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Civil Procedure -- A Possible Solution to the Problem of "Sewer Service" in Consumer Credit Actions

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Blair reasoned, a liquidating agent presents no obstacles to ordinary creditor's remedies, then one is left with the question of why Congress felt it necessary to give bankruptcy courts jurisdiction over liquidating agents. The answer appears to be that liquidating agents do present an obstacle to ordinary creditor remedies. As in the case of receivers, trustees, or assignees, Blair's liquidator had authority, by virtue of the agreement between the corporation and the Special Trust Fund, to liquidate the corporate assets as he saw fit and not according to Blair's dictates.[49] Therefore, it would seem reasonable to treat the appointment of a liquidating agent whose powers were as extensive as Blair's as the equivalent of a receiver or trustee.[50]

While private liquidation agreements of brokerage firms are not likely to present a section 3a(5) issue in the future,[51] the *Blair* decision appears to have opened a door to a procedure which will permit insolvent businesses to defeat the broad objectives of the Bankruptcy Act. The court's decision will permit insolvent businesses to place effective control of the business's assets in the hands of private liquidating agents and allow the liquidation process to be accomplished without the safeguards and uniformity of administration provided for by the Bankruptcy Act. The decision indicates that Congress will have to amend section 3a(5) if it wants to prevent the subversion through private liquidation agreements of the creditors' ability to invoke bankruptcy proceedings.

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Civil Procedure—A Possible Solution to the Problem of "Sewer Service" in Consumer Credit Actions

Notice of a lawsuit is one of the most important elements of an individual's right to due process of law under the fourteenth amendment.[1] Nevertheless, each day in large cities thousands of default judgments

49. *See* note 9 *supra.*

50. *See* 1 COLLIER ¶ 3.503, at 503.

51. Future problems involving the insolvency of brokerage firms will be handled by the Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa-*lll* (1970). *See* Note, *The Securities Investor Protection Act of 1970: A New Federal Role in Investor Protection*, 24 VAND. L. REV. 586, 606-13 (1971).

1. *See* Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 313-16 (1950).

are entered against consumer-debtors who have never received notice of pending litigation.[2] Despite numerous attempts to solve the problem through changes in local rules of civil procedure,[3] licensing of process-servers,[4] and institution of criminal prosecutions,[5] "sewer service" continues unabated.[6] In November of 1972, however, the consent decree in *United States v. Brand Jewelers, Inc.*[7] established procedures that might provide a viable solution to the problem, if they were generally implemented in similar cases. This note will outline the procedures required by this decree and examine its intended effect on the practice of "sewer service."

BACKGROUND

"Sewer service" has been defined as the "fraudulent service of a summons and a complaint, usually 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."[8] The practice is common in consumer-credit actions in areas of high-volume litigation involving relatively trivial amounts.[9] Studies have revealed its use in New York,[10] Washington,[11] Chicago,[12] Boston,[13] Detroit,[14] and Los Angeles.[15] Because of technicalities in the Civil Practice Laws

2. *See* text accompanying notes 10-16 *infra.*

3. *E.g.*, N.Y. CIV. PRAC. LAW § 308 (McKinney Supp. 1970); N.Y.C. CIVIL CT. ACT § 1402 (McKinney Supp. 1972).

4. N.Y. CITY, N.Y., LOCAL LAWS No. 80 § B32-451.0 (1969).

5. DeFeis, *Abuse of Process and its Impact Upon the Poor*, 46 ST. JOHN'S L. REV. 1, 11 (1971); *see* note 30 *infra.*

6. *See public Hearings on Debt Collection Practices Before the FTC*, (Sep. 13, 1971) (testimony of David Paget, Assistant United States Attorney for the Southern District of New York).

7. CIV. No. 70-179 (S.D.N.Y. Nov. 20, 1972).

8. *Public Hearings on Abuses in the Service of Process Before Louis J. Lefkowitz, Attorney General of the State of New York* 2 (1966) (testimony of Frank Pannizzo, Assistant Attorney General).

9. *See* Comment, *Sewer Service and Confessed Judgments: New Protection for Low-Income Consumers*, 6 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 414 (1971).

