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April 22, 2015

VIA EMAIL & FIRST CLASS MAIL
Hon. A. Gail Prudenti
Chief Administrative Judge
NYS Unified Court System
25 Beaver Street
New York, NY 10004
[redacted]

Re: Section 202.71 Uniform Civil Rules for Supreme Court and County Court
Recognition of tribal court judgments

Dear Judge Prudenti:

The Advisory Committee on Civil Practice has reviewed the latest version of the proposed Section 202.71 of the Uniform Civil Rules for Supreme Court and County Court, relating to recognition of tribal court judgments. The Committee believes that the changes made to its original proposal are appropriate and acceptable, and the Committee urges adoption of this new rule.

Thank you for giving us the opportunity to comment on this proposal.

Respectfully submitted,

George F. Carpinello
Chair

cc: via email:
Matthew G. Kiernan, Esq.
John W. McConnell, Esq.
Marc Bloustein, Esq.
Holly Nelson Lütz, Esq.

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COMMITTEE ON CIVIL PRACTICE LAW AND RULES

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May 11, 2015

VIA E-MAIL (rulecomments@nycourts.gov)

John W. McConnell, Esq.
Counsel, Office of Court Administration
State of New York Unified Court System
25 Beaver Street, 11th Floor
New York, New York 10004

Re: Further public comment requested on proposed adoption of 22 NYCRR § 202.71, relating to recognition of tribal judgments

Dear Mr. McConnell:

I am Chair of the Committee on Civil Practice Law and Rules of the New York State Bar Association ("Committee"). In response to your March 9, 2015 memorandum, and following up on my September 14, 2014 letter to you, the Committee offers these additional comments on the revised proposed rule, 22 NYCRR §202.71 on recognition of tribal-court judgments ("Revised Proposed Rule"). This letter supplements, but does not supersede, my original letter. For the reasons set forth below, the Committee unfortunately cannot support the rule in its present form.

The Revised Proposed Rule reads as follows, with italics for the additions and strikeout for the material deleted since the original July 15, 2014 proposal:

> Section 202.71. Recognition of Tribal Court Judgments, *Decrees and Orders*. Any person seeking recognition of a judgment, *decree or order* rendered by a court duly established under tribal or federal law by any Indian tribe, *band* or nation recognized by the State of New York or by the United States may commence a special proceeding in Supreme Court pursuant to Article 4 of the CPLR by filing a notice of petition and a petition with a copy of the tribal court judgment appended thereto in the County Clerk's office in any *appropriate* county of the state. ~~Alternatively, the person may commence an action pursuant to CPLR 3213.~~ If the court finds that the judgment, *decree or order* is entitled to recognition under ~~the provision of Article 53 of the CPLR or under~~ principles of the common law of comity, it shall direct entry of the tribal judgment, *decree or order* as a judgment, *decree or* order of the Supreme Court of the State of New York. *This procedure shall not supplant or diminish other available procedures for the recognition of judgments, decrees and orders under the law.*

Recognition of Tribal-Court Judgments Should Be Subject to the Same Procedural Protections as Recognition of Sister-State and Foreign-Country Judgments

To begin with, the Committee questions why "Recognition of Tribal Court Judgments" in the original proposal has been changed to "Recognition of Tribal Court Judgments, *Decrees and Orders*" in the Revised Proposed Rule. This latter language is from CPLR 5401, "Enforcement of Judgments Entitled to Full Faith and Credit," providing that "[i]n this article, 'foreign judgment' means any judgment, decree, or order of a court of the United States or of any other court which is entitled to full faith and credit in this state, except one obtained by default in appearance, or confession of judgment." See also United States Constitution, Article IV, §1 ("Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state"); 28 USC §1738.

But except as otherwise provided by federal law (*see* 18 USCA §2265, 25 USCA §1911(d); 25 USCA §2207; 25 USCA §3106) tribal judgments are not entitled to full faith and credit, *Wilson v. Marchington*, 127 F.3d 805, 807-08 (9th Cir. 1997) and a court asked to enforce such a tribal judgment may look behind it and refuse to give it effect where, for example, it was procured in violation of due process. *Bird v. Glacier Electric Cooperative*, 255 F.3d 1136 (9th Cir. 2001); *cf.* CPLR 5304(a)(1), providing for non-recognition of foreign-country money judgments where "the judgment was rendered under a *system* which does not provide impartial tribunals or procedures compatible with the requirements of due process of law" (emphasis added).

