1994

Caveat Venditor: A Manual for Consumer Representation in New York. 2nd ed

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A Manual for Consumer Representation in New York

Second Edition

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Cat. No. 148

JULIUS BLUMBERG, INC., 62 White Street, New York, NY 10013

Second Edition

First printing: June, 1994

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CHAPTER 1: PROCEDURE AND TACTICS

[This chapter contains many practice contributions suggested by Douglas V. Ackerman in the first edition of this book]

1.1 Overall Strategy

Advantages in litigation stem from procedural adeptness as well as from substantive merit. Because of the nature of the litigation process, many procedural advantages accrue to the consumer lawyer defending against a typical seller or creditor lawsuit.

The practicalities facing such plaintiffs are stark. The profitability of litigation is the benefit to be gained minus the cost incurred; extended litigation over modest sums is unprofitable; quick litigation is profitable. "Quick litigation" is virtually a contradiction in terms. It happens in consumer cases only when consumers default (which, unfortunately, is often). The mere appearance of a lawyer representing the consumer, however, changes the profitability equation, if the lawyer demonstrates the intent to vigorously litigate all defenses and counterclaims. The tools of litigation available are many; an active defense can deprive the plaintiff of its monetary incentive to litigate.

1.2 Collection Attorneys

Consumer cases are commonly prosecuted by "collection" lawyers. The typical collection lawyer has an enormous number of cases: using clerks, secretaries, and a computer, a single collection lawyer may bring thousands of lawsuits each year. This is possible only because the overwhelming number of defendants sued lose by default. The collection lawyer's practice consists of simply processing the defaults, with the lawyer loosely supervising the secretaries and making a small number of court appearances.

A collection lawyer may receive only an information card from his clients with brief notes on whom to sue and how much to sue for. He feeds the information into a computer, which prints out a summons and complaint to be sent out for service. The attorney may not review the client's records to determine if the sums are accurate, if the contract is valid, what the consumer may have complained of, etc.

This ignorant mass processing of claims allows gross unfairness to occur. Knowing that a judge will never examine most of the cases filed, some collection attorneys cut legal corners, hire process servers who specialize in sewer service, and generally practice law in the most slipshod, irresponsible manner. The practice of collection attorneys has long been subject to the scrutiny of ethics committees (see Committees on Grievances and Legal Assistance, "Improper Collection Practices," 23 Record of N.Y.C.B.A. 441 (1968)), but nothing has been done to change its essential character. Ironically, this state of affairs presents several advantages to the consumer who *is* represented by counsel. Since there are so many cases being handled, the collection lawyer can not spend much time on any one case. If an attorney appears for the consumer, and makes clear an intention to engage in discovery, to raise complicated legal issues, and to assert counterclaims, the collection lawyer will be hard-pressed to respond. In addition to lacking the time to litigate, the collection lawyer generally lacks the experience (briefs and legal argument are not part of the default judgment routine) and the economic incentive to

litigate. Some collection attorneys are under instructions to either settle contested cases or refer them to a different lawyer who will handle the case at a higher fee to plaintiff.

Thus, relevant discovery and motion practice may induce the collector to drop the case, to settle on terms favorable to the consumer, or simply to default in the course of the discovery process. Sometimes collection attorneys are responsible (and liable) for illegal debt collection practices, a matter discussed in section **5.3**.

1.3 Determining Where the Case is

Consumer lawyers are often called in well after cases have been started. In fact, many consumers don't get legal help until after a default judgment has been entered against them, and collection on the judgment (e.g., by wage garnishment) has begun. Since the matter may be in any stage of litigation, the first step is to determine where the case is.

Practice Note. *To determine where your case is, it is essential to copy the court file. If you do not know the index number, you may call the plaintiff's attorney who is obliged to provide defendant with the index number, if one has been obtained. Uniform Rules for NYC Civil Court 208.4; for city courts outside NYC 210.4; for district courts 212.4. For cases brought in Supreme Court, County Court, or Surrogate's court, as discussed more fully below, effective July 1, 1992 the CPLR mandates the filing of the summons (and paying the filing fee) prior to service upon the defendant. CPLR 304. Since payment of the filing fee generates the index number, summonses filed after July 1, 1992 should bear an index number. CPLR 304, 305(a). Actions brought in N.Y.C. Civil Court, the City Courts, District Courts, and the Justice Courts are explicitly exempted from CPLR 304. See, e.g., N.Y.C. Civ.Ct Act 400. In these lower courts, commencement of the action is still achieved by service of the summons, and learning the index number may require some effort.*

If a sheriff or marshall is involved in the case, a call to him will yield the index number. You may also be able to find the index number in the court index books, often kept chronologically, if you can estimate when the alleged service of process took place. There may be two sets of such books, one for corporate plaintiffs and one for individual plaintiffs (if you are uncertain about the corporate status of "Jones Brothers," the clerk may have been too, so you should check both sets of books).