10. D. CAPLOWITZ, DEBTORS IN DEFAULT (1971).

11. *See Public Hearings Before the Nat'l Comm'n on Consumer Finance*, (June 22-23, 1970) (testimony of Maribeth Holloran, Attorney, Neighborhood Legal Services, Washington, D.C.) (hereinafter cited as 1970 *Hearings*).

12. D. CAPLOWITZ, *supra* note 10, at 11-7; 1970 *Hearings* (testimony of Judson H. Miner, Attorney, Chicago Council of Lawyers).

13. *See* 1970 *Hearings* (testimony of Blair C. Shick, Attorney, Nat'l Consumer Center, Boston College Law School).

14. D. CAPLOWITZ, *supra* note 10, at 11-7.

15. *See* Project, *The Direct Selling Industry: An Empirical Study*, 16 U.C.L.A.L. REV. 883, 926 (1969).

of New York,[16] the practice is more prevalent in New York City than anywhere else.

The causes of sewer service are myriad, but foremost among them is the very nature of the consumer-credit action. An attorney who conducts a collection practice necessarily operates on a high-volume, low-overhead basis and cannot afford to pay an adequate fee for private service in states where it is permitted by law.[17] The average fee of one dollar and fifty cents[18] for each service affected by a private process server is little incentive to that server to search diligently for an individual.[19] The fee is barely sufficient to pay for his transportation. In jurisdictions where service must be made by an officer of the court, such as North Carolina,[20] there is still strong incentive to use sewer service. The process server is usually the local law enforcement officer, who thus has no financial incentive but who is likely to feel that his time is too valuable to be spent in personally serving process on a consumer whom he feels will be likely to take a default judgment in any case. Consequently, there is pressure on both public and private process servers to take the "short-cut . . . to the nearest sewer."[21]

Sewer service is almost impossible to detect. The consumer-defendants are usually unaware of their rights and accept default judgments and wage garnishment because the amounts involved are less than the costs of hiring an attorney. Even if a defendant attempts to vacate a judgment on the ground that he was not served, he is faced with an almost impossible burden of proof: he must prove by clear and convincing evi-

16. *See* DeFeis, *supra* note 5, at 4-6 and statutes cited.

17. In only three of the six jurisdictions where studies have revealed the prevalence of sewer service is service by private party permitted in all cases. CAL. CIV. PRO. CODE § 414.10 (West 1971); MICH. STAT. ANN. Rule 103(1) (1972); N.Y. CIV. PRAC. LAW § 2103(a) (McKinney Supp. 1970). The remaining three require service to be completed by a public officer unless a private party is specifically designated by the court. D.C. CODE ANN. § 16-3902(a) (Supp. IV, 1971); ILL. ANN. STAT. ch. 110A, § 103(a) (Smith-Hurd Supp. 1971); MASS. ANN. LAWS ch. 223, § 27 (1971).

18. Tuekheimer, *Service of Process in New York City: A Proposed End to Unregulated Criminality*, 72 COLUM. L. REV. 847, 861 (1972).

19. *See* note 21 *infra.*

20. N.C.R. CIV. PRO. 4(a).

21. Tuekheimer, *supra* note 18, at 868. Professor Tuekheimer feels that there are two temptations that lead process servers to improper conduct: first, the remote and disorganized nature of the victims; and secondly, the fact that "it is not easy for process servers, almost all of whom are white, to venture alone into black neighborhoods, find a specific person, inform him that he is being sued, and then hand him a piece of paper setting in operation machinery that may end with property attachment and income execution." *Id.* These temptations apply to both private and public process servers alike.

dence both that he was *never* served on that date[22] *and* that he has a valid defense to the creditor's claim.[23]

This burden might be easier to meet in a class action. Individual hearings usually result in a swearing contest between the consumer and the process server. Thus, a large number of consumers, all claiming not to have been served by a particular process-server, would serve as much stronger circumstantial evidence that sewer service actually occured. But any possibility of a class action in federal courts is foreclosed by *Snyder v. Harris*,[24] which prohibits accumulating claims to reach the jurisdictional amount in a class action. Likewise, in many states a consumer class action cannot be maintained on the theory that there is insufficient class interest.[25]

