

## BILL TEXT:

## STATE OF NEW YORK

6952

2005-2006 Regular Sessions

## IN ASSEMBLY

April 1, 2005

Introduced by M. of A. BRENNAN, POWELL -- Multi-Sponsored by -- M. of A. GORDON, LAVINE, ZEBROWSKI -- read once and referred to the Committee on Codes

AN ACT to amend the civil practice law and rules, in relation to the validity of service of process in certain circumstances

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

- 1 Section 1. Section 308 of the civil practice law and rules is amended  
2 by adding a new closing paragraph to read as follows:  
3 Where both acts of service pursuant to subdivision two or four of this  
4 section have been attempted, and one of the two acts of service  
5 prescribed under either subdivision two or four of this section has been  
6 validly effected, it shall be sufficient to sustain the service if it is  
7 shown that the defendant actually has received process.  
8 § 2. This act shall take effect on the first of January next succeed-  
9 ing the date on which it shall have become a law, and shall only apply  
10 to actions and proceedings commenced on or after such date.

EXPLANATION--Matter in italics (underscored) is new; matter in brackets [-] is old law to be omitted.

LBD06137-01-5

## SPONSORS MEMO:

NEW YORK STATE ASSEMBLY  
MEMORANDUM IN SUPPORT OF LEGISLATION  
submitted in accordance with Assembly Rule III, Sec 1(e)

BILL NUMBER: A6952

SPONSOR: Brennan (MS)

TITLE OF BILL: An act to amend the civil practice law and rules, in relation to the validity of service of process in certain circumstances

SUMMARY OF SPECIFIC PROVISIONS: This measure, which was recommended by the Chief Administrative Judge's Advisory Committee on Civil Prac-

**RETRIEVE BILL**

tice, would amend CPLR 308 to add a new undesignated paragraph at the end to provide that if both acts of service pursuant to subdivision 2 or subdivision 4 when applicable, have been attempted and only one of them is validly effected, a showing that the defendant actually received process shall be sufficient to sustain service. Of course, completion of service in such a case would include the filing of proof of service with the clerk of the court.

**JUSTIFICATION:** In the interest of basic fairness, this measure is designed in a carefully limited manner to prevent recurrence of the harsh outcome of *Feinstein v. Bergner*, 48 N.Y.2d 234 (1978). That was a wrongful death action in which the plaintiff-widow, despite diligent efforts, was unable to effectuate both the required acts of service - first under CPLR 308(2) (deliver and mail) and then under CPLR 308(4) (affix and mail). The Court of Appeals, with a strong dissent, held that, even though defendant had in fact received timely notice and the limitations period had shortly thereafter elapsed, the service was fatally defective. It reasoned that, while plaintiff had properly mailed process to defendant's "last known residence," she had not satisfied the additional requirement of affixing process to the door of defendant's "dwelling place" or "usual place of abode," affixing it rather to the door of his "last known residence," for she had no reason to believe it was not his "dwelling place" or "usual place of abode."

The result in *Feinstein* makes it clear that the text of the cited subdivision, even as amended by chapter 115 of the laws of 1987, is not flexible enough to provide the full measure of justice desired in such troublesome, even if infrequent, situations. The Advisory Committee also considered the effect of chapter 216 of the laws of 1992 (commencement of action by filing) upon the problem, and concluded that the new provisions enacted by that statute do not render the proposed change unnecessary. While subdivisions 2 and 4 correctly will remain as the appropriate general standard in most cases where utilized, the proposed new paragraph would extend justifiable relief under exceptional circumstances such as those in the *Feinstein* case.

**PRIOR LEGISLATIVE HISTORY:** Similar to bills beginning in 1989, the most recent being 1999-2000 - A.3566a. In Codes in the Assembly.  
A.6093 of 2001-02 - Passed Assembly.  
A.3650 of 2003-04 - Passed Assembly.

**FISCAL IMPLICATIONS TO STATE AND LOCAL GOVERNMENT:** None.

**EFFECTIVE DATE:** January 1, following enactment and would apply only to actions and proceedings commenced on or after that date.

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