A description of the steps in a typical collection lawsuit, through default judgment, follows.

Step 1: Pre-Litigation Attempts to Collect

Pre-litigation attempts to collect usually involve telephone calls and dunning letters threatening legal action if the debt is not paid. A consumer account may be turned over to a professional debt collection agency, which receives a percentage of what it collects. These collectors are told only to "collect $X." Despite their ignorance of the underlying claim, they are often unwilling to discuss billing mistakes, complaints about the goods, or other legal impediments to collection. To them, the consumer is either a skunk or a thief. Collection letters should be checked for violations of state and federal law (see section **5.3**), which can provide quick and easily proved counterclaims.

Step 2: Issuance of Summons and Complaint

The unpaid account is referred to a collection attorney who prepares the summons and complaint. Lawsuits against consumers usually are brought in courts of limited jurisdiction, e.g., New York City Civil Court. For purposes of illustration, we will describe the typical course of a Civil Court consumer lawsuit. Civil Court practice and procedure is that of the CPLR, except as specifically modified by the New York City Civil Court Act and the Rules of Practice of the Civil Court. (For practice in District Courts, see the N.Y. Uniform District Court Act; for practice in City Courts, see the N.Y. Uniform City Court Act.)

The summons indicates the basis for the court's subject matter jurisdiction (in Civil Court, plaintiff must sue for money or goods worth no more than $25,000, Civ. Ct. Act 202) and the basis for venue (in consumer credit transactions, the place where the consumer resides or where the transaction took place). CPLR 503(f), 305(a); Civ. Ct. Act 301. Consumer credit transactions are defined broadly as transactions "wherein credit is extended to an individual and the money, property, or service which is the subject of the transaction is primarily for personal, family or household purposes." CPLR 105, Civ. Ct. Act 2101(g). While the Civil Court's jurisdiction is generally confined to recovery of money and goods and to certain real property actions not exceeding $25,000 in value, counterclaims are not subject to any monetary cap, Civ. Ct. Act 208(b), and the court does have certain specified equitable powers. See Civ. Ct. Act 208(c) and 213.

In Civil Court, the summons usually contains an "indorsed complaint" stating briefly the plaintiff's claim and the amount sued for. Civ. Ct. Act 902(a)(1), 903. Civil Ct. Rule 208.6(d) dictates the form of such a summons. Note that in a suit arising out of a consumer credit transaction, the summons must bear the label "CONSUMER CREDIT TRANSACTION" at the top and must have a warning in not less than 12-point bold upper case type as follows:

Important!! You Are Being Sued!

> THIS IS A COURT PAPER -- A SUMMONS. Don't throw it away!! Talk to a lawyer right away!! Part of your pay can be taken from you (garnished). If you do not bring this to court or see your lawyer, your property can be taken away and your credit rating can be hurt!! You may have to pay other costs too!! If you can't pay for your own lawyer bring these papers to the court right away. The clerk (personal appearance) will help you.

Further, the summons must be accompanied by a specific Spanish language summons (even if your client is Irish). Civ. Ct. Act 401(d).

Court-annexed arbitration is authorized for actions in Civil Court for $10,000 or less by Civ. Ct. Act 206(c) and CPLR 3405. Any party to such an arbitration may demand a trial de novo. CPLR 3405. See Rules of the Chief Judge, Part 28, Rules 28.1 through 28.15. Of course, there is a fee for a trial de novo. At press time, the Civil Court's mandatory arbitration program has been suspended indefinitely for budgetary reasons.

A new "Commercial Claims Part" of the New York City Civil Court, effective January 1, 1991, allows businesses to commence suits on consumer transactions up to $2,000 using a simplified pleading akin to that used by plaintiffs in the regular small claims part. Civ.Ct Act, Art.18-A. No summons is

required. Plaintiff serves the "statement of causes of action" by regular mail then files a verified certificate of mailing. The clerk sends the defendant a notice of claim by regular and certified mail. Each commercial plaintiff is limited to using this part no more than 5 times per calendar month, and as a prerequisite to commencing suit, must certify that it has not exceeded that limit. Civ.Ct Act 1809-A(b).

