TESTIMONY OF
H. KATHLEEN PATCHEL
UNIFORM LAW COMMISSIONER, INDIANA

BEFORE THE
SUBCOMMITTEE ON COURTS, COMMERCIAL AND ADMINISTRATIVE LAW

COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
ONE HUNDRED TWELFTH CONGRESS
1st SESSION

HEARING ON
RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

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Tuesday, November 15, 2011

Chairman Coble, Ranking Member Cohen and Members of the subcommittee:

Thank you for the opportunity to testify before the subcommittee with regard to this important issue of federalism and the appropriate allocation of federal and state responsibilities and resources.

My name is Kathy Patchel. I have been a law professor for 24 years, teaching primarily in the areas of federalism, commercial law, and legislation, most recently at Indiana University School of Law – Indianapolis. Prior to becoming a law professor, I was a commercial litigator practicing in Atlanta, Georgia. As of July 1 of this year, I took *emeritus* status at Indiana University.

Since 1998, when I was appointed by the Governor of Indiana, I have been an Indiana Commissioner of the National Conference of Commissioners on Uniform State Laws, also known as the Uniform Law Commission, or ULC. My testimony today is on behalf of that organization.

The ULC is a national organization of lawyers, judges, and legal scholars appointed by the governor or legislature of each state. The ULC has been in existence since 1892. Its purpose is to provide the states with nonpartisan, well-drafted legislation and to work for the enactment of that legislation in a uniform fashion among the states. The ULC's efforts support the federal system, facilitating both the movement of individuals and the functioning of business organizations across state lines through the enactment of state law statutes that are uniform throughout the nation. The ULC probably is best known for its development of the Uniform Commercial Code, which continues to provide the primary source of basic commercial law in this country well over fifty years after its promulgation by the ULC.

The ULC has been involved in drafting legislation dealing with recognition and enforcement of

foreign country judgments since 1962 when it promulgated the Uniform Foreign Money-Judgments Recognition Act. That Act has become the primary source of law with regard to the recognition of foreign country money judgments in the United States. As part of my work with the ULC, I have served as the Reporter for two more recent ULC drafting projects dealing with recognition and enforcement of foreign country judgments. The first was the drafting of the Uniform Foreign-Country Money Judgments Recognition Act. This uniform law, promulgated in 2005, is a revision of the ULC's Uniform Foreign Money-Judgments Recognition Act to update and clarify the 1962 Act in light of interpretive issues that have arisen during the over forty years since the original Act was promulgated. The second drafting project is an ongoing project to implement the Hague Convention on Choice of Court Agreements of June 30, 2005. The Choice of Court Convention, which has been signed by the United States, provides for the enforcement of choice of court agreements and the recognition and enforcement of judgments of the chosen court in the courts of Contracting States. The ULC has been working with the U.S. Department of State and other interested parties, most recently under the auspices of the American Society of International Law, to develop an implementation method for the Choice of Court Convention that will allow that Convention to be implemented by state law to the extent that state law implementation is effective to insure that the United States meets its treaty obligations under the Convention.

My testimony today focuses on two important questions I believe the subcommittee should address in deciding whether the law of recognition and enforcement should be federalized. The first is whether there are problems with the existing legal regime for recognition and enforcement of foreign country judgments sufficient to justify the impact that a federal statute on recognition and enforcement will have on the existing allocation of state versus federal competence in this area. The second is what impact federalization will have on government resources.

State law has governed the recognition and enforcement of foreign country judgments in our nation for a very long time. Initially, that law was judge-made, based on judicial interpretation of the requirements of international comity. In 1962, however, the trend towards statutory rules began when the ULC promulgated the Uniform Foreign Money-Judgments Recognition Act, which codified the prevalent common law rules. That Act was adopted as state law in a significant majority of U.S. jurisdictions, thus establishing state statutes as the primary source of recognition law. As of the date of this hearing, 35 U.S. jurisdictions have adopted either the 1962 Act[1] or its revision, the 2005 Uniform Foreign-Country Money Judgments Recognition Act.[2] Because the 2005 Act is a targeted act of the ULC – that is, an act with regard to which the ULC is particularly focusing its enactment resources -- the ULC anticipates that the number of states in which recognition and enforcement is governed by statute is likely to continue to

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[1]Alaska, Connecticut, District of Columbia, Florida, Georgia, Maine, Maryland, Massachusetts, Missouri, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Texas, U.S. Virgin Islands and Virginia.

