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Unified Court System
Tribal Courts Committee
serving the
New York Federal-State-Tribal Courts
and Indian Nations Justice Forum
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December 9, 2014

BY E-MAIL AND U.S. MAIL
John McConnell, Esquire
Office of Court Administration
25 Beaver Street, 11th Floor
New York, New York 10004

Re: Supplemental Comments in Support of Proposed Court Rule §202.71

Dear Mr. McConnell:

The New York Unified Court System Tribal Courts Committee (the "Tribal Courts Committee" or the "Committee") respectfully submits for the consideration of the Administrative Board of the Courts the following comments in further support of proposed rule §202.71 (Recognition of Tribal Court Judgments) and in response to the opposition submitted by the Committee on Civil Practice Law and Rules of the New York State Bar Association (the "Bar Association Committee"). The Tribal Courts Committee appreciates the Administrative Board's further consideration of this proposed rule and the courtesy afforded to us by this opportunity to submit additional comments for its consideration.

Background

In October 2011, the Tribal Courts Committee recommended for inclusion in the New York State Unified Court System's 2012 legislative agenda, among other things, an enactment requiring mutual recognition, based on established principals of comity, of judgments of the State courts and the courts of New York's Indian Nations. This recommendation was based, in part, upon a 2008 pilot protocol adopted by a Fifth Judicial District Supreme Court part and the Oneida Indian Nation, which provided for the reciprocal recognition of tribal and state court judgments.[1] In June 2012, the Unified Court System Advisory Committee

[1] A copy of the Proposed Pilot Program Rules on Enforcement of Judgments and Jurisdictional Protocol Between the Courts of New York's Fifth Judicial District and the Oneida Indian Nation of March 19, 2008 ("5th District-OIN Pilot Protocol") is attached as Exhibit A.

on Civil Practice (the "Advisory Committee") initially opposed the Tribal Courts Committee's 2011 recommendation, but later, at the suggestion of Chief Administrative Judge A. Gail Prudenti, agreed to meet with, and consider information provided by, the Tribal Courts Committee. Representatives of the Tribal Courts Committee met with representatives of the Advisory Committee in January 2013 and submitted a response to the Advisory Committee's concerns.[2] The pending proposed rule is the result of the Advisory Committee's thoughtful reconsideration of the recognition issues and concerns advanced by the Tribal Courts Committee and the New York Federal-State Tribal Courts and Indian Nations Justice Forum. During the Administrative Board's public comment period on the proposed rule, comments in support were provided by Tribal Courts Committee, the Oneida Indian Nation and the Honorable James C. Tormey,[3] in addition to those of the Advisory Committee in its memorandum in support.

Response to Bar Association Committee Opposition

The Bar Association Committee advances three primary objections to the Advisory Committee's proposed rule §202.71: (1) CPLR Article 53 does not apply to tribal court judgments; (2) the proposed rule is not necessary because tribal court judgments are already entitled to comity and, sometimes, full faith and credit and tribal court judgments may be enforced under current procedures in the CPLR; and (3) the proposed rule could "invite forum shopping" and "could make New York a nationwide clearing house for conversion of tribal court judgments." We address each objection in turn below.

1. **Article 53 (Recognition of Foreign Money Judgments**

The Bar Association Committee "doubts the applicability of CPLR Article 53 . . . to tribal-court judgments" because tribes are not "foreign states."[4] Article 53 adopts the Uniform Foreign Country Money Judgment

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[2] A copy of the Tribal Courts Committee's January 2013 Response to the Advisory Committee's concerns is attached as Exhibit B.

[3] Justice Tormey, the Administrative Judge for the Fifth Judicial District, oversaw the implementation of the 5th District-OIN Pilot Protocol. A copy of his letter in support of the proposed rule is attached as Exhibit C.

