

Memorandum 2015-50

**Recognition of Tribal and Foreign Court Money Judgments
(Standards of Recognition)**

In this study, the Commission¹ was tasked with reviewing “the standards of recognition of a tribal court or foreign court judgment” under California’s enactment of the 2005 Uniform Foreign Money-Judgments Recognition Act (hereafter, “California’s Uniform Act”; Code Civ. Proc. §§ 1713-1724) and the Tribal Court Civil Money Judgment Act (hereafter, “Tribal Act”; Code Civ. Proc. §§ 1730-1742) and reporting “its findings, along with any recommendations for improvement of those standards.”² In California, the standards of recognition for both foreign and tribal judgments are derived from the 2005 Uniform Foreign-Country Money Judgments Recognition Act (hereafter, “Uniform Act”).³

Under the Uniform Act, foreign money judgments are entitled to recognition unless an exception applies.⁴ Some of the Uniform Act’s exceptions to recognition are mandatory (i.e., the judgment *shall* not be recognized). Others are permissive (i.e., the judgment *need* not be recognized).

This memorandum is the first in what will be a series of memoranda discussing the individual exceptions to recognition for foreign and tribal judgments in California law. This memorandum focuses only on an exception in California’s enactment pertaining to foreign defamation judgments. The exception is not contained in the Uniform Act.

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. 2014 Cal. Stat. ch. 243, § 1 (SB 406 (Evans)).

3. The 2005 Uniform Act is a revision of the earlier 1962 Uniform Foreign Money-Judgments Recognition Act (hereafter, 1962 Uniform Act). Many of the provisions of the 2005 and 1962 Acts are quite similar.

4. See 2005 Uniform Act, § 4(a); 1962 Uniform Act, § 3.

For the purposes of this memorandum, “foreign judgment” refers to a judgment of a court in a foreign country, but not a judgment of a tribal court. The staff uses this convention, which is somewhat at odds with the Uniform Act’s language,⁵ because California has different statutes governing foreign judgments and tribal judgments.

Unless otherwise noted, the statutory citations in this memorandum refer to the Code of Civil Procedure.

CONCERNS ABOUT RECOGNITION OF DEFAMATION JUDGMENTS

In the 2000s, foreign defamation judgments came under increased scrutiny. At the time, there was increasing concern about the situation in which a plaintiff brings a defamation suit in a country with plaintiff-friendly libel laws, regardless of the parties’ contact with the country prior to the lawsuit. This phenomenon is known as “libel tourism.”⁶ England was an especially popular venue for defamation suits, as English law offered both “plaintiff-friendly libel laws and a relatively low bar for personal jurisdiction in libel suits.”⁷

In the United States, there was concern that “U.S. persons, who enjoy relatively strong freedom of speech protections, may experience an undercutting of the rights they enjoy in their home country as a result of a foreign libel suit.”⁸

One case, in particular, that seemed to capture the country’s attention was a British libel suit brought by a Saudi billionaire, Khalid Bin Mahfouz, against a New York author, Rachel Ehrenfeld.⁹ Ehrenfeld wrote a book, published in the United States, that documented Bin Mahfouz’s alleged role in financing terrorism. An English judge allowed the case to proceed in British courts on the basis of the sale of 23 copies of the book to English residents.¹⁰ Ehrenfeld did not defend and was subject to a default judgment, awarding more than \$200,000 in

5. See 2005 Uniform Act, § 2(1)(C).

6. See Anna C. Henning & Vivian S. Chu, Congressional Research Service, Rpt. No. R40497, “Libel Tourism”: Background and Legal Issues 1 (Mar. 5, 2010).

7. *Id.*

8. *Id.* at 16.

9. See *id.* at 2, n. 9 (quoting an article from the *Economist* noting that the Ehrenfeld case is the “best-known” libel tourism case); see also Emily C. Barbour, Congressional Research Service, Rpt. No. R41417, The SPEECH Act: The Federal Response to “Libel Tourism” 4-5 (Sept. 16, 2010).

