Room 549
Legislative Office Building
Albany, New York 12248
518-455-5172; 518-455-5479 (fx.)

77-40 170th Street
Fresh Meadows, New York 11366
718-820-0241; 718-820-0414 (fx.)
lancmanr@assembly.state.ny.us

THE ASSEMBLY
STATE OF NEW YORK

RORY I. LANCMAN
Twenty-Fifth District
Queens County

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Memo

To:
Mariya S. Treisman, Esq.
Assistant Counsel to the Governor

Clayton Rivet, Esq.
Assembly Codes Committee

Richard Ancowitz, Esq.
Assembly Judiciary Committee

Joseph Sorbero
Legislative Director for Senator Dean Skelos

Seth Agata, Esq.
Assembly Program and Counsel

J.R. Drexelius, Esq.
Counsel to Senator Volker

Marty Rosenbaum, Esq.
Assembly Codes Committee

Kevin Engel, Esq.
Counsel to Senator John DeFrancisco

Re: A.9652a/S.6687b (the "Libel Terrorism Protection Act")

Date: March 12, 2008

Introduction

This memo discusses the issues raised in the letter from George F. Carpinello, chairman of the Chief Administrative Judge's Advisory Committee on Civil Practice, opposing the above referenced legislation, which was sent to Assembly and Senate staff on the Codes and Judiciary committees, and the Governor's staff, but not to the committee chairs themselves or to the sponsors of the legislation (or even to the sponsors' staff). Like me, you might also have had the pleasure of first reading these objections articulated in the New York Law Journal the day before Mr. Carpinello's letter was distributed.

Simply put, the Advisory Committee's objections are baseless and reflect a fundamental misunderstanding of the bill and the pernicious problem it addresses.

That problem is the intentional chilling of New York authors in New York through libel lawsuits in foreign jurisdictions with less free speech protection. This phenomenon is sometimes called "libel tourism," or "libel terrorism" when deployed, as it increasingly is, as a tactic to stifle reporting on terrorist financing, networks and ideology. The tactic inhibits New York authors because it prevents them from freely working as though they are protected by the First Amendment. Instead, New York authors must constantly worry about foreign libel lawsuits and consider whether to tailor their work to the more restrictive free speech standards of other countries.

Discussion

The bill attempts to mitigate the effects of libel terrorism in New York by: (1) permitting New York courts to exercise personal jurisdiction over foreign defendants (i.e., the foreign libel plaintiffs) in declaratory judgment actions brought by New York residents who seek to have foreign libel judgments against them deemed unenforceable in New York; and (2) mandating that New York courts not enforce foreign libel judgments unless the foreign laws under which they were obtained satisfy the free speech requirements of the U.S. and New York Constitutions.

None of the Advisory Committee's five objections can withstand scrutiny and analysis.

1.
The Bill Is Constitutional

The Advisory Committee's first objection, that the bill is unconstitutional because it does not meet federal due process requirements, is based on a misreading of the bill and is meritless. The bill on its face only purports to grant jurisdiction "to the fullest extent permitted by the United States Constitution," and New York courts already engage in a constitutional analysis in determining whether they have personal jurisdiction over a foreign defendant. See, e.g., Metro. Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996) (courts first examine whether jurisdiction exists under New York's long-arm statute and then assess whether the exercise of jurisdiction would be constitutional). Thus, in deciding whether there is jurisdiction under proposed CPLR 302(d), a court would not stop with the language of the statute, but would examine the constitutional question itself.

The bill is drafted so that the exercise of jurisdiction under it would comport with constitutional due process. The Advisory Committee asserts repeatedly -- and incorrectly -- that the bill would grant jurisdiction over a foreign defendant merely because that defendant obtained a foreign libel judgment against a New York resident. This is not true. Under the bill, there would be jurisdiction only if the work in question was published in New York, and the New York resident had assets or would have to take action in New York in order to satisfy the foreign libel judgment. These requirements are designed to ensure that jurisdiction would exist only over those foreign defendants who had established the constitutionally necessary minimum contacts with New York by targeting a New York resident and New York publication and by seeking to affect that New York resident's assets or behavior in New York.