[2]California, Colorado, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, Nevada, New Mexico, North Carolina, Oklahoma, Oregon and Washington.

increase at an impressive rate over the next few years.[3]

Prior to 1938, federal courts sitting in diversity felt free to develop their own rules in this area[4], but in 1938 the U.S. Supreme Court in Erie R. Co. v. Tompkins rejected the idea that federal courts sitting in diversity could ignore state decisional law, holding that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state," whether the state law is embodied in a state statute or in a rule of decision established by the state's highest court.[5] Since *Erie*, federal courts as well as state courts have applied state law to the recognition and enforcement of foreign country judgments:

> it has been accepted that in the absence of a federal statute or treaty or some other basis for federal jurisdiction, such as admiralty, recognition and enforcement of foreign country judgments is a matter of State law, and an action to enforce a foreign country judgment is not an action arising under the laws of the United States. Thus, state courts, and federal courts applying State law, recognize and enforce foreign country judgments without reference to federal rules.[6]

Therefore, state law has not only supplied rules for recognition and enforcement of foreign country judgments for a very long time, but it has been the exclusive source of those rules in most of those cases for over seventy years. It is law that is well-settled, familiar to courts and practitioners, and effective. Under this state law regime, the United States has become known as one of the most cooperative nations with regard to recognition and enforcement of the judgments of other countries. At the same time, this state law regime has provided courts in the United States with the tools necessary to deny recognition in those rare, but important, cases in which recognition should be denied,[7] and those rules have been applied with remarkable consistency among the jurisdictions.

A federal statute on recognition and enforcement would significantly alter the current federal-

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[3] There are currently bills to enact the 2005 Act in various stages of the legislative process in the District of Columbia and Massachusetts. The ULC Legislative Office is aware of at least initial plans to introduce UFCMJRA in 2012 in Alabama, Maryland, Mississippi, New York, Rhode Island, Tennessee, U.S. Virgin Islands, Virginia, and Wisconsin. Six of those jurisdictions – Alabama, Mississippi, Rhode Island, Tennessee, Utah, and Wisconsin – currently do not have either Recognition Act.

[4] E.g.,Hilton v. Guyot, 159 U.S. 113(1895).

[5] 304 U.S. 64, 78 (1938).

[6] AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW (THIRD) – FOREIGN RELATIONS LAW OF THE UNITED STATES, §481, cmt a.

[7] E.g., Bank Melli Iran v. Pahlavi, 58 F.3d. 1406 (9th Cir. 1995) (denying recognition and enforcement to Iranian judgment because judicial system failed to provide procedures compatible with due process); Bachchan v. India Abroad Publications, Inc., 585 N.Y.S.2d 661 (Sup. Ct. N.Y. 1992) (British libel judgment denied recognition and enforcement because it violated public policy found in the First Amendment).

state balance in this area, preempting a long-standing and effective state law regime for recognition and enforcement of foreign country judgments in favor of an entirely new and unprecedented federal regime.

Principles of federalism dictate that Congress should not alter the federal-state balance without good reason. This idea is a basic principle of our federalist system, embodied in the U.S. Supreme Court presumption against preemption of state law: "in a field which the States have traditionally occupied [we] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . ."[8] This presumption against preemption is based on the assumption that Congress does not lightly exercise the federal power of preemption, but does so only after careful consideration and with adequate justification. The result of the presumption is that the burden of persuasion lies with those who would change the existing balance.

Are there sufficient reasons to alter the existing federal-state balance with regard to recognition and enforcement of foreign country judgments? The Introduction to the ALI Proposed Federal Statute hints at – without providing concrete examples of– a lack of uniformity in the current recognition law regime: it seems to suggest that the current system is one characterized by "ad hoc judicial decisions" and states that "[a] priori, it would strike anyone as strange to learn that the judgment of an English or German or Japanese court might be recognized and enforced in Texas, but not in Arkansas, in Pennsylvania but not in New Jersey."

If in fact the current state law regime were characterized by a high degree of nonuniformity and that lack of uniformity significantly implicated a federal interest, that would be a factor in favor of federalization in this area.

