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March 5, 2008

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Re: Assembly Bill 9652-A and Senate Bill 6687-B
 The "Libel Terrorism" Bill

Dear Counsel:

The Chief Administrative Judge's Advisory Committee on Civil Practice wishes to present its view with regard to above-mentioned legislation.

The Committee recognizes the serious issues posed by the exposure of American authors and publishers to the libel judgments rendered in countries that do not protect freedom of speech and the press to the same extent as the New York and United States Constitutions. However, the

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BOIES, SCHILLER & FLEXNER LLP

March 5, 2008

Re: Libel Terrorism Bill

Page 3 of 4

In Yahoo!, the foreign judgment plaintiff had obtained a French court order, ordering Yahoo! to cease and desist listing certain material on its website. A divided court held that there was personal jurisdiction because of three contacts that the French plaintiffs had with New York. First, the French plaintiffs sent a cease and desist letter to Yahoo! in California, demanding that it conform to the commands of French law. Second, Yahoo! was served with process in the French action in California. And third, "and most important", the French plaintiffs obtained two orders from the French court directing Yahoo! to take action in California on threat of a substantial penalty.

Of particular importance here is the fact that the majority specifically held that service of process on Yahoo! in California was not sufficient contact with California to assert jurisdiction over the French plaintiffs. What the court said on this issue bears direct quoting:

We do not regard the service of documents in connection with a suit brought in a foreign court as contacts that by themselves justify the exercise of a personal jurisdiction over a foreign litigant in a United States court. If we were to hold that such service were a sufficient basis for jurisdiction, we would be providing a forum-choice tool by which any United States resident sued in a foreign country and served in the United States could bring suit in the United States, regardless of any other basis for jurisdiction. We are unaware of any case so holding, and Yahoo! has cited none.

43 F.3d at 1209.

Thus, the Yahoo! court concluded that the most significant factor leading to assertion of jurisdiction (again, over a three-judge dissent) was the fact that the French court purported to issue orders directing Yahoo! to take action in California, subject to a substantial penalty. This bill is not so limited. It purports to provide jurisdiction merely by virtue of the fact that a New York resident has been found liable by a foreign court in a defamation matter. Only under the very limited facts of Yahoo!, i.e. where a court directly orders a party in New York to take certain action in compliance with a foreign court order, is it arguable that New York courts could obtain jurisdiction over the foreign court plaintiff.

Second, the bill may also violate the equal protection and privileges and immunities clauses of the U.S. Constitution because it grants the right to bring a declaratory judgment action only to New York residents. Non-New Yorkers who have property in the State and are vulnerable to enforcement of a foreign judgment against that property would receive no protection under this bill. The Committee can perceive of no rational basis for discrimination between New Yorkers and non-New Yorkers with regard to enforcement of foreign libel judgments against property located within the State of New York.

Third, the bill is extremely overbroad in that it allows New York courts to refuse recognition of all libel judgments from a foreign country unless that country's libel law "provides

BOIES, SCHILLER & FLEXNER LLP

March 5, 2008

Re: Libel Terrorism Bill

Page 2 of 4

Committee believes that the proposed legislation is ill-advised and possibly unconstitutional and urges that it not be adopted by the Legislature.

There are two aspects to the bill: an extension of the long-arm jurisdiction under CPLR §302 and a modification of CPLR §5304 to expand the court's power to reject libel judgments rendered in other jurisdictions. Both aspects of the bill are problematic.

First, the bill would extend long-arm jurisdiction in New York "to the fullest extent permitted by the United States Constitution" in cases where an individual obtains a judgment in a defamation proceeding outside the United States against a person who is a resident of the State of New York, or corporation which has its principal place of business in New York, the publication at issue was published in New York, and the resident has assets in New York which might be used to satisfy the foreign defamation judgment or the resident may have to take action in New York to comply with the foreign defamation judgment.

