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P E R S P E C T I V E

'Libel Terrorism' Bill

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I've been following the Law Journal's articles on the so-called "libel terrorism" (or "libel tourism") bill (Feb. 28, March 4). I'm delighted to hear the progress the bill is making in the Legislature. I'd like to see it pass, with all its imperfections. Perfection is unachievable here, especially in this era of the Internet, which has added a huge dimension to issues of longarm jurisdiction in defamation cases.

The bill, The Libel Terrorism Protection Act, (A9652/S6687), is in response to the Court of Appeals *Ehrenfeld* case, which 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 Ms. 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 in New York. The U.S. Court of Appeals for the Second Circuit certified the case to the state Court of Appeals, which found New York's long-arm statute did not provide for personal jurisdiction.

I did a lead note on the *Ehrenfeld* case in the February issue of the New York State Law Digest (No. 578). I've been editing the Digest for more than 30 years now and

occasionally an item prompts me to suggest that it be placed on the agenda of our Advisory Committee on Civil Practice for possible legislative submission. *Ehrenfeld* is such a case. I asked that the case be placed on the Feb. 20 committee agenda only to learn, with pleasure, that the Legislature beat me to it.

The bills, sponsored in the Assembly by Rory I. Lancman, D-Queens, and in the Senate by Dean G. Skelos, R-Rockville Centre, were already on the agenda, placed there by Holly Lutz, the committee's counsel. The *Ehrenfeld* situation bothered me enough that I wanted the committee to consider an amendment to grant the jurisdiction Dr. Ehrenfeld sought. Legislators Lancman and Skelos, the sponsors of the bill, and their advisers had drafted a proposal.

Several preliminary items. The bill is quite imperfect, but nothing will make everybody happy here. The subject is fraught with constitutional issues, as my 20 colleagues on the committee ably pointed out (I was one of the two dissenters at the meeting), but any bill that tries to address any situation as complex as *Ehrenfeld* is going to pose constitutional issues. If I may be allowed a flippancy, so what! It will boil down to the classic situation in which a statute toils near the border of constitutionality and leaves it to the courts to draw the line.

Far worse than that would be

to do nothing in the face of what seems to me an egregious effort, in a forum with libel laws offensive to our own and a dubious venue for the *Ehrenfeld* case to boot, to let an alleged libel victim pull off a coup in which he makes it too expensive for a New York writer to contest his foreign lawsuit, ends up with a default and a big money judgment, and is apparently content to seek no enforcement of it in the U.K. or in the U.S.

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Why? What ran on and between all the lines of the *Ehrenfeld* case, as I read it, is an attempt by the alleged defamed party to deter publishers in New York and elsewhere from entertaining any more submissions from Ms. Ehrenfeld in particular,

and perhaps from any similarly situated writers addressing similar subjects.

New York had the overwhelmingly predominant contacts with the case. So predominant that it is helpful to hypothesize a complete geographical reversal of the facts: the U.K. now the writing base and New York the place in which an insignificant few copies of the publication were bought off the Web but in which the libel suit is brought. It's my guess that the New York suit would go nowhere; that it would be dismissed for forum non conveniens without the court's getting into the merits at all.

The U.K., on the other hand, ran with this suit, applied its law rather

than ours to measure its merits, and held the New York writer to a big default judgment.

All the writer then sought in New York was a declaration that the U.K. judgment would not be recognized in New York. That seemed a modest enough request, but the New York Court of Appeals found no jurisdictional basis for it in CPLR 302(a)(1) because Mr. Bin Mahfouz was not transacting business in New York, the statutory premise under that provision.

It seems to me that Mr. Bin Mahfouz's judgment, with or without the declaration, has scant prospect of New York enforcement under CPLR 5304(b)(4), which rejects recognition if the claim on which the judgment is based is "repugnant" to New York public policy. That it is repugnant on substantive law grounds needs no repeating, but we may add a note of procedural repugnance as well: the tort subdivisions, CPLR 302(a)(2) and (3), explicitly exclude New York longarm jurisdiction of defamation claims for policy reasons immersed in the same free speech issues that take our attention here.

The proposed bill merely gives the writer the security of a judicial statement implementing that policy, doing so with the additions of a paragraph 8 to CPLR 5304(b) and a subdivision (d) to CPLR 302. A mild gift in the circumstances, it seems to me.

I would like to see a bill that goes further than that, by giving the writer, first, a substantive cause of action for money damages against a plaintiff like the one in *Ehrenfeld*, based on what seems to me a motive to deter writing in New York. (The plaintiff in *Ehrenfeld* probably laughingly dismisses the idea of collecting on his judgment, like a tycoon ignoring a dime on the sidewalk.)

And then, second, by giving the writer the procedural gift of a clear

basis for New York jurisdiction with a longarm statute that concentrates on the plaintiff's motive in bringing a U.K. lawsuit: to frighten writers in New York, a major publishing center, and, more than that, to discourage New York publishers from accepting articles like Ms. Ehrenfeld's.