10. Henning & Chu, *supra* note 6, at 2.

damages.¹¹ In response, Ehrenfeld sought a judgment from the federal district court in New York declaring the British judgment unenforceable.¹²

In the end, the district court dismissed Ehrenfeld's suit due to a lack of personal jurisdiction over Bin Mahfouz. The dismissal prompted legislation in New York that (1) granted its courts jurisdiction to issue declaratory judgments regarding foreign defamation judgments and (2) modified its Uniform Act enactment to include an exception to recognition for foreign defamation judgments.¹³

Following New York, a few states, including California, enacted similar legislation.¹⁴ Congress then enacted the federal SPEECH Act, in 2010.¹⁵ Only one state, Maryland, amended its Uniform Act enactment to address defamation after the SPEECH Act.¹⁶

The SPEECH Act's standards for recognition of foreign defamation judgments appear to be intended to govern recognition of foreign defamation judgments by both state and federal courts.¹⁷ As discussed below, the federal statutes take a different approach to the recognition of foreign defamation judgments than California's current statutes.

FOREIGN DEFAMATION JUDGMENTS

This section of the memorandum discusses the standards for the recognition of defamation judgments from foreign countries. Tribal judgments are addressed in a separate section of this memorandum.¹⁸

Recognition of Foreign Defamation Judgments Under the Uniform Act

The Uniform Act does not address defamation directly. However, prior to the notoriety of libel tourism, foreign defamation judgments were generally denied

11. *Id.*

12. *Id.*; see also Barbour, *supra* note 9, at 9, n. 66 (As of June 20, 2009, Bin Mahfouz had not sought recognition of the judgment in the the state of New York.)

13. See N.Y. CPLR §§ 302(d), 5304(b)(8).

14. See Memorandum 2015-28, pp. 6-7 (discussing non-uniform defamation provisions generally); see also 2009 Cal. Stat. ch. 579 (SB 320 (Corbett)).

15. See Pub. L. No. 111-223, 124 Stat. 2380 (2010). The full title of the Act is the Securing the Protection of our Enduring and Established Constitutional Heritage Act.

16. See Memorandum 2015-28, pp. 6-7.

17. See 28 U.S.C. § 4101(3) (defining domestic court to mean "a Federal court or a court of any State."); see also Barbour, *supra* note 9, at 11-13.

18. See discussion of "Tribal Defamation Judgments," *infra*.

recognition under the Uniform Act's exception for judgments that are repugnant to public policy.¹⁹

Recognition of Foreign Defamation Judgments Under California Law

As indicated above, California amended its Uniform Act to add a defamation-specific exception to recognition. The exception reads as follows:

1716 ...

(c) A court of this state is not required to recognize a foreign-country judgment if any of the following apply:

...

(9) The judgment includes recovery for a claim of defamation unless the court determines that the defamation law applied by the foreign court provided at least as much protection for freedom of speech and the press as provided by both the United States and California Constitutions.

Under California law, the party seeking recognition of the judgment has the burden of establishing that the judgment is within the scope of the Act.²⁰ Once the party seeking recognition has met that burden, the party opposing recognition has the burden of establishing that a ground for nonrecognition exists.²¹ These burdens apply not only for defamation judgments, but for foreign judgments generally.

California also added a provision authorizing California courts to grant declaratory relief to a party seeking nonrecognition of a foreign defamation judgment.

1717 ...

(c) If a judgment was rendered in an action for defamation in a foreign country against a person who is a resident of California or a person or entity amenable to jurisdiction in California, and declaratory relief with respect to liability for the judgment or a determination that the judgment is not recognizable in California under Section 1716 is sought, a court has jurisdiction to determine the declaratory relief action as well as personal jurisdiction over the

19. See Barbour, *supra* note 9, at 8 ("These public policy exceptions have been raised as grounds for nonrecognition in the small number of actions brought in U.S. courts to enforce foreign libel judgments. Even prior to the enactment of the SPEECH Act, courts in such cases generally declined to enforce foreign libel judgments on the basis of the public policy exceptions, concluding that the foreign libel laws upon which the judgments were based are repugnant to the U.S. Constitution.")