The Committee believes that the bill would be ineffective in the very cases the bill is designed to affect since the extension of long-arm jurisdiction to a foreign judgment creditor who has no nexus to New York other than the fact that that creditor obtained a libel judgment in a foreign country against a New York resident would, in fact, be unconstitutional. The traditional notion of "minimum contacts" necessary to make an assertion of jurisdiction constitutional has required a purposeful availment of the benefits of, or contact with, the State such as shipping goods into the State, contracting in the State or advertising in the State. Merely bringing an action against a New York resident - especially when the libel may have actually occurred in the foreign jurisdiction¹ - has not traditionally been conceived to be purposeful availment in New York.

Some have argued that the recent decision of the Ninth Circuit Court of Appeals in Yahoo! Inc. v. La Ligue Contre le Racisme et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006) (*en banc*) supports an argument that the extension of long-arm jurisdiction proposed in this bill is constitutional. We disagree. In Ehrenfeld v. Mahfouz, ___ N.Y.3d ___, 2007 WL 4438940 (Dec. 20, 2007), the action which prompted this piece of legislation, the New York Court of Appeals noted that Yahoo! would not apply to the facts of that case because Yahoo! analyzed a California long-arm statute which, unlike New York's, extends California long-arm jurisdiction to the outer limits allowed by the United States Constitution. The Court of Appeals distinguished Yahoo! on those grounds and undertook no further analysis of the Yahoo! court decision. However, a careful review of Yahoo! reveals that that decision clearly does not hold that this type of long-arm jurisdiction is constitutional.

¹ Although the bill provides that the assertion of long-arm jurisdiction over the libel judgment creditor would only apply where "the publication at issue was published in New York," that limitation would not prevent application of the bill to situations where the libelous publications actually originated in a foreign country, so long as publication occurred in New York, which, of course, could occur any number of ways, such as a newspaper in New York picking up a story published in a foreign newspaper or, arguably even "publication" on the Internet in New York.

BOIES, SCHILLER & FLEXNER LLP

March 5, 2008

Re: Libel Terrorism Bill

Page 4 of 4

at least as much protection for freedom of speech and press as provided for by both the United States and New York constitutions." Traditionally, CPLR §5304 has been applied on a case-by-case basis to determine whether a particular judgment is consistent with New York public policy. Under this bill, even a British libel judgment that is fully consistent with U.S. and New York free speech standards – for example, where the speech was intentionally defamatory – could be rejected by a New York court because Great Britain is not a country that has defamation laws which provide at least as much protection as the U.S. and New York Constitutions. It would be far better if the bill were amended specifically to give the courts discretion to reject a particular libel judgment where such judgment did not comport with U.S. and New York constitutional standards. However, this change would not ameliorate the other problems raised by this bill.

Fourth, several members of the Committee believe that the bill, even if constitutional, would not accomplish its purpose. The chilling effect of a foreign judgment on a publisher's decision to publish a particular author would not, in our view, be significantly diminished by a declaration by a New York court that a judgment will not be enforced in New York. We believe that the motivation for obtaining some of these foreign libel decisions is not to enforce the judgment in New York, since the expectation is often that no judgment would be enforced under existing CPLR §5304, but rather to expose the publisher to possible enforcement of the judgment in other countries. A New York declaration that the judgment will not be enforced in New York would have no impact on such foreign-country enforcement.

Finally, the Advisory Committee has long expressed a general disapproval of retroactive legislation. This bill would apply to any persons who obtained a judgment in defamation proceedings outside the United States "prior to and/or after the effective date of this subdivision." This appears to be special legislation designed to favor the losing plaintiff in the Ehrenfeld decision and therefore gives the legislation an aura of a special bill, rather than a bill designed to protect the population at large.

As noted above, the Committee is cognizant of the chilling effect that foreign libel judgments can have on authors publishing in the United States. The Committee believes, however, that this issue is better dealt with on a national, government-to-government, level through an international convention or treaty and not through a bill such as this one which allows New York to turn its back wholesale on foreign libel judgments.

Thank you for giving us the opportunity to comment on this bill.

Respectfully submitted,



George F. Carpinello
Chair, Advisory Committee on Civil Practice

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