

Rory Lancman

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Sent: Tuesday, March 04, 2008 12:54 PM
To: Rachel Ehrenfeld
Subject: Civil Practice Committee Finds Fault With Libel Terrorism Bill (Text)

NY LAW JOURNAL

Civil Practice Committee Finds Fault With Libel Terrorism Bill

By Joel Stashenko <<mailto:web-editor@nylj.com>>

March 4, 2008

ALBANY - A civil practice advisory committee to the judiciary is opposing legislation that would give New York-based authors and publishers special protections against libel judgments from foreign courts.

The chief administrative judge's Advisory Committee on Civil Practice overwhelmingly voted last week to urge the Legislature to defeat the bill (A9652 <<http://assembly.state.ny.us/leg/?bn=A09652&sh=t>> /S6687), which would effectively render libel judgments unenforceable in New York if they were won in countries with less-stringent libel standards than federal and state laws.

The bill would expressly give New York courts personal jurisdiction over plaintiffs in such cases.

The measure is in response to what critics refer to as "libel tourism" or "libel terrorism," the use of foreign courts to secure defamation judgments against New York-based authors. Media companies contend that by winning the judgments but not seeking to enforce them, plaintiffs aim to chill the investigative activities of authors and deter publishers from printing the work of authors who have outstanding judgments against them.

"The committee recognizes that it is a serious issue, but doesn't believe the bill is the solution," committee chairman George F. Carpinello of Boies, Schiller & Flexner in Albany said yesterday in an interview.

Mr. Carpinello said he would send a letter to the Legislature outlining the committee's objections. In addition, he said the legislation was discussed yesterday during the committee's annual visit to the Capitol to outline its legislative goals for the year to the Codes and Judiciary committees.

The libel terrorism bill was unanimously approved by the Senate last week (NYLJ, Feb. 28 <<http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1204113036401>>) and is now before the Codes Committee in the Assembly.

Among the civil practice committee's objections is what members deemed the broad scope of the bill, Mr. Carpinello said.

"You could have a libel judgment that would be totally consistent with our laws where someone knowingly and intentionally libeled someone," he said, but under this bill the person who won valid libel judgment would not be able to enforce it in New York because there would be a "blanket prohibition against enforcing judgments from countries that don't have the same standards that we do."

Committee members also questioned the constitutionality of extending the jurisdiction of New York courts to specifically apply to the plaintiffs in foreign libel actions against New York authors and publishers, according to Mr. Carpinello.

"Many members question if it would be constitutional to expand New York's long-arm statute to give jurisdiction whose only nexus is they sued a New Yorker in a libel action," he said.

While the bill contains a clause that extends personal jurisdiction in a declaratory action "to the fullest extent permitted by the U.S. Constitution," most committee members think courts will decide there is no jurisdiction

under that standard, Mr. Carpinello said.

Article 54 of the Civil Practice Law and Rules already gives New York courts the latitude to enforce or not to enforce foreign judgments on a case-by-case basis, Mr. Carpinello said.

"That has worked well for a long time," he said. "By statute and common law, that's the way it has been in New York forever."

Mark C. Zauderer of Flemming Zulack Williamson Zauderer, another member of the civil practice committee, said the bill would carve out an exception to the enforcement of libel judgments in New York that other states do not recognize.

"New York would be seen as stepping out of line with other states," Mr. Zauderer said in an interview. "I think it would be a step backwards in promoting international comity."

The civil practice committee opposed the bill in a 20-2 vote.

Supporters Disagree

Floyd Abrams of Cahill Gordon & Reindel, a supporter of the measure, said critics are right in that New York would be the first state to specifically adopt an expansion of jurisdiction for its courts in libel terrorism cases.

But he noted that the U.S. Court of Appeals for the Ninth Circuit, in *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme* [<http://www.ca9.uscourts.gov/coa/newopinions.nsf/3DF703F416DC0608882570F40006DDCF/\\$file/0117424.pdf?openelement>](http://www.ca9.uscourts.gov/coa/newopinions.nsf/3DF703F416DC0608882570F40006DDCF/$file/0117424.pdf?openelement) , 433 F.3d 119 (2006), has recognized that California courts have personal jurisdiction over a foreign defendant in circumstances similar to a libel terrorism case.