20. Section 1715(c) ("A party seeking recognition of a foreign-country judgment has the burden of establishing that the foreign-country judgment is entitled to recognition under this chapter.")

21. Section 1716(d).

person or entity who obtained the foreign-country judgment if both of the following apply:

(1) The publication at issue was published in California.

(2) The person who is a resident, or the person or entity who is amenable to jurisdiction in California, either (A) has assets in California that might be subject to an enforcement proceeding to satisfy the foreign-country defamation judgment, or (B) may have to take actions in California to comply with the foreign-country defamation judgment.

This subdivision shall apply to persons who obtained judgments in defamation proceedings in a foreign country both prior to and after January 1, 2010.

SPEECH Act

In 2010, the federal government enacted the SPEECH Act.²² The SPEECH Act applies specifically to judgments rendered by a “court, administrative body, or other tribunal of a *foreign country*.”²³ Thus, it appears that the SPEECH Act’s restrictions on the recognition of foreign defamation judgments do not apply to tribal judgments.²⁴

Standards for Defamation and Speech Protection

The SPEECH Act effectively precludes the recognition of a foreign defamation judgment unless that judgment is consistent with the First Amendment to the U.S. Constitution and the relevant constitutional provisions and laws in the state where recognition is sought. Specifically, the Act provides:

Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that —

(A) 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 the first amendment to the Constitution of the United States and by the constitution and law of the State in which the domestic court is located; or

(B) even if the defamation law applied in the foreign court’s adjudication did not provide as much protection for freedom of speech and press as the first amendment to the Constitution of the United States and the constitution and law of the State, the party opposing recognition or enforcement of that foreign judgment

22. See Pub. L. No. 111-223, 124 Stat. 2380 (2010).

23. 28 U.S.C. § 4101(3) (defining “foreign court”) (emphasis added).

24. As indicated previously, tribal judgments will be discussed separately later in this memorandum. See discussion of “Tribal Defamation Judgments,” *infra*.

would have been found liable for defamation by a domestic court applying the first amendment to the Constitution of the United States and the constitution and law of the State in which the domestic court is located.²⁵

The burden of showing that the foreign defamation judgment meets one of these standards falls on the party seeking recognition of the foreign judgment.²⁶

The general standard for recognition of defamation judgments in the SPEECH Act does not expressly require that the foreign law be as protective as federal *statutes*. However, the SPEECH Act contains a separate provision that precludes the recognition of a foreign defamation against a provider of an interactive computer service unless that judgment is consistent with Section 230 of the federal Communications Act of 1934.²⁷ Again, the burden of establishing that the foreign judgment meets this standard falls on the party seeking recognition or enforcement of the judgment.²⁸

Rules for Personal Jurisdiction

The SPEECH Act requires, for foreign defamation judgments, that the foreign court's exercise of personal jurisdiction comports with U.S. constitutional due process requirements.²⁹ Although a party who appears before a court is generally deemed to have submitted to that court's exercise of personal jurisdiction,³⁰ the SPEECH Act provides otherwise. In a recognition proceeding, foreign defamation defendants can raise jurisdictional objections in spite of an appearance.³¹

Procedural Provisions

The SPEECH Act contains several provisions that relate to procedural aspects of judgment recognition or nonrecognition in U.S. courts.

First, the SPEECH Act permits an action to recognize a foreign defamation judgment to be removed to federal court in specified circumstances, regardless of the amount in controversy.³² This provision appears to be self-executing. This

25. 28 U.S.C. § 4102(a)(1).

26. *Id.* § 4102(a)(2).