Action taken by the state and federal governments have been unsuccessful, for the most part, in alleviating this situation. Procedural reforms were instituted in New York expressly to remove the incentive for "sewer service," but these only led to new forms of abuses.[26]

A licensing ordinance was enacted in New York City to regulate process servers and to enforce complaints[27] but the New York Department of Consumer Affairs, whose responsibility it is to detect and punish infractions, was already over-burdened with consumer-credit and landlord-tenant suits and could not afford to devote adequate resources to enforce the ordinance.[28]

Criminal actions have been brought by the federal government against process servers under two statutes: for filing false affidavits of non-military service under the Soldiers' and Sailors' Civil Relief Act of 1940[29] or for wilfully depriving a person of his constitutional rights

22. Dineed v. Myers, 278 App. Div. 658, 102 N.Y.S.2d 596 (2d Dep't 1951); Denning v. Lettenty, 48 Misc. 2d 185, 186, 264 N.Y.S.2d 619, 621-22 (Sup. Ct. 1965); *see* United States v. Barr, 295 F. Supp. 889, 892 (S.D.N.Y. 1969).

23. *See, e.g.*, Roth v. Perry, 158 N.Y.S.2d 122 (Saratoga County Ct. 1957).

24. 394 U.S. 332 (1969).

25. *E.g.*, Hall v. Coburn Corp. of America, 26 N.Y.2d 396, 259 N.E.2d 720, 311 N.Y.S.2d 281 (1970).

26. Our experience in examining more than three hundred services reportedly made in compliance with this new amendment belies its projected remedial qualities. Thus we have discovered that some process servers alleging this form of service have consistently invented the names of fictitious people who they claim they left a copy of the summons and complaint with at the place of employment of the person being sued.

Public Hearings on Debt Collection Practices before the FTC, (Sep. 13, 1971) (testimony of David Paget, Assistant United States Attorney for the Southern District of New York).

27. N.Y. CITY, N.Y. LOCAL LAWS No. 80 § B32-451.0 (1969).

28. DeFeis, *supra* note 5, at 20.

29. 50 U.S.C. § 520(1) (1970) requires as a condition precedent to default judg-

under the 1866 Civil Rights Act.[30] These actions have been singularly unsuccessful; the majority have resulted in suspended sentences and relatively small fines[31] while only one has resulted in a prison sentence.[32]

In *United States v. Brand Jewelers, Inc.*[33] the federal government launched a different attack against sewer service. Brand, which had brought the third largest number of lawsuits of any plaintiff in the civil court of the City of New York, had been the subject of a study that revealed that it had engaged in a long-standing practice of predatory sales tactics.[34] Its salesmen would go from door to door, or to the factories on payday, selling overpriced watches and rings on "easy credit" terms with no downpayment required. Many of its customers never received a copy of the contract or even a payment book.[35] In 1964 Brand secured 5,360 default judgments, 97.7 percent of the total suits it brought. Often the first notice that consumer-debtors ever received of these actions was when their employers gave them notice of the execution of the judgment on their income.[36]

The United States brought suit[37] against Brand Jewelers, its at-

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ment that the plaintiff file an affidavit stating that the defendant is not a member of the armed forces. If the defendant is in the military, the act requires an attorney to be appointed for him. If the plaintiff is unable to ascertain whether or not the defendant is in the military, the court may require him to file a bond. If the plaintiff does not obtain such an affidavit, the judgment may be voided by the defendant.

50 U.S.C. § 520(2) (1970) makes it a misdemeanor to knowingly file a false affidavit under this section.

30. 18 U.S.C. § 242 (1970).