[4] Ironically, the Advisory Committee's initial response to the Tribal Courts Committee's recommendation on enforcement of tribal court judgments concluded that Article 53 would apply to all tribal court judgments. Our Committee expressed concern about this issue as being unsettled, and because tribal court judgments often provide equitable, rather than monetary relief, we proposed language different from that ultimately advanced by the Advisory Committee. We continue to believe that a broader rule, based on mutual recognition of orders, decrees and judgments, such as was established in the 5th District-OIN Pilot Protocol, is warranted. However, we support the Advisory Committee's proposed rule as an important measure required to alleviate uncertainty and promote appropriate recognition of tribal court orders, decrees and judgments under New York's settled comity rules.

Recognition Act ("UFCMJRA"), and whether the UFCMJRA applies to tribal court judgments is, at best, an unsettled question throughout the United States with various state and federal courts reaching differing conclusions. (*See* Exhibit B, p. 5).[5] In New York, however, the only court to have considered the issue, to our knowledge, concluded that Article 53 does apply to tribal court judgments. *See Mashantucket Pequot Gaming Enterprise v. Yau*, 2010 WL 7505742 (Sup. Ct. NY County Feb. 17, 2010). Accordingly, the Bar Association Committee's blanket assertion that Article 53 does not apply to tribal judgments is not uniformly accepted and does not appear to be supported by existing New York case law.

The proposed rule, however, does not change or alter any of the substantive requirements for recognition or non-recognition of a tribal money judgment under Article 53. It merely clarifies that "[i]f the court finds that the judgment is entitled to recognition under provisions of Article 53 of the CPLR or under principles of the common law of comity, it shall direct entry of the tribal judgment as a judgment of the Supreme Court of the State of New York." It is, therefore, hard to see how the Bar Association Committee can characterize the clear and careful language of the proposed rule as an attempt to legislate or modify Article 53.

2. The Proposed Rule is Necessary

The Bar Association Committee argues that the proposed rule is unnecessary because tribal court judgments are entitled to comity (and, sometimes, full faith and credit), and because such judgments can be enforced by an action on a judgment under CPLR §5014 or by summary judgment in lieu of complaint under CPLR §3213. We agree that tribal court orders, decrees and judgments are, at a minimum, entitled to recognition under the doctrine of comity as articulated in *Sung Hwan Co. Ltd. v. Rite Aid Corp.*, 7 NY3d 78 (2006) ("Historically, New York courts have accorded recognition to judgments rendered in foreign countries under the doctrine of comity . . . [a]bsent some showing of fraud in procurement of the foreign court judgment or recognition of the judgment would do violence to some strong policy of the state"). However, the Tribal Courts Committee has learned that those who are directly involved with, or attempting to obtain, New York state court recognition of tribal court orders and judgments have not experienced a uniform, expeditious, or predictable process for recognition. (*See* Exhibit B). As noted in the Oneida Indian Nation's submission during the public comment period supporting the proposed rule, "New York law has been silent on the general recognition and enforcement of tribal court judgments leaving litigants (and potential tribal court litigants) to question whether a particular New York court will in fact recognize a judgment obtained in tribal court." Indeed, the CPLR and current court rules are completely silent on the recognition of tribal court orders, decrees and judgments and leave open the process and procedure by which tribal court judgments will be recognized by New York courts.

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[5] Notably, the California Tribal Court-State Court Forum has recently secured the passage by its state Legislature of SB 406, the Tribal Court Civil Money Judgment Act (CA Stats. 2014, Ch. 243, effective January 1, 2015), to simplify and clarify the process by which tribal court money judgments are recognized by California state courts. (*See* www.courts.ca.gov/3065.htm/LegislativeChaptered [last visited Dec. 9, 2014]).