27. *Id.* § 4102(c)(1).

28. *Id.* § 4102(c)(2).

29. *Id.* § 4102(b)(1).

30. See *Ins. Co. of Ireland v. Compagnie Des Bauxites*, 456 U.S. 694, 703 (1982).

31. 28 U.S.C. § 4102(d).

32. *Id.* § 4103.

provision would apply to a recognition proceeding brought in California's courts.

The SPEECH Act also expressly permits a United States person³³ against whom a foreign defamation judgment was entered to seek a declaration in a federal district court that the judgment is not enforceable under the Act.³⁴ This provision only appears to authorize declaratory relief in federal courts.

In addition, the SPEECH Act requires a court, absent exceptional circumstances, to grant attorney's fees to a party opposing recognition if that party prevails based on the standards in the SPEECH Act.³⁵ This provision appears to be self-executing. This provision would apply in recognition proceedings before California courts.

Differences between SPEECH Act and Uniform Act

The SPEECH Act takes a different approach with respect to foreign judgment recognition than California's Uniform Act. This section addresses potentially problematic conflicts between California and federal law.

In particular, these problematic conflicts are cases in which, read in isolation, California's law could lead to a different result than controlling federal law (i.e., recognition vs. nonrecognition). In practice, the courts may seek to harmonize federal and state law — by only recognizing judgments that are entitled to recognition under both state and federal law. Regardless, the facial conflicts between the laws could lead to confusion.

Court Discretion for Judgment Recognition

The SPEECH Act mandates nonrecognition of a foreign defamation judgment that does not meet the Act's standards for speech protection and jurisdiction.³⁶ California's Uniform Act, however, accords the court discretion to recognize such a judgment.³⁷

California's Act is not consistent with federal law, as California's Act, read in isolation, would authorize recognition of a judgment for which federal law

33. *Id.* § 4101(6) (defining United States person).

34. *Id.* § 4104(a)(1).

35. *Id.* § 4105.

36. See, e.g., *id.* § 4102 (a court "shall not recognize or enforce a foreign judgment for defamation unless the domestic court determines that" the defamation standards are met).

37. Section 1716(c) (a court "is not required to recognize a foreign-country judgment" if the defamation exception applies).

mandates nonrecognition. California’s law should mandate nonrecognition of foreign defamation judgments unless the SPEECH Act standards are met.

Level of Speech Protection Required

The SPEECH Act and California’s Uniform Act call for different levels of speech protection.

In California’s Uniform Act, the foreign defamation law is evaluated against the U.S. and California Constitutions.³⁸ In the SPEECH Act, the defamation judgment is evaluated against the U.S. and state Constitutions, *as well as relevant state statutes*.³⁹ In addition, the SPEECH Act evaluates defamation judgments that would be governed by the Communications Act of 1934 (i.e., defamation judgments against an interactive computer service) against the standards in that Act.⁴⁰

The SPEECH Act appears to require a higher level of speech protection than California’s law, as the SPEECH Act incorporates more legal requirements (i.e., state defamation statutes and the federal Communications Act of 1934). Thus, a foreign defamation judgment that would be denied recognition under federal law (e.g., a judgment that is inconsistent to the Communications Act of 1934) could be granted recognition under California’s Act.

Personal Jurisdiction

The SPEECH Act includes special provisions on the exercise of personal jurisdiction in foreign defamation suits.⁴¹ These requirements appear targeted to preclude judgment recognition where the foreign defamation defendant has limited contacts with the foreign country.

The Uniform Act’s personal jurisdiction provisions will be discussed further in a future memorandum.

However, the staff has initially identified one inconsistency between the personal jurisdiction provisions of the Uniform Act and the SPEECH Act. The SPEECH Act preserves a party’s jurisdictional objections in spite of the party’s appearance in the foreign lawsuit.⁴² The Uniform Act, however, deems

38. Section 1717(c)(9).

39. 28 U.S.C. § 4102(a).