31. *E.g.*, United States v. Barr, 295 F. Supp. 889 (S.D.N.Y. 1969) (constitutional issues raised on motion to dismiss indictment); United States v. Lindsay, Cr. No. 68-994 (S.D.N.Y., filed and entered *nolle prosequi* June 30, 1971); United States v. Tauber, Cr. No. 70-25 (S.D.N.Y., Feb. 23, 1971) (pleaded guilty to four counts of mail fraud, fined $1000); United States v. Bialo, Cr. No. 68-888 (S.D.N.Y., Feb. 3, 1971) (one year suspended sentence); United States v. Kaufman, Cr. No. 70-406 (S.D.N.Y., Jan. 15, 1971) (one year suspended sentence); United States v. Rick, Cr. No. 68-994 (S.D.N.Y., Dec. 12, 1969) (one year suspended sentence); United States v. Wiseman, Cr. No. 68-994 (S.D.N.Y., May 16, 1969) (one year suspended sentence.

32. United States v. Siegel, Cr. No. 72-2416 (2d Cir., judgment affirmed Feb. 22, 1973 (6 month sentence for violation of 50 U.S.C. § 520: knowingly filing a false affidavit of non-military service.)

33. 318 F. Supp. 1293 (S.D.N.Y. 1970).

34. D. CAPLOWITZ, *supra* note 10, at 7-21 to 7-24.

35. *Id.* at 7-26.

36. *Id.* at 11-8.

37. The United States invoked the federal court's jurisdiction under 28 U.S.C. § 1345 (1970). The cause of action was extraordinary in that the government's standing was based on no specific federal statute, but rather on the general right of the federal government to resort to its own courts to vindicate a substantial federal interest. *See* Note, *The United States Government Has Standing to Sue for the Violation of Fourteenth Amendment Rights of an Individual*, 37 BROOKLYN L. REV. 426 (1971); Note, *Federal Government May Sue to Protect Due Process Rights of "Sewer Service" Vic-*

torney, and various process servers to vacate all unlawfully obtained default judgments, to obtain restitution,[38] and to enjoin the further use of "sewer service." The Government alleged that Brand and the other defendants, "as a matter of long-standing and systematic practice," had an understanding by which the process-serving defendants knew that personal service was "neither expected nor desired by Brand" and that Brand and its attorney knew or had reason to know of this practice.[39] Brand's motion to dismiss the suit for lack of standing was denied on two grounds. First, the court felt that the government had a sufficient interest since the alleged activities of the defendants had resulted in interference with interstate commerce. Alternatively, the court based standing upon the government's interest in ending "widespread deprivations (*i.e.*, deprivations affecting many people) of property through 'state action' without due process of law."[40] Brand did not appeal, and two years later the action was finally settled by the consent decree.[41]

THE DECREE

The consent decree was divided into two sections. The first set forth a procedure for the vacation of all default judgments obtained from January 1, 1969, to December 31, 1971, while the second part attempted to insure proper notice of future litigation. The first section required the United States Attorney to write to each judgment debtor to inform him of his right to have the judgment vacated and to secure a trial on the merits. The debtor could secure these rights by simply returning a stamped postcard included in the letter from the Government. If the debtor requested a trial, Brand was to account for and return with interest any excess funds previously received.

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tims, 46 N.Y.U.L. REV. 367 (1971); Note, *United States Has Standing to Seek Injunction Against Practice of Obtaining Default Judgments Through False Affidavits Certifying Service of Process*, 24 VAND. L. REV. 829 (1971); Note, *A New Approach to Legal Assistence for Ghetto Residents or an Invitation to Executive Lawmaking?*, 17 WAYNE L. REV. 1287 (1971); Note, *Nonstatutory Standing to Sue on the Part of the United States Under the Commerce Clause and the Fourteenth Amendment*, 1971 WIS. L. REV. 665.

38. The federal government sought to require Brand Jewelers to bring the actions against consumers *de novo* in the state court. Brand Jewelers was to account for all amounts collected pursuant to the first judgment and repay amounts in excess of the new judgment to the consumers with 6% interest running from the date of collection. 318 F. Supp. at 1295.

39. Plaintiff's Memorandum of Law at 20-21, United States v. Brand Jewelers, Inc., 318 F. Supp. 1293 (S.D.N.Y. 1969).

40. 318 F. Supp. at 1299.