No specific evidence, however, is presented in the Introduction to support these statements. Instead, the Introduction simply states that "various reasons apparent throughout the draft" support the conclusion that a federal statute is needed. More than broad, unsupported assertions should be required to meet the burden of persuading Congress to upset a long-standing, well-established federal-state balance with regard to competence in the area of recognition of foreign country judgments.

Further, I am surprised by the Proposed Statute's description of the current state law regime of recognition and enforcement as one characterized by inconsistent, ad hoc judicial decisions. As previously mentioned, I served as Reporter for the 2005 revision of the ULC Recognition Act. As is customary with proposed uniform acts, before the drafting committee began its work, a study committee was appointed to look into the question of whether a revised act was needed. As part of that study committee's work, I reviewed all of the non-uniform amendments that states had made to the 1962 Act, as well as all the case annotations, reported in the Uniform Laws Annotated, and a number of other reported cases. Quite frankly, given the age of the original act, and the broad language of some of its provisions, particularly with regard to the

[8]Rice v. Santa Fe Elevator Corp. 331 U.S. 218, 230 (1947).

exceptions to recognition, I would not have been surprised to find that there had been substantial variation in interpretation. This, however, was not the case. Instead, my research revealed a high degree of uniformity in the interpretation of the 1962 Act across state lines, particularly with regard to the core provisions regarding recognition, the exceptions to recognition and the effect of recognition. In my opinion, there was at least as high a degree of uniform interpretation as one would expect to find if the courts had been interpreting one statute rather than uniform statutes of a number of jurisdictions. The courts in this area seem to have taken to heart the admonition standard in uniform laws that the law must be interpreted in light of its character as a uniform law and the need to promote its uniform interpretation among the states.

Although my report to the study committee concluded that a revision of the 1962 Act was warranted, most of the important revisions suggested were to deal with issues that had simply not been addressed in the 1962 Act and drafting glitches, rather than to deal with multiple interpretations of the core provisions of the Act.[9]

Because the focus of my involvement in the recognition area has been the ULC Recognition Acts, I have much less extensive first-hand knowledge of the uniformity of interpretation among jurisdictions in which common law comity principles still apply, at least outside of my home state of Indiana, which was a common law jurisdiction until its recent adoption of the 2005 Recognition Act. My more limited research in that area, however, suggests that there is a considerable degree of uniformity in applicable law among the common law jurisdictions, as well as between those jurisdictions and jurisdictions that have the Recognition Acts. First, the common law interpretation of the comity doctrine in the states was influenced to a large extent by the pre-*Erie* U.S. Supreme Court case of Hilton v. Guyot,[10] which continues to be viewed as a seminal case with regard to recognition and enforcement and cited by both common law and Recognition Act jurisdictions. Second, common law jurisdictions also have available the guidance of the American Law Institute's Restatement of Foreign Relation Law (Third), which contains principles for recognition and enforcement quite similar to those in the ULC Recognition Acts.[11] Finally, because the 1962 Act codified prevalent common law principles, and the 2005 Act continues those rules, the rules applied in common law jurisdictions are likely to be quite similar to those applied under the Recognition Acts. Indeed, some courts have applied the Recognition Act rules by analogy on this rationale.

Even if there were a showing of significant inconsistency in recognition of foreign country judgments, that fact seems irrelevant to a justification for federalization unless proponents of a federal statute also can show that the inconsistency impinges on a federal interest. The

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[9]The Prefatory Note to the 2005 Revision states that "[t]his Act continues the basic policies and approach of the 1962 Act" and that its purpose is to update and clarify the 1962 Act, "not to depart from the basic rules or approach of the 1962 Act, which have withstood well the test of time."

[10]159 U.S. 113 (1895).

[11]AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW (THIRD) – FOREIGN RELATIONS LAW OF THE UNITED STATES, §481 et. seq.

Introduction to the Proposed Statute states that "a foreign judgment presented in the United States for recognition or enforcement is an aspect of the relations between the United States and the foreign state, even if the particular controversy that resulted in the foreign judgment involves only private parties." The idea, however, that the mere fact a judgment for which recognition is sought was issued by the court of another country is enough of itself to create a federal interest has been rejected, at least implicitly, by the many decisions in the federal courts since *Erie* that have applied state law in foreign country judgment recognition actions because there is no federal question jurisdiction. Indeed, in this age of globalization, if the fact a foreign element was involved in the determination of private rights was of itself sufficiently persuasive evidence that federal law should govern, then federalization of a large number of issues now governed by state law would be warranted.