A few collection cases may be commenced with motions for summary judgment in lieu of a complaint. See CPLR 3213 and Civ. Ct. Act 1004 (suit based on an instrument only, such as a promissory note or loan agreement, or on a judgment). Civ. Ct. Rules 208.6(e) and (f) dictate another specific summons form in this situation, which warns of the shortened time to reply and early hearing on the motion.

Proof of service is by affidavit stating the date, time, address, and manner of service. If service is personal or upon a person of "suitable age and discretion," the affidavit must physically describe the person served, including sex, hair color, skin color, approximate age, height and weight, and any other identifying features. CPLR 306(b). A Civil Court plaintiff must file a copy of the summons and proof of service, within 14 days after service in the City of New York. Civ. Ct. Act 409. For different time limits in Supreme and County Courts, see CPLR 306-b.

Step 3: Filing the Lawsuit

Historically, the collection attorney, eager to win by default as soon as the rules permit, often would farm out the filing of the lawsuit to the process server or its agency, exercising no supervision over the service or the proof of it made to the court. Upon presentation to the court clerk of a summons, proof of service, and a filing fee (see Civ. Ct. Act 1911 and CPLR 8018(a)), the papers were filed and stamped with a date and an index number. This "service system", so-labeled because legal actions are commenced by service of the summons and complaint or notice, is what you will encounter for all cases filed prior to July 1, 1992.

In an effort to raise more revenue for the court system, the state legislature has abandoned the "service system" for cases commenced after July 1, 1992 in the Supreme Court, County Court or Surrogate's Court, in favor of a "filing system" like that of the federal courts. CPLR 304. Lower courts still follow the service system, although there has been discussion of extending the filing system requirements to the lower courts as well.

In order to protect consumers from inconvenient and improper venue choices by creditors, CPLR 513(a) requires the clerk of the court to examine consumer credit transaction summonses for proper venue and to refuse to file a summons which "upon its face" shows the incorrect county. In the unlikely event that the clerk rejects a creditor's summons on this basis, the plaintiff may simply refile in the proper county. Service is not complete until the summons is properly filed, pursuant to CPLR 513(c).

Step 4: Service of Summons on the Consumer; "Sewer Service"

Summonses and complaints are frequently served by process serving agencies which employ full-time process servers.

In New York City and other urban areas, improper or "sewer" service is rampant because

process servers, paid a set fee for each summons served, have every incentive to avoid the inconvenience of tracking down the debtor. They simply fail to serve the summons and file perjured affidavits of service. The law, of course, provides that service must be made, and failure to do so renders any subsequent default judgment entered null and void, and subject to vacatur upon motion by the defendant. For a discussion of the scope and nature of the default judgment problem in New York City, see "Revisiting the Default Debtor" (Community Service Society 1983).

Proper service must be made in accordance with CPLR 308 or CPLR 312-a, which together provide four relevant methods for service on an individual:

(1) Personal Service--the process server hands the summons directly to the defendant.

(2) Delivery to a person of "suitable age and discretion" at defendant's residence or business, plus mailing the summons to the defendant's residence or business.

(3) Affixing the summons to the door of the defendant's house or office, *and* mailing a copy to the defendant's residence (commonly referred to as "nail and mail"). This method of service may be used only if diligent attempts at service under the above two methods fail.

(4) Service by ordinary, first-class mail, CPLR 312-a, effective January 1, 1990. The summons may be served on the defendant by ordinary mail to any address at which plaintiff believes defendant can be reached. A defendant willing to accept such service signs and returns to the sender a written acknowledgment of receipt.

Note: Although the methods of non-personal service in (2) and (3) clearly provide for two summonses, one of which is mailed, consumer clients almost invariably report they received only a mailed copy. It appears that many process servers falsely claim the first steps, mail the second copy and file a false affidavit. This is *not* valid service. For discussion of claims against process servers, see sections **2.1** and **4.6**.

Step 5: Application for Default Judgment

Default may result from failure to answer the summons; failure to go to a deposition noticed by the collection lawyer; failure to make scheduled settlement stipulation payments; or failure to appear at the actual trial. Most commonly, however, the defaulting event is the failure to answer the summons.

