

Memorandum in Opposition

Committee on the Tort System

Tort #1

February 18, 2016

S. 6408-A – Part N
A. 9008-A – Part N

By: BUDGET
By: BUDGET
Senate Committee: Finance
Assembly Committee: Ways and Means
Effective Date: 120 Days after becoming law

AN ACT to amend amend the business corporation law, the cooperative corporations law, the executive law, the general associations law, the general business law, the limited liability company law, the not-for-profit corporation law, the partnership law, the private housing finance law, the real property law and the tax law, in relation to streamlining the process by which service of process is served on a corporate or other entity with the secretary of state; and to repeal certain provisions of the real property law relating thereto

THE COMMITTEE ON THE TORT SYSTEM OPPOSES THIS LEGISLATION

Background

Governor Cuomo has submitted as part of his 2016-2017 Executive Budget, Part N of S.6408/A.9008 (herein Part N), an Article VII proposal to amend various sections of law in relation to removing from the Secretary of State the responsibility for mailing a copy of service of legal papers (e.g., summons and complaint) to business entities registered with the with the Department of State. The Committee on the Tort System has reviewed this legislation and opposes it for the reasons stated.

The stated purpose of this proposal follows:

Under existing law, persons or entities suing corporations may serve the attendant legal papers upon the Secretary of State as the agent for the defendant corporate entity. The Secretary must then mail copies of such process documents to the defendant entity. This bill would require that plaintiffs serve these papers on the Secretary and the defendant entity at the same time.

The supporting memorandum for this proposal assumes that there will be a savings to the Department of State of \$600,000.

The bill amends various sections of New York law that deal with service of process on various business entities that have designated the Secretary of State as agent for service. Service still may be made by delivering legal papers to the Secretary of State as before. However, service now requires the party filing legal papers to complete service by certified mailing, return receipt requested, to the business entity at the address on file with the Secretary of State. On the same day that process is mailed, a duplicate copy of the process and proof of mailing, together with the statutory fee shall be personally delivered to and left with the Secretary of State in Albany. Proof of mailing shall be by Affidavit of Compliance.

Service of process on the corporation or other entity is complete when the Secretary of State is so served.

Discussion

A. Incongruence with the objective of the Uniform Notice of Claim Act resulting in undue confusion.

It is unclear what would be the societal benefit of enacting Part N. The only stated goal in enacting Part N is the assumption that doing so would, perhaps, save \$600,000 in a state budget totaling \$154.5 billion--that is to say a *possible* savings of 0.038% of the total state budget. At what cost? . . . Unpredictability and additional litigation for New York State's already overburdened court system.

While there are several things troubling about the proposal, it is hard to understand the logic of enacting Part N given the very recent enactment of the Uniform Notice of Claim Act, Chapter 500 of the Laws of 2012 (Chapter 500). With Chapter 500, state leaders clearly proclaimed their stated purpose in the supporting memo for that legislation, which states, in pertinent part:

“The purpose of this bill is to provide plaintiffs with *uniform, fair and statutorily consistent procedure* for serving a notice of claim . . .”. (emphasis supplied).

The supporting memo for Chapter 500 went on to justify the legislation by stating, in pertinent part:

The current statutes governing the filing of notices of claim and commencing an action or proceeding against a public corporation *have become confusing and unfairly difficult for all concerned, including the judiciary and the governmental entities involved. . . .*

In addition, costly, time-consuming and resource-wasting litigation often ensues over arcane issues of notice of claim service and other procedural quirks, unnecessarily burdening the courts . . . , while at the same time

undermining public confidence in the reasonableness and rationality of New York's laws. (emphasis supplied).

While we, as experienced legal practitioners, realize that service on a corporation by serving the Secretary of State and filing a notice of claim pursuant to the Uniform Notice of Claim Act are not identical legal mechanisms, they both have very similar and effective goals. Part N would put at considerable risk the “*uniform, fair and statutorily consistent procedure*” that has come to be relied upon by the judiciary, legal profession and the public by serving the Secretary of State as an agent of business entities. Part N flies in the face of the recent public policy declarations by the state leaders in enacting the Uniform Notice of Claim Act, a bill that passed both houses of the Legislature with overwhelming bipartisan support.

B. Abrogates historic reliance on well-established and effective procedure.

Moreover, Part N would undo a procedure that is well established and has been relied upon for several decades. Changes to these time tested procedures would also very likely lead to the problems sought to be addressed by the Uniform Notice of Claim Act, i.e. “...costly, time-consuming and resource-wasting litigation [that] often ensues over arcane issues of ... service and other procedural quirks, unnecessarily burdening the courts as well as the agencies involved, while at the same time undermining public confidence in the reasonableness and rationality of New York's laws.” These serious concerns were articulated with respect to the state of service of process prior to enactment of the Uniform Notice of Claim Act. If Part N were enacted it would have a deleterious effect on the well-established, recognized and effective procedure now relied upon for service upon business entities.

The system that is now in place, and has been for many decades, was developed for good reasons that have not changed. The current system works well and provides certainty in an increasingly uncertain world.

Part N would introduce uncertainty into a now-certain process.

C. Drafting Concerns

In addition to the previously articulated policy concerns the Committee has with Part N, we note what appear to be several drafting errors in the bill. For example, we are concerned that the requirement of simultaneous (i.e., same day) service on the Secretary of State and on the defendant by mail may present difficulties, which could lead to motion practice related to lack of personal jurisdiction due to defective service. Additional drafting errors are highlighted below.

1. General Associations Law (GAL)

Service of process against an Association upon the Secretary of State by certified mailing to the (budget amendment appears to have a typo here referring to certified mailing to the corporation or other business entity – it should say "Association")

On the same day (budget amendment appears to have a typo here referring to certified mailing to corporation or other business entity – it should say "Association")

Also – the definition of "process" under both the GAL and the Real Property Law (RPL) is new. It is unclear what this new definition is based upon, which may lead to confusion and further litigation.

"Process" means judicial process and all orders, demands, notices or other papers required or permitted by law to be personally served on an association, for the purpose of acquiring jurisdiction of such association (board of managers in the RPL) in any action or proceeding, civil or criminal, whether judicial, administrative, arbitative or otherwise, in this state or in the federal courts sitting in or for this state."

2. General Business Law

On page 76 of Part N – it does not look like the changes to service apply here. On page 77 it still says the service of process is sent forthwith by the Department. Clarification is needed.

Conclusion

If Part N were enacted it would have a deleterious effect on the well-established, recognized and effective procedure now relied upon for service of legal papers upon business entities. Such effect would far outweigh the assumed and miniscule savings that may be realized.

The system that is now in place, and has been for many decades, was developed for good reasons that have not changed. Part N would introduce uncertainty into a now-certain procedure.

Based on the foregoing the New York State Bar Association Committee on the Tort System respectfully **OPPOSES** passage and enactment of Part N.

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