40. *Id.* § 4102(c).

41. See discussion of “Rules for Personal Jurisdiction,” *supra*.

42. 28 U.S.C. § 4102(d).

appearance to be categorically sufficient for personal jurisdiction purposes.⁴³ For a foreign defamation suit, this result is at odds with the SPEECH Act.⁴⁴

Required Showing

For a foreign defamation judgment, the SPEECH Act requires the party seeking recognition to make certain showings before the judgment is eligible for recognition.⁴⁵ In particular, the party seeking recognition of a foreign defamation judgment must show that the judgment meets the standards for speech protection and personal jurisdiction in the SPEECH Act.⁴⁶

California's Uniform Act requires no such initial showing for a defamation judgment, although such a showing would likely be made in response to an objection.⁴⁷

To the extent that California law permits recognition of a foreign defamation judgment absent the showings required under the SPEECH Act, California's law appears inconsistent with federal law.

Declaratory Relief

Strictly speaking, the declaratory relief provisions are beyond the scope of the Commission's current assignment, which specifies that the Commission is to review the "standards of recognition" for foreign judgments.⁴⁸ However, as discussed below, some of the proposed reforms may involve conforming changes to the declaratory relief provisions.

More broadly, the Commission likely has authority to review the declaratory relief provisions under its general authority over creditors' remedies.⁴⁹ However, because the Commission's study on standards of recognition is subject to a statutory deadline,⁵⁰ the staff recommends that the other aspects of declaratory relief be addressed at the end of this study, if time remains, or, as a separate

43. See Section 1717(a)(2).

44. See 28 U.S.C. § 4102(d).

45. See, e.g., *id.* § 4102(a)(1) ("[A] domestic court *shall not* recognize or enforce a foreign judgment for defamation *unless* the domestic court determines that ...") (emphasis added).

46. See *id.* § 4102(a)(2), (b)(2), (c)(2).

47. See Sections 1715; 1716(a), (d). California law permits nonrecognition of a foreign defamation judgment "unless the court determines that the defamation law applied by the foreign court provided at least as much protection for freedom of speech and the press as provided by both the United States and California Constitutions." *Id.* § 1716(c)(9).

48. 2014 Cal. Stat. ch. 243, § 1 (SB 406 (Evans)).

49. 2014 Cal. Stat. res. ch. 63.

50. The Commission is directed to report its findings on the standards of recognition on or before January 1, 2017. See 2014 Cal. Stat. ch. 243, § 1.

stand-alone study once the current study is complete. In the course of the staff's work, we have come across a couple of issues that might be worth reviewing later in this study if time permits.⁵¹

Proposed Reforms

As discussed above, there are several problematic differences between the SPEECH Act and California's Uniform Act. Perhaps the simplest way to harmonize California law with the SPEECH Act would be to incorporate the federal rules by reference and eliminate any inconsistent provisions in California law.

Incorporate Speech and Jurisdiction Protections from Federal Law

In some circumstances, California law appears to authorize recognition of a foreign defamation judgment without the party seeking recognition making any showings about the judgment's level of speech protection or the standards for the foreign court's exercise of personal jurisdiction.⁵² Under federal law, absent such showings, a foreign defamation judgment cannot be recognized.⁵³

In addition, federal law appears to require a higher level of speech protection than California law.⁵⁴

These conflicts could be addressed by amending California's Uniform Act, but not without making significant changes. At a minimum, resolving this discrepancy would require incorporating the SPEECH Act's speech and jurisdictional protections, requiring the party seeking recognition to make the initial showings required by the SPEECH Act, and mandating nonrecognition for foreign defamation judgments as specified in the SPEECH Act.

To achieve consistency with federal law, the staff recommends that the SPEECH Act's speech protection and personal jurisdiction requirements be incorporated by reference into California's law. The staff further recommends addressing the federal defamation rules in a separate, new chapter of California law, to avoid significant disruption to the Uniform Act.