Once the time to appear and answer expires, the defendant is in default, and a default judgment is applied for as quickly as possible, following the general CPLR 3215 rules and those of Civ. Ct. Act 1402. Where suit is for a sum certain, the clerk ("inquest clerk") can give a default judgment; otherwise there must be a motion, on notice to a judge ("inquest court").

The following proofs are required before judgment on default will be entered:

a. Proof of service of summons and complaint (process server's affidavit).

b. Non-military service affidavit: Not mentioned in New York default judgment law, except in allowing costs for it, is the federal requirement of an affidavit that defendant, upon

investigation, was found not to be in the military service. Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. 510 et seq. (providing for the "temporary suspension of legal proceedings and transactions which may prejudice the civil rights" of persons in the military service). Often process servers use a form affidavit which states that they asked someone if the defendant was in military service and were told "no."

c. Additional mailing of the summons and complaint: CPLR 3215 (f)(3) and Civ. Ct. Act 1402 require a plaintiff suing for nonpayment of a contractual obligation to mail to a non-appearing defendant, at least 20 days prior to the entry of any default judgment, an additional copy of the summons. The person mailing the summons must execute an affidavit of mailing. This requirement does not apply to Small Claims Court, the Commercial Claims Part, or summary proceedings.

d. Proof of facts constituting the claim, and the amount due. These facts must be shown by an affidavit from the plaintiff or by the verified complaint with an attorney's affidavit attesting to the defendant's default in appearing. CPLR 3215(e). The facts constituting the claim and the amount due are commonly shown by the skimpy verified indorsed complaint. For example:

VERIFIED COMPLAINT

(Plaintiff complains, etc. "on information and belief," etc.) Action for monies due from defendant(s) to plaintiff, plus agreed attorney's fees, if any, for GOODS SOLD AND DELIVERED for an agreed sum upon which there is a balance due and owing as indicated in the statement appearing below, and made a part hereof, no part of which has been paid although duly demanded. (Demanding judgment) with interest from the date of default, and the costs and disbursements of this action.

STATEMENT

Date of default and/or Balance Due: $
Interest: 11/29/90____% Attorney's fees $_____
Total Amount Due $

In taking a default judgment, some collection attorneys "verify" the complaint themselves, affirming it to be true to their knowledge, except for those things alleged on information and belief (i.e., the whole complaint). The grounds for belief are vaguely described as "information furnished by plaintiff and from records in his possession." The clerk accepts this as a verified showing of "the facts constituting the claim and the amount due." This should be raised as an example of improper procedure, however, in any motion to vacate the default.

Various additions are made to the amount sued for. Interest is added (CPLR 5001, 5002, 5004); costs (Civ. Ct. Act 1901, 1903, 1904) (note that costs set forth in section 1901 are halved if judgment follows failure to answer); and disbursements (fees paid to the clerk, sheriff's fees for executing on judgment, etc.; see CPLR 8301 and Civ. Ct. Act 1908, 1911). All of these items should be scrutinized for accuracy and legality.

Once reviewed by the clerk, the papers are stamped and filed and judgment is entered.

Step 6: Post-Judgment Collection Efforts

Armed with the default judgment, the creditor is permitted wide latitude in hunting for assets and capturing them to satisfy the judgment. See CPLR 5201 et seq. Usually the creditor will direct the sheriff or city marshal to issue an income execution (also known as wage garnishment). CPLR 5231 authorizes the deduction of ten percent of wages remaining after federal law exemptions, provided that the debtor's weekly disposable earnings before garnishment are at least 30 times the federal minimum wage per hour. The law requires that the debtor be given notice and an opportunity to pay voluntarily before garnishment begins. CPLR 5231(c). In practice, this notice is often never sent.

Post-judgment wage garnishment or a "restraining notice" on the consumer's bank account may be the first the consumer hears of the lawsuit (and is often what prompts victims of no-notice lawsuits to seek legal help). Sympathetic employers have been known to direct employees to lawyers and to refuse to make garnishment deductions until the lawyer has had a chance to vacate the garnishment. Certain kinds of income, such as unemployment and disability benefits, are exempt from garnishment, and notice of the exemptions and an opportunity to assert them are required by CPLR 5222, 5231, 5232, 5239, and 5240. (See chapter 6 for further discussion of garnishment, restraining notices, and exemptions.) The principal exemptions are:

Income. If the consumer's "disposable" weekly earnings are less than 30 times the current minimum hourly wage, federal law provides that the salary is not subject to an income execution. 15 U.S.C. 1671-1677. Ten percent of the amount that the salary exceeds the federal threshold is subject to execution under state law, while the rest is exempt. CPLR 5231(b). Other types of income such as unemployment, disability and public assistance benefits, certain pensions and trust accounts are also exempt. For a more complete listing, see "Exemptions" in Appendix B.

