

DOUGLAS F. GANSLER  
ATTORNEY GENERAL

KATHERINE WINFREE  
Chief Deputy Attorney General

JOHN B. HOWARD, JR.  
Deputy Attorney General



DAN FRIEDMAN  
Counsel to the General Assembly

SANDRA BENSON BRANTLEY  
BONNIE A. KIRKLAND  
KATHRYN M. ROWE  
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND  
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 3, 2010

The Honorable Martin O'Malley  
Governor of Maryland  
State House  
Annapolis, Maryland 21401-1991

**Re: *Senate Bill 13 and House Bill 193***

Dear Governor O'Malley:

We have reviewed Senate Bill 13 and House Bill 193, which despite the similar titles, are not identical. Because these bills extend the State's long-arm statute, we have considered whether they comply with the Due Process Clause of the United States Constitution. Because we find that they do, we hereby approve them for constitutionality and legal sufficiency.

Senate Bill 13 and House Bill 193 address a problem that has been labeled "libel tourism," which is a situation "where plaintiffs who believe that they have been defamed go forum shopping for the courts of a country that is more likely to allow their claims and award them high and dissuasive damages, irrespective of the tenuous nexus between the forum and the substance of the dispute." Yasmine Lahlou, "Libel Tourism: A Transatlantic Quandary," 2 *J. Int'l Media & Ent. L. Rev.* 199, 200 (Winter 2009). The legislation does two things: (1) expands the State's long-arm statute and (2) limits the recognition of foreign judgments.

The Court of Appeals has previously determined that recognition of an English libel judgment would "be repugnant to the public policy of Maryland." *Telnikoff v. Matusevitch*, 347 Md. 561 (1997). In that case, the Court noted that "[t]he contrast between English standards governing defamation actions and the present Maryland standards is striking." *Id.* at 595. "[P]resent Maryland defamation law is totally different from English defamation law in virtually every significant respect." *Id.* at 598. "[R]ecognition of English defamation judgments could well lead to wholesale circumvention of fundamental public policy in Maryland and the rest of the country." *Id.* at 601. Thus, the Court ultimately determined that "[t]he importance of that free flow of ideas and opinions on matters of public concern precludes Maryland recognition of [the plaintiff's] English libel judgment." *Id.* at 602.

The *Telnikoff* case arose when the English citizen who had obtained the English libel judgment sought to enforce it in the United States. Senate Bill 13 and House Bill 193 would give persons against whom a foreign defamation judgment was entered the opportunity to seek a declaratory judgment action that the judgment is unenforceable in Maryland. Moreover, the bills prohibit a Maryland court from recognizing a foreign defamation judgment unless the court first determines that the defamation law as applied in the foreign jurisdiction provides for at least as much protection for freedom of speech and the press as provided by both the United States Constitution and the Maryland Constitution. The bills also prohibit recognition of a foreign defamation judgment against "the provider of an interactive computer service, as defined in 47 U.S.C. § 230, unless the court ... determines that the judgment is consistent with 47 U.S.C. § 230."<sup>1</sup>

Because Senate Bill 13 and House Bill 193 expand the State's long-arm statute, we have examined whether they violate the Due Process Clause of the United States Constitution. The Court of Appeals has construed the State's long-arm statute to "authorize the exercise of personal jurisdiction to the full extent allowable under the Due Process Clause." *CRS Ltd. v. Taylor*, 411 Md. 457, 473 (2009). "In other words, 'if to exercise ... jurisdiction in a given case would violate Due Process, we construe our long-arm statute not authorizing the exercise of personal jurisdiction over the defendant.'" *Id.* at 476 (quoting *Bond v. Messerman*, 391 Md. 706, 721 (2006)). Under the Due Process Clause, a court may exercise personal jurisdiction over a person only where that person has "established minimum contacts with the forum state and that to hale him or her into court in the forum state would comport with traditional notions of fair play and substantial justice." *Bond*, 391 Md. at 722 (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

It is possible that a court would determine that merely seeking damages in a foreign court against someone who is a Maryland resident or who has assets in Maryland is not sufficient minimum contacts with the State. To establish this requirement, the Court of Appeals held that "[i]t is essential in each case that there be some act by which the defendant *purposefully avails* itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *CRS Ltd.*, 411 Md. at 479 (emphasis in original) (citations omitted). In a case involving personal jurisdiction over persons who had obtained a foreign judgment against a California company based on material published on the internet, the Ninth Circuit found that the exercise of personal jurisdiction over the French plaintiffs who had obtained the order against Yahoo! Inc. was constitutional because the French plaintiffs had sufficient contacts with California, the forum state. *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006) (en banc). In that case, the court found three contacts that the French plaintiffs had with California: (1) sending a cease and desist letter, (2) serving process on Yahoo! in California, and (3) obtaining orders from the French court directing Yahoo! to take certain

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<sup>1</sup> 47 U.S.C. § 230 provides immunity from liability for service providers who publish or post information on the internet provided by others.

