

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Judiciary Committee

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BILL: SB 1066

INTRODUCER: Senator Aronberg

SUBJECT: Foreign Defamation Judgments/Nonrecognition

DATE: April 14, 2009

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Daniell	Maclure	JU	<b>Favorable</b>
2.			RC	
3.				
4.				
5.				
6.				

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**I. Summary:**

This bill provides that a Florida court is not required to recognize a foreign defamation judgment, unless the court determines that the defamation law applied in the foreign court's adjudication provided at least as much constitutional free speech protection as would be provided in a Florida court. Additionally, the bill provides Florida courts personal jurisdiction over any person who obtains a foreign defamation judgment against specified persons.

This bill substantially amends section 55.605, Florida Statutes. This bill creates section 55.6055, Florida Statutes.

**II. Present Situation:**

**Foreign Judgments**

Under the full faith and credit clause of the United States Constitution, judgments of any state or federal court within the United States are automatically enforceable in any other state or federal court.<sup>1</sup> However, the enforcement of a foreign judgment is not subject to the full faith and credit clause. Instead foreign judgments are generally governed by the principles of comity. Comity is “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”<sup>2</sup>

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<sup>1</sup> U.S. CONST. art. IV, s. 1.

<sup>2</sup> *Int'l Transactions, LTD. v. Embotelladora Agral Regiomontana*, 347 F.3d 589, 593 (5th Cir. 2003) (quoting *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895)).

The purpose of granting comity is similar to the application of res judicata in that “once the parties have had an opportunity to present their cases fully and fairly before a court of competent jurisdiction, the results of the litigation process should be final.”<sup>3</sup> Although the principles of comity generally apply to foreign judgments, a United States court may deny recognition of the foreign judgment if it is inconsistent with the public policies of the forum state.<sup>4</sup> Currently, there is no federal law governing the recognition or enforcement of foreign judgments.<sup>5</sup>

In 1962, the National Conference of Commissioners on Uniform State Laws (NCCUSL)<sup>6</sup> developed the Uniform Foreign Money-Judgments Recognition Act (UFMJRA), which recognized the general principles of comity with respect to foreign money judgments. In its prefatory note, the NCCUSL stated:

The Act states rules that have long been applied by the majority of courts in this country. In some respects the Act may not go as far as the decisions. The Act makes clear that a court is privileged to give the judgment of the court of a foreign country greater effect than is required to do by the provisions of the Act. . . . Because the Act is not selective and applies to judgments from any foreign court, the Act states that judgments rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law shall neither be recognized nor enforced.

The Act does not prescribe a uniform enforcement procedure. Instead, the Act provides that a judgment entitled to recognition will be enforceable in the same manner as the judgment of a court of a sister state which is entitled to full faith and credit.<sup>7</sup>

At least 29 states, plus the District of Columbia, have adopted the UFMJRA.<sup>8</sup> Florida adopted the UFMJRA in 1994. The UFMJRA, codified in ss. 55.601-55.607, F.S., applies “to any out-of-country foreign judgment<sup>9</sup> that is final and conclusive<sup>10</sup> and enforceable where rendered.”<sup>11</sup> Out-of-country foreign judgments:

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<sup>3</sup> *Id.*

<sup>4</sup> *Telnikoff v. Matusевич*, 702 A.2d 230, 237 (Md. 1997); see also Louis M. Solomon, Proskauer Rose LLP, *Ch. 6 The Role of Comity: II. Grounds for Granting Comity*, <http://www.proskauerguide.com/litigation/6/II/> (last visited April 8, 2009).

<sup>5</sup> See *Universal Trading & Investment Co. v. Kiritchenko*, 2007 WL 2669841, \*10 (N.D. Cal. 2007); Violeta I. Balan, *Recognition and Enforcement of Foreign Judgments in the United States: The Need for Federal Legislation*, 37 J. MARSHALL L. REV. 229, 234 (2003).