Personal Property. Unless the judgment is for the purchase price of particular personal property, a person's clothing, household furniture, appliances (including TV set), utensils, and working tools necessary for the debtor and family, are exempt. CPLR 5205(a). Recent CPLR amendments have also made exempt trust and custodial accounts, 5205(c), security deposits held by residential landlords or utilities, 5205(g), and devices for the handicapped, 5205(h).

Real Property. The debtor's interest in his/her own home is exempt up to the value of $10,000. CPLR 5206.

The judgment creditor's other primary weapon is the threat to seize the debtor's property. CPLR 5232. This is also done through the sheriff or marshal, who sends the consumer a "notice of levy and sale." This form, announcing that the sheriff or marshal will soon seize and publicly sell all the debtor's personal property, may be printed in large, lurid red letters.

The creditor is required to mail the notice of exemptions pursuant to CPLR 5222 to the debtor to alert him to possible immunity (e.g., under CPLR 5205). If the execution does not state that the creditor has served the notice of exemptions on the debtor, the sheriff or marshal is obliged to do so by CPLR 5232(c). In fact, the low-income consumer usually has nothing that can be taken, and the notice of levy and sale is a scare tactic sent to frighten the consumer to pay voluntarily. As with income executions and restraining notices, this collection effort may be the consumer's first clue that legal action has been taken by the plaintiff.

The sheriff or marshal pays any money collected to the creditor's attorney less fees and expenses. CPLR 5231 (k).

1.4 Client Interview

At the client interview, you need to determine if proceedings have been instituted, to get copies of documents in the client's possession, and to see if facts exist to support defenses and counterclaims. Eliciting all relevant information requires time, but it is time well spent, since command of the facts is crucial to negotiation and favorable settlement and to formation of pleading and discovery strategy. It is critical to keep good notes on the client's story. If possible, interview the client together with others (spouse, relative, friend) who are familiar with the facts.

Clients are often very anxious when they first come in to see you. You may want to begin by reassuring them that you are on their side, that they should not be embarrassed about their predicament, and that they will not go to jail as a result of this dispute. Stress the importance of full disclosure of all details. Initial friendliness will encourage full disclosure; appearing too busy to talk can ruin the interview.

Here are some guidelines to provoke good recall of the facts by the client:

1. Allow clients to tell the story once, with minimal interruption.

2. Probe for information by broad questions ("what happened then?") and narrow questions ("what did he say when you said you couldn't afford it?"). A series of narrow questions may seem too much like cross-examination, and too many broad questions may produce vague, rambling answers.

3. Reinforce responsive answers, encouraging clients by nod of the head, sympathetic expression.

4. Ask clients to recall simple details--physical setting, time of day, persons present. These may trigger further thought associations.

5. In addition to asking questions, develop facts by re-stating the last thing the client said and waiting for more; expressing agreement; or just being silent.

6. Be non-judgmental; if clients sense disapproval, they will become defensive and "clam up."

7. Re-enact important scenes with the client, e.g., the sale presentation.

8. Repeat parts of the client's story; upon retelling, people remember more details.

Important points to cover in the interview are summarized in the following checklist.

Client Interview Checklist

1. Facts of service of process:

   a. whether summons ever received;
   b. if so, when, how and number of copies;
   c. where the client was living at the time of service (compared to the affidavit of service).

2. Facts indicating where the case is (wage garnishment, receipt of notices from sheriff or marshal, any other documents or contact from collection attorney, etc.)