41. Consent Decree, United States v. Brand Jewelers, Inc., Civ. No. 70-179 (S.D.N.Y. 1972) [hereinafter cited as Consent Decree].

The second part of the decree attempted to control the problem of sewer service in the future.[42] First, it imposed broad duties upon Brand's attorney to insure the correctness of service in all future consumer-credit suits, and secondly, it required him to follow specific procedures in monitoring the service of process and investigating allegations of fraudulent service.

Four duties were imposed upon the plaintiff's attorney under this plan. First, he must investigate every situation where he has "good cause to believe that service of process was not lawfully made or that the affidavit of service of process was not lawfully made or that the affidavit of service or of non-military service was fraudulently made."[43] Secondly, he has the duty to monitor the manner in which process is assigned and accomplished to ascertain whether all steps are being taken to insure proper service.[44] Thirdly, he must move to vacate any judgment when there is substantial evidence of unlawful service.[45] Finally, he must switch process-serving agencies when there is evidence that it is serving false affidavits.[46] The effect of these four provisions is to render Brand's attorney subject to criminal prosecution for the federal crimes of mail fraud[47] or of causing non-military affidavits to be filed with the knowledge that they were false,[48] by removing the defense of lack of knowledge.[49]

The decree prescribes specific steps to insure that the creditor-plaintiff's attorney complies with that duty. In order to understand how these proceedings have altered Brand's usual procedure for suing in consumer-credit transactions, it is expedient to trace a hypothetical suit brought under this new procedure.

Assume that Brand is owed one hundred dollars by consumer *C*, who has stopped making payments on this debt. Brand turns the customer's file over to its attorney, *A*, who files a complaint in civil court requesting judgment for the one hundred dollar debt plus costs. The clerk gives *A* a docket number, and *A* then takes the complaint and gives it to a private process-serving agency. The agency would norm-

42. This part of the decree is operative from January 1, 1973 until December 31, 1975, and may be extended for a period of 3 years if any party is judged in contempt. Consent Decree ¶ 23.

43. Consent Decree ¶ 10.

44. Consent Decree ¶ 11.

45. Consent Decree ¶ 12.

46. Consent Decree ¶ 13.

47. 18 U.S.C. § 1341 (1970).

48. 50 U.S.C. § 520(2) (1970).

49. *See* Tuekheimer, *supra* note 18, at 867.

ally take all responsibility for serving the process and for executing the affidavits of service and non-military service.[50] *A* would then file these as his proof of service, wait ten days, and move for default judgment.[51] Instead, under this decree, when *A* hands the docketed complaint over to an agency he must record in a log the name of the agency and the name and license number of the process server to whom the complaint is given for service. When service is completed, *A* must also enter the date, precise time and mode of service, and if substitute service is made on a person of suitable age and discretion, the name and address of the person served and his relationship to the party sued. When proof of service is filed, the affidavit must include the precise time of service.

If *C* suffers a default judgment as a result of sewer service the specificity of the information in the log and affidavit makes it simpler for *C* to refute the allegations of service in a hearing to vacate judgment.[52] Thus this procedure provides a means to rectify sewer service once it occurs. But if the decree stopped at this point, it would not have solved the problem of the vast majority of consumers who are entirely unaware of their rights, who are unable to afford an attorney, and who therefore never get as far as a hearing.

Again, assume that *A* has filed his proof of service. Normally he would merely wait the requisite ten days and then move for default judgment. Under this decree, however, within five working days from proof of service *A* must write a letter to *C* at the address where he was alleged to have been served. The letter must inform *C* in Spanish as well as English of the fact that he is being sued, of all the relevant details of the alleged service of process, and that if he has not been so

50. So long as there is no direct proof of knowledge by the attorney that sewer service has taken place, he is not criminally liable. *See* United States v. Kalkin, Cr. No. 69-864 (S.D.N.Y., Sep. 15, 1971) (conviction of attorney for mail fraud not directly related to sewer service when indictment under 1866 Civil Rights Act, 18 U.S.C. § 242 (1970), failed for lack of knowledge); United States v. Shenghit, Cr. No. 71-928 (S.D.N.Y., filed Aug. 26, 1971) (attorney pled guilty to charge of causing non-military affidavits to be filed with knowledge they were false).