The experience of tribal courts and litigants with respect to state recognition of tribal court judgments has been frustrating, inconsistent and unreliable. (See Exhibit B). The Bar Association Committee points to various sections of New York's Indian Law relating to the Seneca Nation of Indians as evidence that the proposed rule is unnecessary. Unfortunately, New York Indian Law does not, in and of itself, address the problem initially raised by this Committee and now addressed by the Advisory Committee's proposed rule. First, these referenced sections of the New York Indian Law only afford recognition and establish procedures for the orders and judgments of the Seneca Nation Peacemakers' Court, leaving uncertainty regarding the process for the decision, orders and judgments of the two other New York tribal nations that maintain court systems. Second, despite the clear language of sections cited by the Bar Association Committee, current practice in Western New York prevents the Seneca Nation's tribal judgment and orders from being filed and enforced, even in the case of the most routine orders. Neither of the county clerks in Allegany or Cattaraugus counties, where the Seneca Nation is located, has a procedure in place for the filing of Seneca Nation orders and judgments, and both county clerks' offices operate as if New York does not recognize these as valid court orders. In fact, judges of the Seneca Nation have reported to this Committee, and the Cattaraugus County Clerk has confirmed, that the Cattaraugus County Clerk's office flatly refuses to recognize Seneca Peacemakers' Court divorce decrees and name change orders. The adherence to this policy deprives tribal court litigants of the ability to effectuate a name change at the Department of Motor Vehicles,[6] Social Security Office or Board of Elections, notwithstanding the clear language of the existing New York Indian Law. Accordingly, although the Bar Association Committee believes that New York's existing case law, statutes and rules demonstrate little or no need for the proposed rule, the real world experiences of the Indian nations (*see* Exhibit B), the Administrative Judge whose judicial district includes a portion of three of New York's Indian reservations (*see* Exhibit C), and the participants in the New York Federal-State Tribal Courts and Indian Nations Justice Forum indicate otherwise.

The Bar Association Committee also suggests that tribal court judgments and orders may be enforced in New York courts through existing procedural provisions of the CPLR, namely by an action upon a judgment (CPLR §5014) or by a motion for or summary judgment in lieu of complaint (CPLR §3213). Requiring tribal court litigants to commence yet another action with the potential for re-litigation of the entire controversy would not only impose additional, unnecessary costs upon the victorious tribal court litigant, but would also undermine the sovereignty of the tribal courts of New York while flouting New York's settled common law rules of comity. The purpose of the proposed rule is to promote judicial economy by avoiding such costly and time-consuming re-litigation of matters already decided in the tribal courts. The proposed rule clearly recognizes that properly rendered tribal court judgments and orders are entitled to comity and establishes an expeditious procedure (a special proceeding pursuant to Article 4 of the CPLR) for recognition of such judgments that is compatible with due process requirements and consistent with well-established New York State law on comity.

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[6] The opposition comment submitted by Russell J. Genna, Esquire, of the New York State Department of Motor Vehicles, suggests that tribal court jurisdiction should only occur when "both parties consent to the adjudication of their dispute by the 'Indian Courts' [and] then they should be treated as an arbitration and should be entitled to have the judgment enforced." This comment misapprehends well-established law regarding the jurisdiction of tribal courts and itself exemplifies the need for the proposed rule.

(*See Sung Hwan v. Rite Aid Corp., supra*). The proposed rule also avoids duplicative litigation and the potential for conflicting judgments that could result from the commencement of new actions for the sole purpose of state recognition. This proposed rule, although not the mutual recognition and jurisdictional transfer rule that the Tribal Courts Committee initially sought and recommended, will provide a state-wide uniform system of recognition that will give state and tribal courts, as well as county clerks' offices, the full confidence and authority necessary to achieve the efficiencies and benefits contemplated by the Committee's recommendation for a court rule for mutual recognition of orders and judgments.[7]

3. **The Proposed Rule Will Not Make the New York Courts System a Clearinghouse for Conversion of Tribal Court Judgments**

The Bar Association Committee fears that the proposed rule would (a) invite forum shopping and compel a tribal court judgment debtor to defend an action in a distant county unrelated to the dispute or parties, and (b) make the New York courts a nationwide clearing house for the conversion of tribal court judgments. The Bar Association Committee's fears are unfounded.