3. Chronological story of entire transaction.

   a. Advertising or other initial sales inducement relied on by buyer.
   b. Where sale took place, and who was present.
   c. Oral statements made at sale, and in what language.
   d. What was said about finance charges, price, and payment schedule.
   e. Description of any floor models or samples shown.
   f. Documents given to consumer before sale consummated (written warranties, sales brochures, etc.).
   g. Consumer disadvantages in dealing with seller (seller's high pressure; lack of time to "think it over"; consumer's lack of education, language skills, sophistication, relevant expertise).
   h. Length of time spent with seller.
   i. Nature of all documents signed, how seller identified them (get copies).
   j. Problems with goods on or after delivery; did goods conform to contract and to oral representations.
   k. Consumer's complaints to the store (copy, if written).
   l. Seller's collection attempts, consumer's response.
   m. Payments made, including down payment, traded-in goods, wage garnishment, deductions, etc. (amount and date of payments).
   n. What damages client suffered (including inconvenience, loss of work time and pay, physical injury, damage to property, out-of-pocket expenditures for repair or replacement, etc.).

4. Obtain copies of all documents (and have client bring in or mail copies of those left at home).

5. Examine contract, dunning notices, restraining notices, advertisements, etc. for statutory violations (see chapter 3 on statutory regulation of consumer contracts, section **5.3** on unlawful debt collection tactics, and section **6.1** on income executions).

6. Question client to clarify differences between the oral sales pitch and the written contract.

1.5 Initial Moves

First steps depend upon when the case is received. If the consumer has not been sued, a letter from you to the merchant may resolve the dispute quickly. Abusive collection tactics should be stopped with a complaint letter to the bill collector, store owner and telephone company if abusive phone calls are involved (see section **5.3**). Consultation with the relevant consumer protection agency may yield helpful information or assistance (see Appendix A, "Note on Consumer Protection Agencies").

If the consumer has been sued, but a default judgment not yet entered, determine if the time to answer has expired. Get a copy of the court file to determine what form of service of process has been alleged. For personal service, the time to appear is 20 days after service of the summons; for other methods of service, it is 30 days after proof of service is filed with the court. Civ. Ct. Act 402.

If the time to answer is about to expire, ask the attorney for a stipulation extending time to answer or move with respect to the complaint. Do not agree to any conditions on your right to respond - if the attorney won't agree to a 30-day extension, a simple motion to extend time will invariably succeed.

> **Practice Note.** *As discussed previously, plaintiffs must mail another copy of the summons to the consumer as a prerequisite to entering a default. This complicates your determination as to which mailed copy the client has. Be sure to copy the court file so you can see what's been alleged as far as service goes.*

1. WRITTEN DEMANDS

Substantive law sometimes permits the opposite party to cure violations upon notification of their existence. For retail installment transactions, make a demand by letter for a statement of the dates and amounts of payments and of the unpaid balance (seller's failure to furnish violates N.Y. Pers.Prop. Law 407). When you perceive a Retail Installment Sales Act violation, write the creditor to say what it is and demand payment of the statutory penalty (the amount of the finance charge). The creditor will probably exceed the 10-day time to correct errors, if it acts at all. See N.Y. Pers. Prop. Law 414.

Truth-In-Lending violations should also be stated in a letter, demanding penalties; the letter itself cuts off the 60-day right to cure prior to lawsuit. 15 U.S.C. 1640(b).

2. VACATING A DEFAULT JUDGMENT

If the consumer brings in a sheriff's or marshal's notice of levy, notice of income execution, or restraining notice, then a default judgment has been rendered. The client may need to be reassured by your going over the exemptions which protect property such as household furniture and certain types of income from seizure. See Appendix B under "exemptions." If the consumer claims that the property restrained in the bank account is derived from exempt sources, the court must provide an expedited hearing to adjudicate the claim and, if found valid, release the funds.

In order to vacate the underlying default judgment, you will need to interview your client about the reasons for the default. Your client may have failed to answer for any one of several reasons. The

common ones are:

- failure to receive the summons;
- failure to understand the summons;
- lack of access to a lawyer;
- inability to respond quickly to the summons because of personal or work problems;
- fear of the judicial process (many consumers think the judge can order them to jail);
- ignorance of legal defenses and counterclaims.

In addition, some consumers do respond to the summons by calling the telephone number most prominently displayed on the summons form, i.e., that of the collection attorney, who may advise the consumer that payment is the only alternative.

Collection attorney practice in taking default judgments is often very slipshod. Check carefully for any of the following:

- errors in the calculation of amounts due;
- addition of improper delinquency charges, excessive interest, or illegal or excessive attorney's fees (see section **3.4** on Penalty Clauses);
- perjured affidavits of service;
- violation of any of the procedural rules governing default judgments outlined above.

