OHIO HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE
HOUSE BILL 339

PROPONENT TESTIMONY OF MICHAEL S. GOLDSTEIN, ESQ.
APRIL 12, 2016

Chairman Butler, Vice Chairman Manning, Ranking Member Johnson, and honorable members of the House Judiciary Committee:

I am Michael Goldstein. I have been a member of the Ohio Bar for over 40 years, practicing as an assistant law director, as a prosecutor, as a senior attorney for the Cleveland Electric Illuminating Company, and as a private practice employment law attorney. I am also a military retiree with a 30-year Navy career as an intelligence officer. I am here to apply my experience to my testimony as a proponent of House Bill 339, and to urge the Committee to report this bill to the House floor with a unanimous favorable vote.

Eleven states have passed versions of this bill: Tennessee, Louisiana, Oklahoma, Kansas, Arizona, Alabama, North Carolina, Mississippi, Washington, South Dakota and Florida.

I will first explain Ohio's need for enactment of this bill in terms of what is presently missing from Ohio's jurisprudence in the protection of litigants' constitutional rights in specific areas of application of foreign law, and the way in which HB 339 will remedy these problems.

I will close by setting forth four important reasons why the members of the Judiciary Committee should vote in favor of HB 339.

HB 339 addresses primarily four areas of application of foreign law in Ohio tribunals: Comity, Conflicts of laws, Choice of law, Contractual clauses or forum/venue, and Forum non conveniens. I will also briefly discuss the corporate and tribal law exceptions set forth in the bill.

Comity

HB 339 states, in pertinent part,

(B) (1) No court, administrative agency, or arbitrator shall base any ruling or decision in whole or in part on any statutory or other law or a system of foreign law that does not grant the parties affected by the ruling or decision all of the liberties, rights, and privileges granted to United States citizens or legal resident aliens under the constitution of this state or the United States, including, but not limited to, the following:

(a) Equal protection of the laws;
(b) Due process of law;
(c) Freedom of religion;
(d) Freedom of speech;
(e) Freedom of the press;
(f) Any right of privacy or marriage.

The conclusiveness of foreign judgments in American courts rests upon considerations of comity. "Comity" is defined in Black's Law Dictionary as,

> "courtesy; complaisance; respect; a willingness to grant a privilege, not as a matter of right, but out of deference and good will . . . . In general, [the] principle of `comity` is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect."

Comity is not a rule of law, but one of practice, convenience, and expedience. Like most U.S. states, Ohio has no general statutory law on comity. I address it here in terms of recognition of foreign judgments, but it is also employed to defer to a foreign jurisdiction when a prior lawsuit was filed in the foreign jurisdiction.

In applying the general common law of comity, Ohio courts have narrowly applied a public policy exception, but have never explicitly required, as is mandated in HB 339, that the foreign jurisdiction granted the same fundamental constitutional rights as Ohio.

Ohio courts have, on occasion, addressed whether comity should be granted to foreign judgments, but in the area of family law, except for the *Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)*, ORC Sec. 3127.01 et seq. regarding foreign custody judgments with its vague standard of "human rights," neither the General Assembly nor the courts have clearly required that for a foreign judgment to be granted comity, the foreign court must have granted the parties the same fundamental liberties, rights, and privileges granted under the U.S. and Ohio Constitutions. HB 339 does require this analysis, and its passage would provide constitutional clarity and finality to Ohio courts and other tribunals.

Conflicts of Laws

HB 339 states, in pertinent part,

(C) (1) A contract, or a contractual provision that is severable from the contract, that designates a system of foreign law or authorizes the choice of a system of foreign law to govern some or all of the disputes between the parties or that grants personal jurisdiction over the parties to any court, administrative agency, or arbitrator that operates under a system of foreign law is void and unenforceable if the system of foreign law designated or chosen or under which the court, administrative agency, or arbitrator operates does not grant the parties all of the liberties, rights, and privileges granted to United States citizens or legal resident aliens under the constitution of this state or the United States, including, but not limited to, the following:

(a) Equal protection of the laws;
(b) Due process of law;
(c) Freedom of religion;
(d) Freedom of speech;
(e) Freedom of the press;
(f) Any right of privacy or marriage.

These provisions address conflicts of laws, i.e., the determination of the law of what jurisdiction applies, absent any agreement thereto, and separate from any determination of which jurisdiction should adjudicate the matter.

Ohio has few statutory provisions regarding conflicts of laws. It generally applies the *Restatement (Second) of Conflict of Laws*. Importantly, the *Restatement* and Ohio jurisprudence do not, as does HB 339, require that a conflicts of laws analysis include a determination as to whether the foreign law grants the parties the same rights granted under the U.S. and Ohio Constitutions.

Choice of Forum/Venue

Arbitrations in Ohio are governed by the Federal Arbitration Act (FAA), and by the Ohio Arbitration Act (OAA), ORC Sec. 2711.01et seq., which largely tracks the FAA. Under both the FAA and the OAA arbitration is considered a matter of contract law. Therefore, courts may require a party to submit a dispute to arbitration only if the party has expressly agreed to do so.