51. N.Y.C. CIVIL CT. ACT § 402 (McKinney 1963).

52. Under current New York procedure, the affidavit of personal service need only state the date on which service was completed and, if substitute service is made on a person of suitable age and discretion at the defendant's place of work or residence, need not state the person's name, description, or even sex. Thus under current procedure, in order to prove he was not served, *C* must prove he was not home at all on the date service was alleged. *See* Tuekheimer, *supra* note 18, at 854-55. Moreover, if service was alleged on a person of suitable age and discretion, then *C* must prove that no one was home on that date. The information given by the logs that *A* must maintain limits the number of times at which and persons upon whom service might have been effected, and thus substantially reduces his burden of proof. See text accompanying note 22 *supra*.

served, he should indicate that fact by signing and mailing a postcard included in the letter. It also must explain his obligation to respond, the possibilities of default judgment and garnishment with their adverse effects on his credit rating, and the availability of free legal assistance.

There are then three possible events that could occur: *C* could receive *A*'s letter but not return the postcard; *C* could receive the letter and return the postcard to *A*; or the letter could be returned to *A* stamped "Addressee Unknown." The decree provides a separate procedure for each case.

In the first situation if *C* does not file an answer, *A* must wait thirty days from the date of the letter's delivery before filing his petition for default judgment. He must also file an affidavit swearing that he has mailed the letter as required by the decree. Under these circumstances it is safe to assume that *C* had decided to permit default judgment against him. The requirements of the Spanish translation, the deletion of the merchant's name from the envelope,[53] and the use of certified mail virtually insure that the letter was read and understood. *C* is thus in a position to know his rights and to be able to decide rationally whether or not to litigate the claim.

What if *C* receives the letter, but returns the postcard to *A* and claims that process was never served on him? Then the decree requires that *A* enter *C*'s name in a log of parties who have claimed that they were not properly served, along with the name of the process server who allegedly made the service. He must then discontinue the lawsuit and start again. However, since *A* may now safely assume that *C* is aware of his intent to sue, the decree does not require *A* to write *C* a letter in the second suit, but instead allows him to proceed, after proof of second service, to file an affidavit of compliance and petition for default judgment. This procedure assures that *C* is aware of his rights and is on notice that the merchant is suing him. At the same time the procedure prevents the possible abuse of *C*'s repeated return of the postcard to postpone the suit indefinitely.

What if *A*'s letter is returned stamped "Addressee Unknown"? When he receives a returned letter, the decree requires that *A* make a full investigation to ascertain what has occurred. *C* may have moved

53. Brand was found in Professor Caplowitz's study to have utilized insulting letters and phone calls, threats to contact and the actual contact of friends and relatives and, most frequently, employers. This provision assures that the consumer does not discard the letter, believing it to be another of these insulting letters. D. CAPLOVITZ, *supra* note 10, at 10-16.

since service was made, may have refused delivery, or may, in fact, have been the victim of sewer service. The lawsuit is to be delayed until *A* determines that *C* was indeed residing at the address appearing on the letter at the time the service was attempted and until *A* has made a good faith determination that there is no reason to believe that the party sued did not receive legal notice. *A* must enter the name and the address appearing on the returned letters in a journal that will be subject to periodic inspection by the United States Attorney's Office. *A* is also required to record the nature, details, and conclusions of every investigation made therein. Only when *A* has made this good faith determination that *C* has received notice may he file an affidavit of compliance and petition for default judgment.

Under current New York procedure, once *A* obtains a default judgment he may obtain an income execution.[54] He would then deliver the income execution to the City Marshall, who would give it to *C*'s employer.[55] Ordinarily *C* would not learn about execution until his paycheck was reduced by ten percent. Under the decree, however, *A* must write *C* at least ten days prior to income execution informing him in Spanish as well as in English of the pending proceedings. Thus *C* is given a final chance to pay the judgment or to contest it in a hearing to reopen the judgment.