51. These issues include the persons entitled to seek such relief under the statute (California's provision and the SPEECH Act appear to differ on this point) and the grant of personal jurisdiction over the defendant (some critics have deemed a similar personal jurisdiction provision in New York law as constitutionally suspect). See 28 U.S.C. § 4104; Section 1727(c); Henning & Chu, *supra* note 6, at 15.

52. See discussion of "Required Showing," *supra*.

53. *Id.*

54. See discussion of "Level of Speech Protection Required," *supra*.

Need for Continuing California's Current Defamation Provision

When California added the defamation provision to its Uniform Act, the federal government had not yet enacted the SPEECH Act.⁵⁵ That federal law appears to obviate the need for California's defamation provision.

As indicated above, the SPEECH Act appears to offer a higher level of speech protection than California's defamation provision.⁵⁶ **For this reason, the staff's initial assessment is that it does not seem necessary to continue California's current defamation provision.**

However, California's defamation exception appears to be broader in one sense. Federal law permits recognition of a foreign defamation judgment in either of the following circumstances: (1) the foreign defamation law was as protective as specified state and federal rules or (2) the facts of the case would have been sufficient to constitute defamation in a domestic court.⁵⁷ California's law does not address the second circumstance. Specifically, where the facts of a foreign defamation judgment would constitute defamation in California, the judgment could still be denied recognition based on the level of speech protection in foreign law generally.⁵⁸ The staff does not see why a foreign judgment would be denied recognition based on an abstract assessment of whether foreign law would sufficiently protect speech in other cases. It is possible that, in practice, a California court would use its discretion to recognize a judgment in these circumstances. **The staff welcomes comment on California law should continue to permit nonrecognition of a foreign defamation judgment in these circumstances.**

Location of Declaratory Relief Provision

The staff considered whether it would be appropriate to also move the declaratory relief provisions for defamation judgments out of California's Uniform Act and into the proposed, separate chapter of California law. Moving this provision would keep all the provisions related to foreign defamation judgments together.

55. The SPEECH Act was enacted in 2010. See Pub. L. No. 111-223, 124 Stat. 2380 (2010). California's defamation provision was enacted in 2009. See 2009 Cal. Stat. ch. 579 (SB 320 (Corbett)).

56. See discussion of "Level of Speech Protection Required," *supra*.

57. See 28 U.S.C. § 4102(a)(1).

58. Section 1716(c)(9).

The staff considered whether there was a good reason to keep the provision in its current location within the Uniform Act and concluded that there was not.⁵⁹ Further, it appears that the declaratory relief provision may have been intended to apply to defamation judgments that solely include injunctive relief, while the Uniform Act is limited to money judgments.⁶⁰

Given the relationship of this provision to the recognition of foreign defamation judgments generally, **the staff recommends that California’s provisions on declaratory relief from foreign defamation judgments be moved into a new chapter of California law, which will address foreign defamation judgments.**

Grounds for Declaratory Relief

In light of the proposed changes above, the Commission may want to reconsider the specified grounds on which declaratory relief is available. Currently, the declaratory relief provision authorizes “a determination that the judgment is not recognizable in California under Section 1716.”⁶¹ As proposed above, California’s defamation exception would no longer be in Section 1716, as it would be supplanted by the SPEECH Act’s protections.

The Commission needs to consider whether the declaratory relief provision should continue to refer only to the exceptions to recognition in the Uniform Act, which, as proposed above, would no longer include a specific defamation exception. Alternatively, the Commission could amend the declaratory relief provision to either (1) refer only to the grounds of nonrecognition in the SPEECH Act or (2) refer to the grounds in both the Uniform Act and the SPEECH Act.