<sup>6</sup> The NCCUSL is a non-profit organization comprised of state commissions on uniform laws from each state and certain U.S. territories. The purpose of the NCCUSL is to “study and review the law of the states to determine which areas of law should be uniform. The commissioners promote the principle of uniformity by drafting and proposing specific statutes in areas of the law where uniformity between the states is desirable.” Uniform Law Comm’n, Nat’l Conference of Comm’rs on Uniform State Laws, *Organization*, <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=11> (last visited April 8, 2009).

<sup>7</sup> Nat’l Conference of Comm’rs on Uniform State Laws, *Uniform Foreign Money-Judgments Recognition Act*, 1 (1962), available at [http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920\\_69/ufmjra62.pdf](http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/ufmjra62.pdf) (last visited April 8, 2009).

<sup>8</sup> Uniform Foreign Money-Judgments Recognition Act 1962, *Table of Jurisdictions Wherein Act has Been Adopted* (2009) (on file with the Senate Committee on Judiciary).

<sup>9</sup> Section 55.602, F.S., defines an “out-of-country foreign judgment” as “any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine, or other penalty.”

<sup>10</sup> An out-of-country foreign judgment is conclusive if “it grants or denies recovery of a sum of money.” Section 55.604, F.S.

[C]an be recognized and enforced in this state by filing an authenticated copy of the judgment with the clerk of the court and recording it in the public records in the county where enforcement is sought. The clerk must give notice to the judgment debtor at the address provided by the judgment creditor, and the debtor has thirty days in which to file objections to recognition of the judgment. If no objections are filed, the clerk records a certificate to that effect.

Upon application by either party, the circuit court shall conduct a hearing and enter an appropriate order granting or denying recognition in accordance with the terms of the UFMJRA. That is an appealable order. After the clerk files the certificate or the court enters an order, the judgment “shall be enforceable in the same manner as the judgment of a court of this state.”<sup>12</sup>

Section 55.605, F.S., provides a number of grounds under which a Florida court may refuse to recognize a foreign judgment. An out-of-country foreign judgment is not considered “conclusive” and shall not be recognized if:

- The judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
- The foreign court did not have personal jurisdiction over the defendant; or
- The foreign court did not have jurisdiction over the subject matter.<sup>13</sup>

A court may choose not to recognize an out-of-country foreign judgment if:

- The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him or her to defend;
- The judgment was obtained by fraud;
- The cause of action or claim for relief on which the judgment is based is repugnant to the public policy of this state;
- The judgment conflicts with another final and conclusive order;
- The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court;
- In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action; or
- The foreign jurisdiction where judgment was rendered would not give recognition to a similar judgment rendered in this state.<sup>14</sup>

### **Foreign Defamation Judgments**

Defamation is defined as “a communication that ‘tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or

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<sup>11</sup> Section 55.603, F.S.

<sup>12</sup> *Le Credit Lyonnais, S.A. v. Nadd*, 741 So. 2d 1165, 1166 (Fla. 5th DCA 1999).

<sup>13</sup> Section 55.605(1), F.S.

<sup>14</sup> Section 55.605(2), F.S.

dealing with him.”<sup>15</sup> The Second Restatement of Torts<sup>16</sup> provides four elements to establish a cause of action for defamation:

- (a) a false and defamatory statement concerning another;
- (b) an unprivileged publication to a third party;
- (c) fault amounting at least to negligence on the part of the publisher; and
- (d) either actionability of the statement irrespective of the special harm or the existence of special harm caused by the publication.<sup>17</sup>

In the United States, defamation actions are subject to First Amendment protections. The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.<sup>18</sup>

Florida’s right to free speech and press is more specific than its federal counterpart. Article I, section 4 of the Florida Constitution provides:

Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

Based on the First Amendment, the United States Supreme Court has placed limitations on when a person may sue for defamation. For example, if the plaintiff is a public official or public figure, the plaintiff must prove that the defamatory statement was published with actual malice.<sup>19</sup> Additionally, in the United States only one defamation action may be brought for mass communications, a public figure or public official plaintiff may not receive punitive damages if the plaintiff cannot prove actual malice, and most “opinions” are protected speech.<sup>20</sup>

The standards, however, for filing a defamation action vary around the world. For example, defamation law in England is significantly different than in the United States. Even after recent

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<sup>15</sup> Robin Baker Perkins, *The Truth Behind False Light – A Recommendation for Texas’ Re-Adoption of False Light Invasion of Privacy*, 34 TEX. TECH L. REV. 1199, 1202 (2003) (quoting RESTATEMENT (SECOND) OF TORTS s. 559).

<sup>16</sup> The Restatement of Torts is one of several influential treatises that describe the law in a given area and guide its development. BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>17</sup> RESTATEMENT (SECOND) OF TORTS s. 558.

<sup>18</sup> U.S. CONST. amend. I.

<sup>19</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (newspaper cannot be sued for libel by a public official absent a showing of actual malice); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967) (public figures must show actual malice in a defamation action); *But see Gertz v. Robert Walsh, Inc.*, 418 U.S. 323 (1974) (newspaper publishing defamatory statements about an individual who is neither a public official or public figure may not claim a constitutional privilege against liability).

<sup>20</sup> Raymond W. Beauchamp, *England’s Chilling Forecast: The Case for Granting Declaratory Relief to Prevent English Defamation Actions from Chilling American Speech*, 74 FORDHAM L. REV. 3073, 3085-86 (May 2006).

reform in England, the defendant carries the burden of proof regarding the truth, the court will not consider the degree of fault by the publisher, there is no separate treatment based on the plaintiff's status, proof of damages is not needed, and mass communications are actionable more than once.<sup>21</sup>

This disparity between American and British libel law has led to a phenomenon called "libel tourism." Libel tourism has been defined as "choosing to sue in a forum with plaintiff-friendly libel laws."<sup>22</sup> For example, a resident of country A sues a resident of country B, who allegedly defamed the plaintiff in country B, in a court in a third country (C) because its law of defamation is more favorable to plaintiffs than the law of the country where the statement was made. England is the primary destination for libel tourism; however, Singapore, New Zealand, Kyrgyzstan, and Australia have also been considered plaintiff-friendly.<sup>23</sup>

In 1997, the Maryland Court of Appeals held that a foreign libel judgment was repugnant to the public policy of Maryland and therefore the court did not enforce it.<sup>24</sup> The court explained the differences between English defamation law and Maryland's defamation law and found that the "principles governing defamation actions under English law, which were applied to *Telnikoff's* libel suit, are so contrary to Maryland defamation law, and to the policy of freedom of the press underlying Maryland law, that *Telnikoff's* judgment should be denied recognition under principles of comity."<sup>25</sup>

Ten years later, the United States Court of Appeals for the Second Circuit specifically found that "[f]oreign judgments that impinge on First Amendment rights will be found to be 'repugnant' to public policy."<sup>26</sup> The court set forth a two-step analysis for determining whether a foreign libel judgment is repugnant to public policy: "(1) identifying the protections deemed constitutionally mandatory for the defamatory speech at issue, and (2) determining whether the foreign libel laws provide comparable protection."<sup>27</sup>

Recently, there has been an attempt to create legislation to address libel tourism. Two attempts at the federal level have failed. First, H.R. 6146 was introduced in the United States House of Representatives in May 2008. This bill amended title 28 of the United States Code to prohibit a domestic court from recognizing or enforcing a foreign judgment for defamation that is based upon a publication concerning a public figure or matter of public concern, unless the domestic court determines that the judgment is consistent with the First Amendment to the U.S. Constitution.<sup>28</sup> This bill passed the House, but was not considered by the Senate. The second bill that did not pass was H.R. 5814, titled the Free Speech Protection Act of 2008. This bill was introduced in April 2008, but was never reported by a committee. The following is a summary of H.R. 5814:

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<sup>21</sup> *Id.* at 3091.