There is currently no requirement in Ohio law that for a choice of forum or arbitration clause to be enforceable, the forum or arbitrator designated would grant the parties the same fundamental liberties, rights, and privileges granted under the U.S. and Ohio Constitution. HB 339 would prevent arbitration decisions from being enforced if a party was denied fundamental constitutional rights.

Choice of Law Contractual Clauses

Section (C) (1) of HB 339, cited above, concerns contractual choice of law clauses other than those contracts entered into between non-natural persons.

The Ohio Supreme Court has stated periodically that an Ohio court is not required to enforce a foreign law if enforcement would be contrary to Ohio public policy. However, "the law of Ohio will only be applied when it can be shown that this state has a materially greater interest than the chosen state in the determination of a particular issue." *Jarvis v. Ashland Oil, Inc*., 17 Ohio St.3d 189, 192; 478 N.E.2d 786 (1985)

Ohio jurisprudence allows for a limited public policy analysis, but it does not require that the foreign law chosen not violate the fundamental constitutional rights of the parties. The adoption of HB 339 will remedy that omission.

Forum Non Conveniens

HB 339 reads, in pertinent part:

(D) If, in an action or proceeding commenced by a resident of this state, an adverse party makes a motion based on forum non conveniens or a similar doctrine, the court shall deny the motion if it finds that granting the motion would likely result in the violation in the foreign forum of any of the liberties, rights, and privileges granted under the constitution of this state or the United States with respect to the matter in dispute.

Ohio's version of the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA) contains a provision regarding inconvenient forums, ORC Sec. 3127.21(1) (a) through (h). None of these criteria, however, include any consideration of constitutional, or even human, rights. The adoption of HB 339 will remedy that omission, as well.

Corporate Exception

HB 339 includes a corporate exception that states, in pertinent part:

(E) This section does not apply to any non-natural person that contracts to subject itself to a system of foreign law in a jurisdiction outside the United States.

This provision allows corporate entities to agree contractually to the application of foreign law in a foreign jurisdiction, and thereby prevents HB 339 from interfering with international commerce while still protecting individuals' constitutional rights.

Tribal Law Exception

HB 339 defines "System of foreign law" as, "the legal code or system of jurisdiction outside of the United States or its territories, including international law but <u>not including the legal system of any native American tribe in this state</u>." [Emphasis added] Thus HB 339 explicitly excludes tribal law from the application of this bill.

Reasons Supporting a Favorable Vote

There are four reasons why the members of the Judiciary Committee should vote in favor of this bill:

- First, and most importantly, this bill will protect the constitutional rights of a multitude of people from foreign lands, many of them new to the United States and to Ohio, who do not yet understand our laws and how to invoke them, and who may not understand either the English language or our legal system very well. HB 339 will constitute the General Assembly's statement of the intent of the people of the State of Ohio that foreign judgments, foreign laws, and foreign courts' opinions will not be applied, enforced, or deferred to by Ohio courts when such judgments, laws, or courts fail to accord litigants their fundamental constitutional rights guaranteed under the Constitutions of the United States and the State of Ohio.

- Second, the present state of Ohio law relating to enforcement of foreign judgments and the application of foreign law in our courts requires that each trial court judge and each administrative agency magistrate, hearing officer, administrative law judge, and arbitrator faced with deciding a matter involving foreign law, determine whether the application of such foreign law is in harmony with or violates the public policy of the State of Ohio. Enactment of HB 339 would end the probability of various courts and administrative agencies and arbitrators making disparate decisions regarding application of foreign law based on essentially similar facts. The General Assembly, by enacting this bill, will

provide Ohio's first line triers of law and fact with the definition of Ohio's public policy in the application of all foreign law. HB 339, with respect to how Ohio tribunals must determine Ohio's public policy in the application of foreign laws and judgments, is "one-stop shopping" to protect litigants' constitutional rights.

- Third, this is as it should be. Although we are mostly lawyers here, the Ohio House of Representatives, the People's House, together with the Ohio Senate, rather than judges, should be determining the public policy of our State. I suggest that as representatives of the people, members of the House, and members of this Committee, should not be in favor of leaving the definition of Ohio public policy to piecemeal determinations by the courts. I suggest that he General Assembly should provide Ohio law in this area, and that is what passage of HB 339 will do.

- Fourth, although Ohio's appellate courts (unlike appellate courts in several other states) are deciding properly most foreign law issues in cases that come before them, and are protecting the constitutional rights of those foreign litigants who have learned enough and who have the financial resources to get to a court of appeals, as lawyers we know that only a minor fraction of trial court cases are appealed. If the trial court or administrative agency or arbitrator fails to apply proper constitutional scrutiny to foreign law, there is little chance that most litigants will be able to appeal. How much more difficult is the plight of a litigant before an administrative agency whose only path to appeal is a mandamus action where the burden of proof requires the relator to demonstrate that there was **no evidence** by which the administrative agency could have reached its decision! It is the responsibility of the General Assembly to provide this legislative guidance to the trial courts and administrative agencies and arbitrators so that litigants' constitutional rights will be protected and cases can be properly decided at the first level.

Once again, I urge each member of this honorable committee to vote in favor of HB 339. Thank you for your attention, and I will be pleased to respond to your questions.