The staff recommends that California’s declaratory relief be amended to incorporate the speech and jurisdiction standards in the SPEECH Act. Given that the concern about libel tourism was a primary factor motivating the enactment of the declaratory relief provision,⁶² perhaps the most important grounds for nonrecognition of a defamation judgment are related to speech

59. The declaratory relief provision is contained in a Uniform Act section that lists appropriate grounds for a foreign court to exercise personal jurisdiction over a defendant. See Section 1717.

60. See Section 1717(c)(2) (the person seeking injunctive relief either has assets in California that might be subject to enforcement or “may have to take action in California to comply with the foreign-country defamation judgment.”)

61. Section 1717(c).

62. See, e.g., Senate Floor Analysis of SB 320 (Aug. 18, 2009), pp. 3-4 (discussing the Ehrenfeld case and New York’s legislative response).

protection and personal jurisdiction. The SPEECH Act covers both of these issues.⁶³

Further, the staff concludes that it seems appropriate to offer declaratory relief from defamation judgments solely on the grounds specified in the SPEECH Act (i.e., not the grounds in the Uniform Act). Although such a change narrows the grounds for declaratory relief, the declaratory relief provision would be focused on the key “libel tourism” concerns – speech protection and jurisdiction. Offering the extraordinary remedy of declaratory relief where the judgment does not offend free speech or personal jurisdiction principles seems unnecessary to achieve some of the main goals of the defamation provisions — deterring libel tourism and ensuring U.S. journalists and authors are protected.⁶⁴

TRIBAL DEFAMATION JUDGMENTS

As indicated above, the SPEECH Act does not appear to cover tribal judgments.⁶⁵ Thus, the situation for tribal defamation judgments is significantly less complicated.

Recognition of Tribal Defamation Judgments Under California Law

In enacting the Tribal Act, the Legislature continued the judgment recognition standards from California’s Uniform Act. Thus, the Tribal Act includes a defamation exception to recognition of tribal judgments that is nearly identical to the defamation exception in California’s Uniform Act. The Tribal Act’s exception reads as follows:

1737 ...

(c) The superior court may, in its discretion, decline to recognize and enter a tribal court money judgment on any one of the following grounds:

...

(9) The judgment includes recovery for a claim of defamation, unless the court determines that the defamation law applied by the tribal court provided at least as much protection for freedom of speech and the press as provided by both the United States and California Constitutions.

63. See 28 U.S.C. § 4102.

64. See Assembly Judiciary Committee Analysis of SB 320 (Jun. 22, 2009), p. 3.

65. See discussion of “SPEECH Act,” *supra*.

Under the Tribal Act, the burdens are placed on the parties as in California's Uniform Act. The party seeking recognition of the judgment has the burden of making the initial showing that the judgment falls within the scope of the Act.⁶⁶ The party opposing recognition has the burden of establishing that an exception to recognition applies.⁶⁷

The Tribal Act does not, however, include a provision authorizing declaratory relief for defamation judgments, as California's Uniform Act does.

Standard of Speech Protection for Tribal Defamation Judgments

The Tribal Act's defamation provision does not seem to pose any legal concerns. In particular, the SPEECH Act does not appear to govern recognition of tribal defamation judgments. Thus, there is no need to conform to the SPEECH Act requirements.

The Commission, however, may want to consider whether other considerations would support modifying the Tribal Act's defamation provision. In the staff's view, there are three main options for addressing the Tribal Act's defamation provision:

- (1) Leave the defamation provision in the Tribal Act unchanged.
- (2) Repeal the defamation provision in the Tribal Act.
- (3) Replace the defamation provision in the Tribal Act with a requirement that tribal judgments to meet the standards of the SPEECH Act (as a matter of state law).

Each of these options is discussed in turn below.

As a general matter, the Commission may want to consider whether, when changes are proposed to California's Uniform Act standards (as in this memorandum), the Tribal Act standards should similarly be changed.