For this reason, the Advisory Committee's attempt to distinguish Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 433 F.3d 1199 (9th Cir. 2006) (en banc), also fails. The Advisory Committee asserts that the Ninth Circuit held that there was personal jurisdiction in that case because the foreign judgment ordered Yahoo! to take action in California, whereas the bill here provides jurisdiction solely because of the existence of a foreign defamation judgment. This is false -- there would only be jurisdiction under the bill if the foreign libel judgment also required the New York resident to take action in New York, or the New York resident had assets in New York that might be used to satisfy the judgment. The bill would, in short, confer jurisdiction only in situations similar to that in Yahoo!, where the Ninth Circuit held that the exercise of personal jurisdiction was constitutionally permissible.

The Advisory Committee's constitutional arguments are puzzling given the recent decision by the New York Court of Appeals in Ehrenfeld v. Mahfouz, where the Court strongly implied that a bill of this nature would be constitutional. In Ehrenfeld, a New York author, Rachel Ehrenfeld, sought a declaratory judgment that an English libel judgment obtained by Saudi financier Khalid bin Mahfouz was unenforceable in New York on federal and New York constitutional grounds. The Court of Appeals held that there was no jurisdiction over Mahfouz under New York's existing long-arm statute, which does not grant personal jurisdiction to the full extent of the U.S. Constitution. Nevertheless, the Court acknowledged the "pernicious" phenomenon of libel terrorism and explicitly suggested that the exercise of jurisdiction over Mahfouz would have passed constitutional muster. Ehrenfeld v. Mahfouz, 2007 WL 4438940, at *3, 6 (N.Y. Dec. 20, 2007). See also Ehrenfeld v. Mahfouz, 06-2228-cv, 2008 WL 553560, at *1 (2d Cir. March 3, 2008). The Advisory Committee is conjuring constitutional problems that New York's highest court did not seem to think exist.

2.
The Bill Does Not Impermissibly Favor New York Residents

The Advisory Committee's second objection, that there is no rational basis for distinguishing between New Yorkers and non-New Yorkers in the bill, is also baseless. The reason for distinguishing between New Yorkers and non-New Yorkers is to ensure that the exercise of jurisdiction would meet constitutional due process requirements. By limiting its scope to foreign defendants who have obtained libel judgments against New York residents, the bill ensures that courts will exercise personal jurisdiction only in situations where the foreign defendants have established the necessary minimum contacts with New York by targeting the speech of New Yorkers. If the statute applied to non-New York residents -- even those who had assets in New York and whose work had been published in New York -- it arguably would raise the constitutional problems articulated by the Advisory Committee in its first objection, because it would be less clear that the foreign libel plaintiffs had reached out to target an author's work in New York.

3.
The Bill Is Not Overbroad

The Advisory Committee's third objection mischaracterizes existing procedures for determining whether a foreign judgment is unenforceable in New York on public policy grounds. The Advisory Committee erroneously asserts that courts traditionally analyze particular judgments to determine whether they are unenforceable, as opposed to examining whether the laws under which

they have been obtained contravene New York public policy. This statement is mistaken. In the libel context, New York courts examine the foreign law under which the libel judgment was obtained -- not the particular judgment itself -- in determining whether the judgment is enforceable in New York. See Bachchan v. India Abroad Publications Inc., 154 Misc.2d 228, 231, 585 N.Y.S.2d 661, 662 (Sup. Ct. N.Y. Co. 1992) ("Accordingly, the libel law applied by the High Court of Justice in London in granting judgment to plaintiff will be reviewed to ascertain whether its provisions meet the safeguards for the press which have been enunciated by the courts of this country."). Section 5304(8) of the bill merely codifies this existing procedure.