With respect to its first concern, the Bar Association Committee's assertion that a tribal court judgment creditor should be required to demonstrate personal jurisdiction and convenient venue as a precondition of recognition under the doctrine of comity is contrary to established New York law. In a recent First Department decision, the Court expressly held that New York's common law of comity does not require such prerequisites, explaining the requirements of the comity doctrine as follows:

> Judgments of foreign countries are accorded recognition only through comity. "[T]he inquiry turns on whether exercise of jurisdiction by the foreign court comports with New York's concept of personal jurisdiction, and if so, whether that foreign jurisdiction shares our notions of procedure and due process of law" . . . . "If the above criteria are met, and enforcement of the foreign judgment is not otherwise repugnant to our notion of fairness, the foreign judgment should be enforced in New York under well-settled comity principles without microscopic analysis of the underlying proceeding" . . . .
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[7] The specific language of the proposed rule is currently limited to "judgments." The Committee respectfully suggests that the Administrative Board add clarifying language to the proposed rule to make clear that "judgment" as used in the proposed rule includes only judgments, but also orders and decrees of the tribal courts. This would not be unprecedented. Indian Law §52 is titled "Enforcement of judgments," but the statute's application is not limited to judgments and has been judicially extended to include the "orders, directions and judgments of the Peacemakers' Court." *Silverheels v. Maybee*, 82 Misc. 48, 51 (Sup. Ct. Cattaraugus Co. 1913). The Committee urges that the same reading should be applied to the proposed rule to ensure that enforcement applies to all tribal orders, decrees and judgments, including those Seneca Peacemakers' Court orders and decrees which are not currently receiving recognition in western New York.

> [S]ince CPLR article 53 and the [foreign jurisdiction] court are already protecting the defendant's due process rights, including personal jurisdiction, the [New York] court charged with recognition and enforcement should not be required to grant further protection during a ministerial enforcement action . . . .

Abu Dhabi Commercial Bank v. Saad Trading Contr. & Fin. Serv. Co., 117 AD3d 609, 612, 613 (1st Dept. 2014), quoting *Sung Hwan Co. v. Rite Aid Corp., supra,* 7 N.Y.3d at 82-83.

Regarding the Bar Association's second concern, that the proposed rule will create a nationwide clearing house for recognition of tribal court judgments, as a practical matter, tribal court litigants will be unlikely to incur the expense and effort associated with seeking recognition of their tribal court judgments by the New York courts if the tribal court judgment debtor has no assets in the state. The more practical and likely motivation for seeking recognition of tribal court judgments and orders is to enforce them against assets that are located within the State of New York, such as real property, bank accounts, etc.

In any case, although neither required by New York's comity law, nor necessary from a practical standpoint, the Administrative Board could slightly revise the language proposed by the Advisory Committee to address the concern advanced by the Bar Association Committee by making clear that the proposed rule relates only to the judgments and orders by the duly established courts of the Indian nations or tribes listed in Indian Law § 2 ("term 'Indian nation or tribe' means one of the following New York state Indian nation or tribes . . . .").

Conclusion

As demonstrated above and in Exhibit B, there is a need for this proposed rule, as the process and path to recognition of tribal court orders and judgments is anything but clear. The Bar Association Committee does not disagree that tribal court judgments are entitled to enforcement by the New York state courts. Moreover, its own comments demonstrate the need for the proposed rule so that the courts of this state are aware of the existing rules on comity for tribal court judgments and are able to apply those rules efficiently and fairly in accordance with a clear, predictable and uniform rule.

The Advisory Committee carefully considered and balanced potential concerns such as those raised by the Bar Association Committee against the need of litigants, practitioners and judges to have a uniform roadmap and predictable procedure for the enforcement of tribal court judgments. Proposed rule §202.71 is the result of those considerations and is a carefully and deliberately crafted proposed court rule. It neither changes the substantive requirements for recognition found in comity principles nor amends any existing procedures for enforcement. It merely, and carefully, provides a predictable roadmap following the comity rules of New York

as set forth by the Court of Appeals in *Sung Hwan Co. v. Rite Aid Corp.*, *supra*. Accordingly, we urge adoption of proposed rule 202.71.

We thank the Administrative Board for its consideration of this supplemental submission.

Respectfully submitted,

Marcy L. Kahn
Chair of the New York Tribal Courts Committee

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Enclosures