That would be far greater a deterrent to similar Bin Mahfouzes in the future. If such a statute worked, it could lead to a huge judgment in New York, and with more prospect of proceeding to collection than the *Ehrenfeld* judgment has in the U.K. (Ms. Ehrenfeld has no property in the U.K.) Mr. Bin Mahfouz, an apparent multi-millionaire, could then be pursued, in New York, with the whole panoply of enforcement devices offered by Article 52 of the CPLR, including its

range of garnishment possibilities against banks, brokerage accounts, and other financial entities with a New York presence; that might offer some sophisticated access to assets even if actually held by these local entities outside the state.

That might even be possible under the current CPLR 302(a)(3), which supports jurisdiction when it is shown (1) that the defendant committed a tortious act outside New York and (2) that the act caused injury within New York. While a defamation claim itself is excluded from those provisions, what we have here is not a defamation claim: it's more analogous to the tort of deliberate interference with an advantageous relationship. A case might be made out to show that the primary motive of the plaintiff's suing in the U.K. was to deter New York publishers and threaten monetary loss to a New York writer. It would be a reach, a stretch, but the additional requirement of paragraph (ii) of CPLR 302(a)(3) might be met. It requires a showing that the defendant expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

The additional requirement here is the revenue deriving. But it's not unlikely that Mr. Bin Mahfouz is involved in international commerce of some kind, adequate to meet that second requirement.

How to prove it? Bring the action here and serve him there with motion papers, before or even with summons and complaint in the New York action, requiring an appearance in the action, at least at the outset, just to answer questions about his possible jurisdiction-giving activities. That requires a lesser showing of contacts than jurisdiction in the action proper does. (I go into this in some measure in my book, Siegel, New York Practice 4th Ed. §93.)

This is all terribly iffy, of course, in point of both substantive law and procedure, but to my mind worth a try. The current bill makes such a try, and on the far more modest stage of a simple declaratory judgment demand.

Will the bill pose constitutional issues? Count on it, but again: so what! It will all turn on the fact-intensive inquiry in the particular case, including some hard probings into motivation. The shame would be not to try.

In national context the try is by no means unique. The California longarm statute involved in the *Yahoo!* decision, for example, discussed in the *Ehrenfeld* case, makes a constitutional inquiry necessary in every case. Indeed, it's the only inquiry under the California statute. California has one of those terse longarm statutes which, in

its terseness, covers everything due process would allow:

A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States. (Cal.Civ.Proc. Code §410.10.)

With that statute in contrast, what will New York be doing with the present Lancman-Skelos bill? It will be inviting, in but one situation, a far narrower inquiry than California invites—necessitates!—in all situations. And the California statute has been on the books for years. Instead of running in lockstep with due process, as California does, the Lancman-Skelos bill will be carving out what by comparison is a modest range of additional longarm jurisdiction, imposing far less on the New York courts than the California statute imposes on the California courts in all cases. It would be a run in lockstep with due process, in other words, not for the whole distance, but for just a few steps.

That there will be a number of attempts under this proposal that the courts will reject on due process grounds, I have no doubt, but I also have no doubt that some such endeavors will succeed, and I suspect, and hope, that a case like *Ehrenfeld* will be one of the latter.

What we really have here is the free speech facet of the globalization of business and the exponential expansion of world communication through electronics and the Internet. It has been suggested that the best solution to the free speech issue—which many within the community of nations probably don't even consider important—would be a treaty. That would indeed be ideal; all of the nations of the world getting together to define the borders of free speech. But let the treaty-making process begin straightaway, so that at least our great grandchildren may have a look at the first draft. I must say a word in defense of my colleagues on the advisory committee. Mr. Lancman, as quoted in the *Law Journal*, refers to our committee's objections to his bill as "uninformed and absurd." Strong words, and I think unfair. I heard all of the committee's comments. All of their objections were well considered. Indeed, that's what prompted my dissent, and support for the bill. It seemed to me from the aggregate of the valid constitutional points made by my colleagues that they were unlikely ever to agree unanimously on any bill that would answer all their points, and to my mind it was important to get something out on the subject a.s.a.p., lest folks like Mr. Bin Mahfouz be emboldened to try more of the same.

As a matter of fact, a concern with me is that this bill does not go

far enough towards disemboldening litigants like him; that both a substantive and jurisdictional effort that looks to a big money judgment against him in New York, and with a reasonable prospect of its being collectible in New York, will be a more potent deterrent.

But at least let's go forward with the something that's before us while nothing else is.

The Advisory Committee on Civil Practice, including its present chair, George Carpinello, are in my judgment a constructive committee that I've been pleased to be a part of for more than 30 years. Hence I do not subscribe to Mr. Lancman's attributed remarks unkindly describing their objections to his bill. But nor do I agree with their objections. So I thank both Mr. Lancman and his cohort, Mr. Skelos, for producing the bill.

I did add one light note when I dissented at our committee meeting. I reminded my colleagues of the observation made by the American humorist, Fred Allen, who described a committee as an aggregate of people who individually can do nothing, but who together can decide that nothing can be done.

This bill does something and we should run with it.