<sup>22</sup> *Id.* at 3073.

<sup>23</sup> *Id.* at 3076.

<sup>24</sup> *Telnikoff v. Matusевич*, 702 A.2d 230 (Md. 1997).

<sup>25</sup> *Id.* at 249.

<sup>26</sup> *Sarl Louis Feraud Int'l v. Viewfinder, Inc.*, 489 F.3d 474, 480 (2d Cir. 2007).

<sup>27</sup> *Id.* at 481.

<sup>28</sup> H.R. 6146, 110th Cong. (2008).

Free Speech Protection Act of 2008 – Allows any U.S. person against whom a lawsuit for defamation is brought in a foreign country on the basis of the content of any speech by that person that has been published, uttered, or otherwise disseminated in the United States to bring an action in a U.S. district court against any person who, or entity which, brought the suit, if the speech at issue in the foreign lawsuit does not constitute defamation under U.S. law.<sup>29</sup>

In 2008, New York was successful in passing legislation titled the “Libel Terrorism Protection Act.”<sup>30</sup> The legislation added a new provision in New York’s grounds for non-recognition statute, stating that a foreign country judgment need not be recognized if:

8. the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless the court before which the matter is brought sitting in this state first determines that the defamation law applied in the foreign court’s adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York constitutions.<sup>31</sup>

Additionally, New York added language in its personal jurisdiction over non-resident statute that authorizes the courts of New York to have jurisdiction over the person who obtains a defamation foreign judgment against a resident of New York. Specifically:

(d) Foreign defamation judgment. The courts of this state shall have personal jurisdiction over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of New York or is a person or entity amenable to jurisdiction in New York who has assets in New York or may have to take actions in New York to comply with the judgment, for the purposes of rendering declaratory relief with respect to that person’s liability for the judgment, and/or for the purpose of determining whether said judgment should be deemed non-recognizable . . . provided:

1. the publication at issue was published in New York, and
2. that resident or person amenable to jurisdiction in New York (i) has assets in New York which might be used to satisfy the foreign defamation judgment, or (ii) may have to take actions in New York to comply with the foreign defamation judgment.<sup>32</sup>

### III. Effect of Proposed Changes:

This bill amends s. 55.605, F.S., to provide that a Florida court is not required to recognize an out-of-country foreign judgment if the cause of action resulted in a defamation judgment, unless the Florida court determines that the defamation law applied in the foreign court’s adjudication

<sup>29</sup> H.R. 5814, 110th Cong. (2008), Summary as of 4/16/2008 – Introduced.

<sup>30</sup> 2008 N.Y. Sess. Laws ch. 66 (S. 6687-C) (on file with the Senate Committee on Judiciary).

<sup>31</sup> N.Y. C.P.L.R. s. 5304.

<sup>32</sup> N.Y. C.P.L.R. s. 302(d).

provided at least as much constitutional free speech protection as would be provided by the United States and Florida constitutions.

Additionally, the bill creates s. 55.6055, F.S., providing Florida courts personal jurisdiction over any person who obtains a foreign defamation judgment against any person who:

- Is a resident of this state;
- Is a person or entity amenable to the jurisdiction of this state;
- Has assets in this state; or
- May have to take action in this state to comply with the judgment.

Section 55.6055, F.S., provides Florida courts personal jurisdiction for the purpose of rendering declaratory relief with respect to a person's liability for a foreign defamation judgment and for determining whether the foreign defamation judgment should be considered nonrecognizable under s. 55.605, F.S.

The bill provides that s. 55.6055, F.S., applies to foreign defamation judgments entered before, on, or after the effective date of the bill.