66. See Sections 1732(g) (defining a "tribal court money judgment" to be "final, conclusive, and enforceable"), 1734 (requiring the application for recognition of a tribal court money judgment to include, among other things, statements that the judgment is final, that the applicable statutes of limitations has not run, that the judgment has not been paid, and that no action on the judgment is pending or has been taken in this state), 1736 (requiring the clerk to enter the judgment if no objections are filed), 1737(d) (placing the burden on the applicant to establish the judgment is entitled to recognition if objections are timely filed).

67. See Section 1737(d).

Leave Defamation Provision Unchanged

In the absence of apparent legal deficiency or error, the Commission may conclude that the defamation provision in the Tribal Act should simply be continued without change.

To the extent that policy considerations may justify a change (as discussed below), the Commission could leave it to the Legislature to decide whether such a change is necessary or appropriate.

Repeal Defamation Provision

The Commission may want to consider repealing the defamation provision in the Tribal Act. Since the defamation provision was a non-uniform addition in California, repealing this provision would result in greater uniformity with the Uniform Act. As a general matter, uniformity promotes judicial economy and provides certainty.⁶⁸

From a policy perspective, the concerns about libel tourism that drove the adoption of the defamation provision in California largely relate to foreign judgments, as opposed to tribal ones.⁶⁹ Libel tourism concerns appear to be much less acute for tribal judgments, given a host of other laws governing tribes. For instance, concerns about the unreasonable exercises of personal jurisdiction are much less of an issue for tribes, as federal law includes standards for tribal jurisdiction over nonmembers.⁷⁰ Similarly, concerns about the adequacy of speech protection are tempered by the Indian Civil Rights Act, which precludes tribes from “mak[ing] or enforce[ing] any law ... abridging the freedom of speech.”⁷¹

Thus, the Tribal Act’s standards of recognition could perhaps be realigned with the Uniform Act.

The Commission should, however, consider whether there are other concerns outweighing the interest in uniformity in this situation. For instance, simply eliminating the existing defamation provision would likely be perceived as a loosening of the standards for tribal judgments. As a practical matter, problematic defamation judgments could still be denied recognition under the

68. See generally <http://uniformlaws.org/Narrative.aspx?title=About%20the%20ULC>.

69. See generally discussion of “Concerns about Recognition of Defamation Judgments,” *supra*.

70. See generally Jane M. Smith, Congressional Research Service, Tribal Jurisdiction over Nonmembers: A Legal Overview (November 26, 2013).

71. See 25 U.S.C. § 1302(a)(1).

Tribal Act's public policy exception,⁷² as occurred under the Uniform Act prior to states adopting defamation-specific exceptions.⁷³

Apply SPEECH Act Standards

When adopting the Tribal Act, the Legislature essentially restated the standards of recognition in California's Uniform Act without substantive change.⁷⁴ The Commission may want to consider whether this history suggests that California should seek to preserve consistency between the rules governing the recognition of foreign judgments and tribal judgments. In particular, the Commission should consider whether to apply the standards in the SPEECH Act in tribal judgments as a matter of state law.

In this instance, the practical benefits of parallelism seem marginal. As discussed above, tribal judgments simply do not seem to pose the same threat of libel tourism as foreign judgments.⁷⁵

In the staff's view, applying the SPEECH Act standards to tribal judgments has some facial appeal by retaining consistent standards for foreign and tribal judgments. However, this change is unlikely to have much practical effect.

In short, the staff's initial assessment is that applying the SPEECH Act standards to tribal judgments as a matter of state law seems unnecessary.

Commission Decision

The Commission will need to tentatively decide which of the options, discussed above, should be used to address the Tribal Act's defamation provision. The staff's initial assessment is that applying the SPEECH Act's standards to tribal judgments appears unnecessary. As to the other options (i.e., leave the provision unchanged or repeal the provision), the staff has no recommendation.

Respectfully submitted,

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72. Section 1737(c)(9).

73. See *supra* note 19.

74. Compare Section 1716 with Section 1737.

75. See discussion of "Repeal Defamation Provision," *supra*.