The procedure of the decree discourages sewer service in two ways: by an *in terrorem* effect caused by greater enforceability of criminal sanctions against the process-server and Brand's attorney and by an economic effect caused by the increased costs to the plaintiff or bringing suit.

The procedures of the decree provide the state and federal authorities with an excellent source of evidence for use against the process-servers in criminal prosecutions.[56] By examining the records of process allegedly served by a particular process-server on a certain day, for example, it might be possible to show that the process-server claimed to have been in two places at the same time. The returned letters and subsequent investigations might reveal that he claimed personal service

54. N.Y. CIV. PRAC. LAW § 5231 (McKinney Supp. 1972).

55. *Id.*

56. A process-server who commits sewer service may be guilty of federal crimes: *e.g.*, aiding and abetting wilful subjection of an individual to the deprivation of his constitutional rights under 18 U.S.C. § 242 (1970), *see* United States v. Wiseman, 445 F.2d 792 (2d Cir.), *cert. denied*, 402 U.S. 967 (1971); mail fraud under 18 U.S.C. § 1341 (1970); filing a false affidavit of non-military service under 50 U.S.C. § 502(2) (1970). He may also be guilty of committing such state crimes as perjury and fraud.

upon someone who had been dead two years or was abroad on the date service was alleged.[57] These records have the advantage of ready availability and low cost to the authorities. The government may easily monitor the process-serving industry without great expense. Thus the process-servers have a strong incentive to make actual service.

Brand's attorney shares this incentive. Under the terms of the decree he may be punished by a contempt citation if he does not monitor the method by which process is served. But when he does monitor the method of service he is chargeable with knowledge of any sewer service that occurs and may be prosecuted under the 1866 Civil Rights Act[58] for wilfully depriving an individual of his constitutional rights.

The procedures of the decree are also designed to decrease the profits the process-serving agencies derive from utilizing "sewer service." An attorney involved in the collection of small debts from consumers would naturally desire to keep his transaction costs as low as possible.[59] Normally he would seek to minimize costs by employing the process-serving agency that gave the quickest, cheapest service—inevitably that which employed "sewer service" most frequently. The procdures under this decree effectively prohibit Brand's attorney from reducing his costs in this way by requiring him to put each agency on notice that he will change to another if he finds it to be employing sewer service.[60] The process-serving agency is thus given an economic incentive to complete service of process if it wishes to maintain its account with Brand.

The procedures of the decree, however, increase Brand's costs of litigation irregardless of its use of "sewer service." The agencies will charge Brand's attorney a higher fee for effecting service in the manner required. The amount of paperwork that Brand's attorney must complete to maintain the suit is greatly increased.[61] Ultimately Brand's attorney will pass these costs on to his client. Thus Brand will be required

57. Instances such as these are quite commonplace in New York and Chicago. *See Public Hearings on Debt Collection Practices Before the FTC,* (testimony of David Paget, Assistant United States Attorney, Southern District of New York) at 6-7; 1970 *Hearings* (testimony of Judson H. Miner, Attorney, Chicago Council of Lawyers) at 2-6.

58. 28 U.S.C. § 242 (1970).

59. *See* text accompanying note 17, *supra.*

60. Consent Decree ¶ 14.

61. The decree requires that four separate logs be maintained, and that letters be sent to each defendant. Each time a letter is returned unanswered it must be investigated, and the attorney must make a good faith determination of its results. Before a default judgment can issue, the attorney himself must review the case and swear in an affidavit that he has followed all the required procedures. Consent Decree ¶¶ 2, 7.

to bear this burden of higher costs for the duration of the decree, no matter how accurately its agents complete service. Since this will hardly serve in itself as an incentive for accurate service, it can only be justified as the cost necessary to implement the procedure.

FUTURE APPLICATIONS OF THE PROCEEDINGS IN THE DECREE

This decree may prove useful in the future either as a model decree for similar litigation or as a model for a statute.[62] Although restricting its use to a model decree would have the advantage of preventing the burden of increased cost from falling on honest merchants, such a restricted use would have severe disadvantages. The problems of litigating each case are too great,[63] and sewer service is too widespread in that segment of the consumer-credit industry catering to low-income consumers[64] for a case-by-case attack to be effective.