Equally misguided is the Advisory Committee's statement that courts should review particular foreign libel judgments, as opposed to the laws under which they were obtained. In urging courts to examine particular libel judgments, the Advisory Committee is essentially asking courts to retry the libel cases that resulted in the foreign libel judgments at issue. To use the Advisory Committee's own example, a New York court could only determine whether an English libel judgment was based on intentionally defamatory speech, and therefore also libelous in New York, by examining the underlying facts of the case. The process advocated by the Advisory Committee would substantially drain judicial resources and undercut the efficiency of judgment enforcement procedures.

4.
The Bill Accomplishes Its Stated Purpose

The Advisory Committee's fourth objection, that "[t]he 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," is purely speculative and reveals a lack of understanding of the libel terrorism phenomenon.[1] The Advisory Committee assumes, without any factual basis, that the motivation of foreign libel plaintiffs is simply to enforce their judgments against New York authors in foreign countries. In fact, many libel terrorists file lawsuits against New York authors in foreign jurisdictions not because they expect to enforce those judgments abroad, but rather because they want to chill the New York authors in New York. Libel terrorists who know that they could not prevail in libel suits in New York go to foreign jurisdictions with less protection for freedom of speech so that they can obtain easy judgments there that will then hang over the heads of New York authors and publishers. Some libel plaintiffs, like Khalid bin Mahfouz in Ehrenfeld v. Mahfouz, then refrain from attempting to enforce their judgments in New York so that New York authors will remain in a continuing state of uncertainty as to the enforceability of the judgments against them. The end result of this Sword of Damocles is a chilling effect: New York authors curb their speech so that they do not run afoul of libel laws in countries that do not provide as much protection for free speech as does the United States, or they are unable to find media outlets willing to publish their work.

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1. It is also an inappropriate disregard of the legislature's policymaking judgment and outside the competence of the Chief Judge's Advisory Committee on Civil Practice, as is the suggestion "that this issue is better dealt with on a national, government-to-government, level through an international convention or treaty." (I will be sure to send a copy of the bill to the State Department and the United Nations. In the meantime, we'll act to protect New York's reporters, authors and publishers from libel terrorism by passing this bill.)

The bill would alleviate this problem by enabling New York authors to obtain declaratory judgments that the foreign libel judgments are unenforceable in New York. While these declaratory judgments would have no effect on the foreign libel judgments in foreign countries, they would at least give New York authors the benefit of knowing that they can work in New York as though they have the full protection of the First Amendment and New York Constitution.

5.
The Bill Is Not A "Private Bill"

The Advisory Committee's final objection, that the proposed legislation amounts to a private bill, has no basis. While the Ehrenfeld case received significant attention, the overall problem of libel terrorism is greater than Rachel Ehrenfeld. As the Second Circuit Court of Appeals stated when it certified the question of whether there was personal jurisdiction over Mahfouz to the New York Court of Appeals: "the question certified is significant, implicates important public policy for the State of New York, and is likely to be repeated." Ehrenfeld v. Mahfouz, 489 F.3d 542, 549 (2d Cir. 2007). The Ehrenfeld case was indeed a catalyst for the bill, as often happens as litigation points out the need for remedial legislation. But the bill is not retroactive to benefit Ehrenfeld alone. It applies -- as it should -- to all existing and future foreign libel judgments.

Conclusion

Libel terrorism is a growing phenomenon that not only harms New York authors by chilling their speech, but also harms the general public by cutting off their access to important information that the threat of foreign libel judgments might prevent from being published. The bill would help solve this problem by allowing New York authors to obtain relief from the threat of foreign libel judgments in New York. The Advisory Committee's approach would allow the problem to fester and worsen, and offers no remedy. The Advisory Committee's objections to the bill are meritless, and the bill should move forward to enactment.

Rory Lancman

cc: Speaker Sheldon Silver

Assemblywoman Helene Weinstein
Chair, Judiciary Committee

Assemblyman Joseph Lentol
Chair, Codes Committee

The Honorable Ann Pfau
NYS Chief Administrative Judge

Senator Dean Skelos
Deputy Majority Leader

Senator John DeFrancisco
Chair, Judiciary Committee

Senator Dale Volker
Chair, Codes Committee