Before moving on to the question of allocation of resources, I would like to mention briefly two other issues relevant to federalism considerations. The first is the fact recognition law is directed primarily to the courts rather than private individuals. It establishes the rules under which those courts may, or are required to, treat a judgment of a court outside of that court's judicial system as though it were a judgment of a court within that system. In considering the impact of federalization, therefore, consideration should be given to the extent to which that federalization may involve federal law dictates to state courts and the appropriateness of such rules.

Second, in deciding whether federalization in this area is appropriate, the subcommittee should consider the relationship between recognition of a judgment and its enforcement. Recognition of a foreign country judgment is a prerequisite to the ability to enforce the judgment, and most requests for recognition, particularly with regard to money judgments, are made for the purpose of obtaining court enforcement of the judgment through court initiation of the actions necessary to invoke the collection procedures available in that court's jurisdiction. The Proposed Statute does not seek to federalize these state enforcement procedures, and, indeed, it would be very problematic to do so. These procedures vary from state to state, and touch upon issues, such as control over title to real property, exemptions from execution, and standards for seizure of property without consent, that traditionally have been viewed as very local in nature. Nevertheless, because recognition is the step that entitles a party to request enforcement, imposition of federal standards for recognition upon the states necessarily will implicate state control over these enforcement procedures.

The federal government is a government not only of limited powers, but of limited resources. I believe it is safe to say that the federal government's power to regulate far exceeds its ability to absorb the costs of regulation. Thus, even if a case adequate to satisfy the federalism concerns involved in federalizing the area of recognition and enforcement of foreign country judgments is made, the costs to the federal government of federalization also must be considered. It seems obvious that at the very least a shift from a state law to a federal law in this area will impose additional costs on the federal judiciary and executive branch.

Because many actions to recognize and enforce foreign country judgments involve diverse parties within the meaning of 28 U.S.C. §1332 and meet the amount in controversy requirement

of that section, federal courts are very often an available alternative to state courts under the current state law regime through diversity jurisdiction. This is true both with regard to plaintiffs and, through removal, with regard to defendants, if the additional requirement of 28 U.S.C. §1441 that none of the defendants is a citizen of the state in which the action is brought also is met. Thus, federal courts play a significant role in the current regime. Nevertheless, it is a secondary role to that of state courts. Because the applicable law is state law, federal courts are neither the authoritative interpreters of the rules they apply, nor are they the experts with regard to the enforcement remedies available. Indeed, my review of cases decided under the ULC's 1962 Recognition Act revealed many instances in which a case that apparently could have been brought in federal court under diversity nevertheless was brought and remained in state court.

Enactment of a federal statutory scheme would reverse the role of federal and state courts in the area of recognition and enforcement of foreign country judgments. Federal courts would have the primary role under that scheme, and existing limits on federal diversity jurisdiction would become irrelevant because the more expansive federal question ground for jurisdiction would become the basis for access to the federal courts.[12] This reversal inevitably would lead to an increase in the case load of the federal courts *vis-a-vis* state courts in this area. Creditor-oriented provisions such as those in sections 10 (registration of foreign money judgments in federal courts) and 12 (issuance of asset-freezing injunctions by federal courts) of the Proposed Statute would further encourage federal court filings.

It also seems inevitable that an increase in federal filings will lead to an increased burden on federal enforcement officials. As discussed above, recognition is most often sought in order to gain access to state enforcement procedures. While those state procedures are available with regard to both state and federal enforcement actions, when these state enforcement procedures are initiated by a federal court, it is a federal marshal and not the local sheriff who carries them out.

In conclusion, it is my belief that when all factors are considered – the effectiveness and uniformity of the existing state law regime, the federalism issues raised by preemption of that regime, the lack of a distinctive federal interest justifying preemption, and the additional costs to the federal judiciary and enforcement officials from federalization in this area – the case for federalizing the area of recognition and enforcement of foreign country judgments has not been made.

Thank you again for the opportunity to submit this testimony.

[12]See, e.g., Proposed Statute §8.