"And if New York were the first state to provide protections to its authors who write books fully protected by the First Amendment and find themselves hauled into foreign jurisdictions that do not recognize the need to protect free expression as we do, why would that be a bad thing?" Mr. Abrams said yesterday.

The New York legislation, The Libel Terrorism Protection Act, arose from the libel suit New York author Rachel Ehrenfeld faced following publication of "Funding Evil - How Terrorism Is Financed and How to Stop It." In the book, Ms. Ehrenfeld identified Saudi businessman Khalid Bin Mahfouz as a financier of Al Qaeda prior to the Sept. 11, 2001, attacks on the World Trade Center and the Pentagon.

Mr. Bin Mahfouz, who denies supporting terrorists, won a defamation judgment and a damage award of \$225,000 against Mr. Ehrenfeld in London's High Court of Justice. Ms. Ehrenfeld did not contest the libel action.

While Mr. Bin Mahfouz has chosen not to enforce the judgment against Ms. Ehrenfeld, she sought in federal court to have the judgment ruled unenforceable because it is contrary to public policy in New York.

In December, deciding a certified question posed by the U.S. Court of Appeals for the Second Circuit in *Ehrenfeld v. Mahfouz* [<http://www.ca2.uscourts.gov:8080/isysnative/RDpcT3BpbnNcT1BOXDA2LTlyMjgtY3Zfb3BuLnBkZg==/06-2228-cv_opn.pdf>](http://www.ca2.uscourts.gov:8080/isysnative/RDpcT3BpbnNcT1BOXDA2LTlyMjgtY3Zfb3BuLnBkZg==/06-2228-cv_opn.pdf) , 489 F.3d 542 (2007), the state Court of Appeals decided New York's long-arm statute did not provide for personal jurisdiction in the case (NYLJ, Dec. 21, 2007 [<http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1198145094478>](http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1198145094478)).

Yesterday, the Second Circuit dismissed Ms. Ehrenfeld's action [<http://www.ca2.uscourts.gov:8080/isysnative/RDpcT3BpbnNcT1BOXDA2LTlyMjgtY3Zfb3BuMi5wZGY=/06-2228-cv_opn2.pdf>](http://www.ca2.uscourts.gov:8080/isysnative/RDpcT3BpbnNcT1BOXDA2LTlyMjgtY3Zfb3BuMi5wZGY=/06-2228-cv_opn2.pdf) , clearing the way for Mr. Bin Mahfouz to seek enforcement of the judgment if he so chooses.

In that ruling, the circuit acknowledged the growing concern about libel terrorism, but said it was up to the Legislature and not the courts to expand the reach of the long-arm statute, which is CPLR §302.

'Uninformed and Absurd'

The Assembly sponsor of the libel terrorism bill, Rory I. Lancman, D-Queens, disputed the Advisory Committee

on Civil Practice's conclusion that there could be constitutional problems with the legislation.

"The constitutional question is such a non-issue that the Court of Appeals expressly invited the Legislature to amend the long-arm statute if the Legislature wanted to allow for suits such as Ehrenfeld's," he said yesterday.

Like Mr. Abrams, Mr. Lancman questioned why New York should shy away from protecting authors from foreign libel judgments simply because no other state is doing so.

"I can't wrap my head around the notion that New York should decline to adopt important legislation achieving a significant policy goal benefiting New York residents and businesses because other state's haven't yet done so," he said.

Mr. Lancman said the committee's "uninformed and absurd" objections to the legislation would not prompt him to alter the bill or prevent him from seeking passage by the Assembly.

Thomas Dunham, an aide to Senator Dean G. Skelos, R-Rockville Centre, also said the committee was misreading the bill and urged the Assembly to proceed with final legislative approval. Mr. Skelos sponsored the bill in the Senate.

Mr. Carpinello said it might ultimately take an international treaty convention to standardize libel laws and the recognition of judgments by courts.

"The whole issue of libel is going to have to be dealt with on an international level because of differing ideas of what constitutes libel," Mr. Carpinello said.

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