If these procedures were applied by a narrowly drawn statute—for example, one applicable only to consumer-credit actions—the burden of increased costs would inevitably fall on some honest merchants, as well as those who employ "sewer service." Clearly, any legislature considering statutory adoption of these procedures would have to balance the burdens of increased costs against the benefits from the elimination of "sewer service."

There are several basic policies that would seem to support imposition of this burden upon the merchant. This burden would fall most heavily on those merchants who rely on default judgments and garnishment proceedings to collect their debts. These merchants are most likely to be engaged in high-risk credit sales to low-income individuals. Although it has long been thought desirable to stimulate trade,[65] public policy favors strict regulation and even discouragment of the "no money down," "easy credit" sales industry because of its predatory nature.[66] Furthermore, although the courts should be as accessible as possible to

62. *See* note 68 *infra.*

63. Proof of a "long standing and systematic practice" as was alleged in *Brand, see* text accompanying note 39 *supra,* requires an extensive study. In addition other jurisdictions may be unwilling to grant the federal government standing, *see* note 37 *supra.*

64. *See* notes 10-16 supra.

65. One major policy of the law of negotiable instruments under the U.C.C., for example, is to decrease the expense and increase the speed of actions for a creditor to secure payments. *See, e.g.,* UNIFORM COMMERCIAL CODE § 3-305.

66. *See* Peterson, *Representing the Consumer Interest in the Federal Government,* 64 MICH. L. REV. 1323 (1966).

litigants,[67] the court dockets are already much too crowded to require the courts to function as glorified collection agencies. Indeed, there is a very strong policy in favor of encouraging private settlement of disputes.[68] In any case, the burden would fall most heavily on those merchants who repeatedly resort to the courts. Consequently, the policy of encouraging private settlement would be furthered, while the courts would remain open to settle bona fide disputes.

Merchants will no doubt attempt to pass this burden on to the consumer who buy their products. The procedure of the decree incerases costs of those merchants who cater to low-income individuals more than those who sell to wealthier customers. This increase may in turn be passed on to high-risk consumers who are already plagued by higher-than-average prices, or it may discourage sales to these individuals altogether. The legislature should weigh this possibility as well in determining the desirability of enacting this procedure. Ultimately the decision should rest upon policy decisions based on empirical data gained from the results in the *Brand Jewelers* case.[69] If the experience gained from the *Brand Jewelers* decree shows that it is possible through its implementation to reduce "sewer service" without substantially increasing the costs of goods bought by the inhabitants of lower income neighborhoods and without unduly burdening the innocent merchant, then clearly these procedures would be well worth adopting on a statutory basis for all consumer-credit actions.[70]

JAMES STODDARD HAYES, JR.

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67. One major policy in the Federal Rules of Civil Procedure is to make the courts more open to all litigants. *See* Dioguardi v. Durning, 139 F.2d 774 (2d Cir. 1944).

68. The U.C.C. reflects this policy in its encouragement of "cover" rather than suit. *Compare* UNIFORM COMMERCIAL CODE § 2-712 *with* UNIFORM COMMERCIAL CODE § 2-713.

69. The New York Bar Association Committee on Consumer Affairs is presently considering a proposal to codify the procedures outlined in this decree, but have postponed final determination until such time as the results of the Brand Jewelers Decree can be studied. Interview with David Paget, Chairman of the New York Bar Association Committee on Consumer Affairs, by telephone, February 5, 1973.

70. It is safe to state that the toll which sewer service and the default judgments and wage garnishments, which almost ineluctable follow in its wake, exact, demonstrably include the loss of employment, increased personal indebtedness, personal bankruptcies, disruption and splintering of family life, the fostering of fraudulent and predatory sales practices, the frustration and hindrance of numerous Government programs designed to aid the urban poor, the impairment of the integrity of the judicial system and an erosion in respect for the rule of law.

Plaintiff's Memorandum of Law, United States v. Brand Jewelers, Inc., Civ. No. 70-170 (S.D.N.Y. 1969).