COMMITTEE ON COMMUNICATIONS AND MEDIA LAW
THE LIBEL TERRORISM PROTECTION ACT

S.6687 B **Senator Skelos**
A.9652 **M of A Lancman**

AN ACT relating to personal jurisdiction and enforceability of certain foreign judgments in cases involving defamation.

THIS BILL IS APPROVED

The New York City Bar strongly urges the passage of S.6687/A.9652 ("the Bill"), which will help secure the free speech rights of New York authors and publishers by making modest amendments to two sections of the Civil Practice Law and Rules ("CPLR"): the long-arm statute and the provision regarding the enforcement of foreign judgments. The Bill attacks the problem that arises when plaintiffs go into foreign countries that do not protect free speech to the extent that it is protected in the United States and win libel judgments against authors they wish to silence.

The Bill would amend the New York long-arm statute, CPLR § 302, to provide for jurisdiction over a foreign libel plaintiff who secures a foreign defamation judgment when the author or the underlying work has sufficient ties to New York State. This jurisdiction would be limited to an action by the publisher or author seeking a declaration that the foreign judgment is not enforceable. This amendment to CPLR § 302 would respond to the decision in *Ehrenfeld v. Bin Mahfouz*,[1] in which the Court of Appeals held that the long-arm statute, as currently written, did not provide jurisdiction in such a case. Briefly stated, the facts of *Ehrenfeld* are as follows: Khalid Bin Mahfouz, a Saudi national, sued Rachel Ehrenfeld, a New York author, for libel after she published a book in which she stated that Bin Mahfouz financially supported terrorist groups prior to September 11, 2001. Bin Mahouz sued Ehrenfeld in England, even though the book was not published or offered for sale there, and obtained a default judgment against her. Ehrenfeld

[1] 9 N.Y.3d 501, 2007 WL 4438940 (Dec. 20, 2007).

then brought a declaratory judgment action in New York seeking a declaration that the English judgment was unenforceable because English law provides weaker free expression protections than those under New York and United States law.[2] The Court of Appeals ruled that there was no jurisdiction over Bin Mahfouz for such an action.[3]

Among those who would benefit most from the Bill are authors and publishers who are the victims of "libel tourism," the practice of plaintiffs, such as Bin Mahfouz, suing in foreign jurisdictions that have no legitimate connection to the challenged publication and that provide weaker free speech and free press protections. Increasingly, wealthy litigants implicated by hard-hitting investigative reporting have elected to file suit in countries with plaintiff-friendly libel laws to attack the credibility of American authors and journalists, many of whom reside and work in New York.[4] Libel tourism sends an unmistakable message to other writers and publishers that investigative journalism and reporting on critical issues such as the financing of terrorism will expose journalists to legal, professional and financial perils. In *Ehrenfeld*, the Court of Appeals acknowledged the problem of libel tourism but stated that the "arguments regarding the enlargement of CPLR 302(a)(1) to confer jurisdiction upon 'libel tourists' must be directed to the Legislature."[5] The Bill is a response to that invitation.

The amendment to the long-arm statute would fill a significant gap in New York's free speech protections. If a defamation plaintiff tries to enforce a foreign defamation judgment here, a New York court can refuse to enforce the judgment.[6] The federal courts follow a similar rule.[7] But under current law, as set forth by the Court of Appeals in *Ehrenfeld*, a New Yorker sued for defamation abroad must wait for the foreign libel plaintiff to take action enforcing the judgment in New York. This limitation permits the foreign plaintiff to use the foreign judgment to chill future criticism while also ensuring that a New York court will not have jurisdiction over him to declare the judgment unenforceable. In many cases, the libel plaintiff never intends to enforce the foreign judgment. Instead, he simply wants to use it to chill criticism of him. For example, Bin Mahfouz has taken no actions to enforce the default judgment he obtained against Ehrenfeld, but maintains a website where he has posted information about this suit and suits he has brought against other authors and publishers. The website also contains a warning designed to chill future criticism of him: "Khalid Bin Mahfouz and his family reserve their rights against the

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[2] 2007 WL 4438940 at *2-4.