The bill provides an effective date of July 1, 2009.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

##### **D. Other Constitutional Issues:**

This bill provides that s. 55.6055, F.S., created by the bill, applies to all judgments rendered in defamation proceedings outside the United States before, on, or after July 1, 2009. Therefore, for a foreign defamation judgment entered prior to July 1, 2009, Florida courts will have personal jurisdiction over the person who obtained the foreign defamation judgment for purposes of determining whether the judgment should be deemed nonrecognizable or for rendering declaratory relief.

In general, courts will refuse to apply a statute retroactively if it affects substantive rights, liabilities, and duties,<sup>33</sup> impairs vested rights, creates new obligations, or imposes new

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<sup>33</sup> *Progressive Express Ins. Co. v. Menendez*, 979 So. 2d 324 (Fla. 3d DCA 2008).

penalties.<sup>34</sup> However, statutes which do not alter contractual or vested rights, but relate only to remedies or procedure, can be applied retroactively.<sup>35</sup>

Florida courts have recognized that a statute may be retroactively applied if:

- There is clear evidence that the Legislature intended to apply the statute retroactively; and
- Retroactive application is constitutionally permissible.<sup>36</sup>

The bill appears to meet the first prong because the bill states that it will apply to judgments rendered before the effective date of the bill.

In determining whether retroactive application is constitutional, courts have generally held that due process considerations prevent the retroactive abolition of vested rights.<sup>37</sup> This is not an absolute rule, however, because the courts have identified factors that may be considered in determining whether to allow retroactivity. In one case, the Supreme Court weighed three factors in considering the validity of retroactivity:

- The strength of the public interest served by the statute;
- The extent to which the right affected is abrogated; and
- The nature of the right affected.<sup>38</sup>

As a further consideration, the Court has ruled that when “an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof.”<sup>39</sup> There are numerous examples wherein the Court has rejected retroactivity<sup>40</sup> and has approved retroactivity.<sup>41</sup>

The constitutionality of this provision of the bill will likely turn on whether the court believes a party’s substantive rights would be affected by its application.

## V. Fiscal Impact Statement:

### A. Tax/Fee Issues:

None.

<sup>34</sup> *Romine v. Florida Birth Related Neurological Injury Compensation Ass’n*, 842 So. 2d 148, 153 (Fla. 5th DCA 2003).

<sup>35</sup> *Menendez*, 979 So. 2d at 330.

<sup>36</sup> *Metropolitan Dade County v. Chase Fed. Housing Corp.*, 737 So. 2d 494 (Fla. 1999); *Promontory Enterprises, Inc. v. Southern Engineering & Contracting, Inc.*, 864 So. 2d 479 (Fla. 5th DCA. 2004).

<sup>37</sup> *State Dep’t of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1981).

<sup>38</sup> *Id.*

<sup>39</sup> *Lowry v. Parole and Probation Comm’n*, 473 So. 2d 1248 (Fla. 1985).

<sup>40</sup> *State Dep’t of Transportation v. Knowles*, 402 So. 2d 1155 (Fla. 1981); *Rupp v. Bryant*, 417 So. 2d 658 (Fla. 1982); *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995); *Kaiser v. Kolb*, 543 So. 2d 732 (Fla. 1989).

<sup>41</sup> *Dep’t of Agricultural Servs. v. Bonanno*, 568 So. 2d 24 (Fla. 1990); *Metropolitan Dade Co. v. Chase Federal Housing Corp.* 737 So. 2d 494 (Fla. 1999); *Orlando v. Desjardins*, 493 So. 2d 1027 (Fla. 1986); *Lakeland v. Catinella*, 129 So. 2d 133 (Fla. 1961).



**B. Private Sector Impact:**

This bill offers citizens greater protection against libel judgments decided in countries whose laws are inconsistent with the freedom of speech granted by both the federal and state constitutions. The fiscal impact of the bill is indeterminate, however, since it is not known how many people are being subjected to foreign defamation judgments.

**C. Government Sector Impact:**

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.