined the residence served is the *actual* residence of a defendant.
- Immediately establish a joint task force with representatives of the Civil Court, DCA, consumers, debt collectors and the process servicing industry to investigate the scope of the problem and to recommend additional solutions.
- Examine the results of the recent amendment to the Uniform Rules for the New York City Civil Court requiring additional notice to defendants in consumer credit transaction cases and compare those results to affidavits of service filed in those cases.

Thank you for taking the initiative to hold today's hearing to investigate this problem and look for solutions. MFY Legal Services greatly appreciates the Department of Consumer Affair's leadership, and is committed to working with the Department to better protect the consumers of New York City.