

Report Approving Proposal to Amend CPLR 1008

Prepared by the Civil Practice Law and Rules Committee

For the reasons stated herein, the Commercial and Federal Litigation Section (the "Section") APPROVES the proposal put forward by the Committee on the Civil Practice Law and Rules (the "Standing Committee") to amend CPLR 1008 to undo the effects of the decision in *Charles v. Long Island Community Hospital et al.*, 850 N.Y.S.2d 173 (2d Dep't 2008) regarding third-party practice.

CPLR 1008 provides that third-party defendants may assert in their answer any defenses they have to the defendant/third-party plaintiff's claim. The statute further provides that a third-party defendant's answer may assert "against the plaintiff" . . . "any defenses which the third-party plaintiff has to the plaintiff's claim."

In *Charles*, the plaintiff did not effectuate proper service on the defendant, but the defendant chose not to contest service of process. When the defendant subsequently brought a third-party complaint, the third-party defendant moved to dismiss on the ground that plaintiff had failed to effect proper service on the defendant/third-party plaintiff. The trial court granted the motion and the Second Department affirmed.

Contemporary practice both discourages needless objections to service of process and requires defendants who wish to assert such a defense to do so promptly. With the advent of commencement by filing, there is often little incentive for a defendant to raise a defense of defective service; because the filing of the action tolls the statute of limitations, even if the defense is successful in the first instance, the plaintiff will often be able to re-serve and cure the defect. Moreover, CPLR 3211(e) requires that a defense to service of process must be raised promptly by the defendant or it will be deemed waived.

The decision in *Charles*, by permitting a third-party defendant to assert the *plaintiff's* failure to properly serve the *defendant* as a complete defense against the *defendant/third-party plaintiff*—and to do so at a time when the defendant/third-party plaintiff no longer has the ability to

assert the same defense against the plaintiff—effectively forces defendants who are contemplating third-party practice to raise and litigate any service defenses that they may have at the outset of the case. Such a result is wasteful of the resources of courts and litigants; where a defendant reasonably chooses not to contest service, that defendant should not then be penalized by a possible loss of rights that they may have against potential third parties.

The proposed amendment offered by the Standing Committee would eliminate the negative effects of the *Charles* decision by clarifying that third-party defendants may not assert the plaintiff's failure to serve the defendant as a defense against the third-party complaint. The proposal would not limit the third-party defendant's rights in any other way. This proposal is entirely reasonable and deserves the support of the Bar.

Conclusion

For the reasons stated, the Commercial and Federal Litigation Section recommends that the proposed legislation be APPROVED.

This report was prepared by the Civil Practice Law and Rules Committee of the Commercial and Federal Litigation Section of the New York State Bar Association. The Civil Practice Law and Rules Committee is co-chaired by James Michael Bergin of Morrison & Foerster LLP and Thomas C. Bivona of Milbank, Tweed, Hadley & McCloy LLP. To join this Committee, please contact Mr. Bergin at jbergin@mofa.com or Mr. Bivona at tbivona@milbank.com.

This report was sent to John A. Williamson, Associate Executive Director of New York State Bar Association, on April 3, 2008.