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actions in California. Likewise, we believe that a court in Maryland applying Senate Bill 13 and House Bill 193, if signed, would require a defendant to have additional contact with Maryland beyond simply obtaining a foreign judgment against a Maryland resident or someone who has assets in Maryland. Nevertheless, "[t]he 'minimum contacts' standard 'is not susceptible of mechanical application, and the facts of each case must be weighed ...'" *CRS Ltd.*, 411 Md. at 477 (citations omitted). Therefore, it is our view that the legislation is constitutional on its face.

We recommend, however, that you sign only SB 13 or, if you choose to sign both, that you sign Senate Bill 13 last because in our view its language is more consistent with the Due Process Clause requirements. Senate Bill 13, at page 2, lines 17 – 33, extends long-arm jurisdiction in the following manner:

A court may exercise personal jurisdiction, to the fullest extent permitted by the United States Constitution, over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of this State or has assets in this State for the purpose of providing declaratory relief with respect to that person's liability for the judgment or determining whether the judgment may not be recognized under § 10-704 of this article if the Maryland resident or person who has assets in this State may have to take actions in Maryland to comply with the foreign defamation judgment.

House Bill 193, on the other hand, extends long-arm jurisdiction by stating:

A court may exercise personal jurisdiction, to the fullest extent permitted by the United States Constitution, over any person who obtains a judgment in a defamation proceeding outside the United States against any person who is a resident of this State or is otherwise subject to jurisdiction in the State for the purpose of providing declaratory relief with respect to that person's liability for the judgment or determining whether the judgment may not be recognized under § 10-704 of this article if the resident or person subject to jurisdiction in this State:

- (1) Has assets in this State that might be used to satisfy the foreign defamation judgment; or
- (2) May have to take actions in this State to comply with the foreign defamation judgment.

Thus, it appears that House Bill 193 would extend personal jurisdiction over a defendant who obtained a foreign judgment against Maryland resident or person subject to

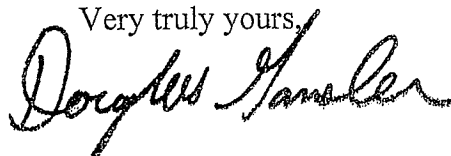
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jurisdiction in Maryland who has assets in Maryland. On the other hand, Senate Bill 13 additionally requires the person who is subject to the foreign defamation judgment, who is a resident of this State or has assets in this State, "may have to take actions in Maryland to comply with the foreign defamation judgment." House Bill 193 states that that is an additional basis for application of the long-arm statute, not a requirement. Thus we believe that SB 13 is more consistent with due process requirements.

Finally, we note that there are additional differences between Senate Bill 13 and House Bill 193 in the provision addressing the recognition of a foreign judgment. Senate Bill 13 states, "A foreign judgment against any person who is a resident of this State or who has assets in this State may not be recognized ..." (Page 3, lines 25 - 30.) In contrast, House Bill 193 simply states, "A foreign judgment may not be recognized ..." (Page 3, line 22.). We do not believe that this difference has any legal significance. Additionally, Senate Bill 13 states that to recognize a foreign defamation judgment, a court must first determine "that the defamation law as applied in the foreign jurisdiction provides for at least as much protection" as federal and Maryland law. (Page 4, line 1.) Whereas, House Bill 193 omits the "as" and states "defamation law applied in the foreign jurisdiction." (Page 3, line 26.). Again, there is no legal significance to this difference.

In accordance with the foregoing, we hereby approve the constitutionality and legal sufficiency of both Senate Bill 13 and House Bill 193, but express a mild preference for SB 13.

Very truly yours,



Douglas F. Gansler  
Attorney General

DFG/SBB/kk

cc: The Honorable Samuel I. Rosenberg  
The Honorable John P. McDonough  
Joseph Bryce  
Karl Aro