[3] *Id.* at *4.

[4] *See, e.g., American Starts Queue to Sue in Libel-Friendly Belfast*, Sunday Times, June 25, 2006; *More Celebrities Suing Papers in UK*, The Guardian, Aug. 4, 2006.

[5] 2007 WL 443894 at *4 n.5.

[6] *See, e.g., Bachchan v. India Abroad Publications Inc.*, 154 Misc. 2d 228 (Sup. Ct. N.Y. County 1992) (declining to enforce an English defamation judgment because it would be repugnant to public policy to enforce a judgment imposed without First Amendment protections).

[7] *See, e.g., Matusevitch v. Telnikoff*, 877 F. Supp. 1, 4 (D.D.C. 1995) (same), *aff'd*, 159 F.3d 636 (D.C. Cir. 1998).

authors, editors, publishers, distributors and printers of these publications [and] they expressly reserve their rights against any person or entity which repeats any of the erroneous allegations contained in these or any other publications."[8]

If enacted, the Libel Terrorism Protection Act would allow the New York resident to clear away the *in terrorem* impact of these foreign libel judgments. The New York resident could take the initiative, giving New York courts jurisdiction over the foreign libel plaintiff, even if the foreign plaintiff does not try to enforce the judgment here.[9] The New York resident then could obtain a judgment from a New York court stating that the foreign judgment is unenforceable as against public policy. These declaratory judgments would be powerful checks against libel tourists' attempts to chill criticism and investigative reporting by New York authors and publishers.

The Bill strikes the proper balance between providing protection for New York authors and publishers on the one hand and not opening our courts to declaratory judgment actions with insufficient ties to this State on the other hand. The Bill provides for jurisdiction over declaratory judgment actions only if they are brought by New York residents; the publication at issue was published in New York; and the New York resident "has assets in New York which might be used to satisfy the foreign judgment" or "may have to take actions in New York to comply with the foreign judgment."[10] To avoid due process problems, the Bill also provides that it is conferring jurisdiction only "to the fullest extent permitted by the United States Constitution."[11]

The Legislature previously has recognized that defamation suits are unique, and that the long-arm statute should reflect this. CPLR § 302(a)(2) and (a)(3) presently provide for long-arm jurisdiction over non-domiciliaries who commit torts in New York or who commit torts outside New York that cause injuries in this state. "[C]ause[s] of action for defamation of character" are excluded: An author or publisher who resides elsewhere cannot be made subject to the jurisdiction of the New York courts simply because a challenged statement was made in New York or allegedly caused an injury in New York.[12] "'In incorporating this exception . . . the Advisory Committee intended to avoid unnecessary inhibitions on freedom of speech or the press. These important civil liberties are entitled to special protections lest procedural burdens shackle them. It did not wish New York to force newspapers published in other states to defend

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[8] *See* http://www.binmahfouz.info/faqs_4.html.

[9] Bill § 3.

[10] *Id*. The latter clause addresses foreign judgments that require a New York author or publisher to issue a retraction or apology, to make changes to future editions, or to destroy unsold copies of a work.

[11] *Id.*

[12] CPLR §§ 302(a)(2), 302(a)(3).

themselves in states where they had no substantial interests, as the New York Times was forced to do so in Alabama [in *New York Times v. Sullivan*.]'"[13]

The same concern for freedom of expression that led the Legislature to codify these exceptions to CPLR § 302(a)(2) and (a)(3) should lead the Legislature to enact the Bill. By providing New York authors and publishers with a mechanism to challenge foreign defamation judgments, the Bill will help ensure that New York remains a center for vigorous debate and investigative journalism, "a cultural center for the Nation . . . [and] a hospitable climate for the free exchange of ideas."[14]