Collection lawyers get away with shoddy legal work because cases ending in default are not subject to judicial scrutiny. When discovered, these irregularities should be used to support a motion to vacate the default judgment; they may also be used as the basis for counterclaims against the plaintiff and process server and collection lawyer. See sections **2.1** and **5.3**. Serious or repeated infractions can be reported to licensing agencies (see section **2.2**; note that process servers are among those licensed), to bar grievance committees, and to the administrative head of the court in which the infraction occurred. En masse vacatur of default judgments by the chief administrative judge is authorized upon a showing of widespread abuse such as fraud, illegality, misrepresentation, unconscionability, or lack of adequate service by a particular plaintiff or plaintiff's attorney. CPLR 5015(c).

The law does not favor default judgments, and several distinct grounds for vacating the judgment exist. They may be summarized as follows:

a. Lack of Jurisdiction.

Improper service is regarded as a jurisdictional defect which renders the judgment absolutely void. See McMullen v. Arnone, 79 A.D.2d 496, 437 N.Y.S.2d 373 (2d Dep't 1981). In such a circumstance, the court should also dismiss the complaint. Sears Roebuck & Co. v. Austin, 60 Misc.2d 908, 304 N.Y.S.2d 131 (Civ. Ct. 1969). A motion to vacate judgment on this ground under CPLR 5015(a)(4) is never barred by lapse of time. Malone v. Citarella, 7 A.D.2d 871, 182 N.Y.S.2d 200 (2d Dep't 1959).

Get the affidavit of service from the court file, and determine which statutory requirements were not met. Move to vacate the default judgment and to dismiss the complaint on the ground of lack of jurisdiction when any service of process rule is not fully complied with, even if the defendant received

actual notice. Macchia v. Russo, 67 N.Y.2d 592, 505 N.Y.S.2d 591 (1986) (delivery to defendant's son inadequate, even though son immediately gave it to father); Feinstein v. Bergner, 48 N.Y.2d 234, 422 N.Y.S.2d 356 (1979). Wilson v. O'Neal, 58 Misc.2d 837, 296 N.Y.S.2d 812 (Dist. Ct. 1969).

A meritorious defense need not be set forth in the affidavit supporting a motion to vacate based upon improper service under CPLR 5015 (a)(4). See Peralta v. Heights Medical Ctr., 485 U.S. 80 (1988). However, lack of personal jurisdiction is often combined in the same motion with other alternative grounds discussed below, such as excusable default, which require a meritorious defense.

Note that process servers alleging service on a person of suitable age and discretion sometimes invent fictitious persons with whom they claim a summons was left. Affidavits claim service on "John" or Jane," adding an ethnic surname common in that neighborhood.

Each individual defendant, even those living together, must be served with his or her own copy of the summons. See Raschel v. Rish, 69 N.Y.2d 694, 512 N.Y.S.2d 22 (1986) (service on hospital administrator of single copy of summons insufficient to obtain jurisdiction over both hospital and doctor defendants).

If the process server disputes your client's denial of proper service, the court must hold a hearing ("traverse") to determine the facts of service. The process server must testify; a mere affidavit should be challenged as inadmissible. Queensboro Leasing Inc. v. Resnick, 78 Misc.2d 919, 358 N.Y.S.2d 939 (Civ. Ct. 1974). A New York City Civil Court Rule requires a process server testifying at a traverse hearing to bring his or her license and all records about the contested service to the hearing. Uniform Civil Rules for the NYC Civil Court, 208.29. Often, the process server's records will fail to comply with the requirements of the General Business Law (sec. 89-bb et seq.), which can generally damage his credibility.

On the witness stand, the process server will undoubtedly be unable to recall specifically this one service incident among the thousands normally done, and will testify merely from records. In this situation the word of the consumer usually prevails against that of the process server.

> **Practice Note.** *Personal service disputed by your client amounts to a question of whom the judge believes. In this situation, keep your client away from the courtroom until time to testify so that the process server is compelled to describe your client truly from memory. It's sometimes possible to do this: wait in court with a friend of the defendant or someone from your office of the same sex and race as your client--opposing counsel and process server may "identify" the friend as the person served, whereupon your client testifies as to non-service.*

b. Excusable Default

"Excusable default" can mean client confusion, ignorance, misunderstanding, hospitalization or other medical problems, etc. See CPLR 5015(a)(1). The motion to vacate must be made within one year of notice of entry. The moving affidavit must show the court that a meritorious defense exists.