The Bill is consistent with New York statutory and decisional law regarding the enforcement of foreign money judgments. Article 53 of the CPLR, enacted in 1970, is New York's version of the Uniform Foreign Money-Judgments Recognition Act. Article 53 "codif[ied] and clarif[ied]" the existing New York decisional law with respect to recognition and enforcement of foreign money judgments.[15] Among the codified principles is the long-standing rule that New York courts may decline to recognize and enforce a judgment where "the cause of action on which the judgment is based is repugnant to the public policy of this state."[16] The Bill would amend CPLR § 5304 to state explicitly that a court may decline enforce a foreign defamation judgment if it was obtained in a country that provides fewer free speech protections than those guaranteed by the New York and United States constitutions.[17]

The common-law public policy exception to recognition, while narrow, remains viable. It has been applied in particular to foreign judgments whose enforcement in New York would be contrary to American constitutional principles. Prior to recent years, the most common example of this were judgments that arose from orders of foreign governments that confiscated property without compensation.[18] More recently, courts in New York and elsewhere have held that defamation judgments should not be enforced in the United States where such judgments are "antithetical to the protections afforded to the press by the US Constitution."[19]

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[13] *Legros v. Irving*, 38 A.D.2d 53, 55 (1st Dep't 1971) (quoting 1 Weinstein, Korn & Miller N.Y. CIVIL PRACTICE ¶ 302.11).

[14] *Immuno, A.G. v. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991).

[15] *CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V.*, 100 N.Y.2d 215, 221 (2003).

[16] CPLR § 5304(b)(4).

[17] Bill § 2.

[18] *See, e.g., Republic of Iraq v. First National City Bank*, 353 F.2d 47, 51-52 (2d Cir. 1966); *Vladikavkazsky Ry. Co. v. New York Trust Co.*, 263 N.Y. 369, 378 (1934); *Plesch v. Banque Nationale de la Republique d' Haiti*, 273 A.D. 224 (1st Dep't), *aff'd*, 298 N.Y. 573 (1948).

[19] *Bachchan*, 154 Misc. 2d at 230-31 (citing CPLR § 5304(b)(4) in declining to enforce English libel judgment against foreign news agency operating in New York). *See also Dow Jones & Co. v. Harrods, Ltd.*, 237 F. Supp. 2d 394 (S.D.N.Y. 2002), *aff'd*, 346 F.2d 357 (2d Cir. 2003); *Yahoo!, Inc. v. La Ligue Contre le Racisme et l'Anti-Semitisme*, 169 F. Supp. 2d 1181 (continued…)

By amending Article 53 of the CPLR, the Bill would codify this case law, and facilitate its continued application. The Bill is not a departure from the principles of Article 53, but an application of New York's long-standing policy that judgments based on law that is contrary to American constitutional principles should not be recognized in this State.

Seventeen years ago, the Court of Appeals stated in *Immuno, A.G. v. Moor-Jankowski* that "the expansive language of our State constitutional guarantee, its formulation and adoption prior to the Supreme Court's application of the First Amendment to the States * * * the recognition in very early New York history of a constitutionally guaranteed liberty of the press * * * and the consistent tradition in this State of providing the broadest possible protection to 'the sensitive role of gathering and disseminating news of public events' * * * all call for particular vigilance by the courts of this State in safeguarding the free press against undue interference."[20] *Ehrenfeld*'s result is inconsistent with *Immuno, A.G*. and is inconsistent with New York's longstanding protection for freedom of expression. Enacting the Bill would allow the Legislature to provide this protection for New York authors and publishers that the Court of Appeals could not provide them.

(N.D.Cal. 2001), *dismissed for lack of ripeness*, 433 F.2d 1199 (9th Cir. 2006), *cert. denied*, 126 S.Ct. 2332 (2006); *Telnikoff v. Matsuevich*, 347 Md. 561 (1997).

[20] *Immuno, A.G.*, 77 N.Y.2d at 249 (asterisks in original).