As noted above CPLR 5401 is limited to any "judgment, decree, or order of a court of the United States or of any other court *which is entitled to full faith and credit in this state*" (emphasis added) which generally means only those judgments, decrees or orders that are final and entitled to *res judicata* under the law of the rendering jurisdiction. *See Ford v. Ford*, 371 U.S. 187 (1962). By encompassing any and all tribal court "judgments, decrees and orders," whether they are final or not, the Revised Proposed Rule would potentially allow for the recognition of interlocutory tribal-court orders which would not be accorded recognition were they orders of a sister-state. *See id.*; *Board of Public Works v. Columbia College*, 84 U.S. 521, 529-30 (1873). Allowing recognition of interlocutory tribal-court judgments, decrees and orders, while limiting recognition of sister-state judgments, decrees and orders to those that are final, makes no sense and cannot have been intended.

Moreover, the Revised Proposed Rule omits all of the procedural protections for filing of full faith and credit judgments under CPLR Article 54, including the exclusion from Article 54 (but not from the Revised Proposed Rule) of judgments obtained by default of appearance or by confession (CPLR §5401); the requirements for authentication of the judgment and an affidavit from judgment creditor that such judgment has not been satisfied or stayed (§5402(a)); specification of grounds for reopening, stay or vacatur of a judgment filed under Article 54 (§5402(a)); the requirement of notice to the judgment debtor of the filing of the judgment, and a stay of distribution of the proceeds of execution pending such notice (§5403); and the provision for a stay of enforcement of the filed judgment pending appeal of the underlying judgment in the rendering jurisdiction (§5404). Nor does Revised Proposed Rule contain any of the requirements of CPLR Article 53 for recognition of a foreign-country money judgment, including finality, conclusiveness and enforceability in the rendering jurisdiction (CPLR 5302), personal and subject matter jurisdiction of the rendering court (CPLR 5304(a)(2), (b)(2)), or impartial tribunals and procedures in the rendering jurisdiction. (CPLR 5304(a)(1)). Although CPLR Article 53 does not by its terms apply to tribal-court judgments as they are not "foreign country judgments" per CPLR 5301(b), the doctrine of comity governs recognition of both foreign-country judgments and tribal-court judgments, *Wippert v. Blackfeet Tribe*, 201 Mont. 299, 654 P.2d 512 (1982); *Wilson v. Marchington*, 127 F.3d 805, 807-08 (9th Cir. 1997) so the procedural requirements for recognition should be similar.

The apparent intention of the Revised Proposed Rule to allow recognition and enforcement by the New York courts of a tribal-court default judgment which may have been jurisdictionally defective in the first place, without any new notice to the judgment debtor, raises doubts as to its constitutionality. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988); *cf.* CPLR 3215(g), requiring notice to judgment debtor before entry of default judgment. In any event it is incongruous to accord more procedural protections to debtors under full faith and credit judgments, which the New York courts are required to enforce (United States Constitution, Article IV, §1; 28 USC §1738) than to debtors under tribal-court judgments, which are only entitled to comity. As set forth above, even such requirements for recognition of foreign-country judgments as personal and subject matter jurisdiction of the rendering court are missing from the Revised Proposed Rule. Accordingly, the Revised Proposed Rule should not be adopted in its present form.

Any New Special Proceeding for Recognition of Tribal Judgments Must Be Created by Legislation, not Court Rule

As set forth in my September 14, 2014 letter, those tribal judgments that are entitled to full faith and credit under present law may be enforced in accordance with CPLR Article 54; judgments of the Seneca Nation Peacemakers' Court may be enforced pursuant to Indian Law §52; and tribal judgments entitled to comity may be enforced by a motion for summary judgment in lieu of a complaint pursuant to CPLR 3213, or by an action on the judgment. In light of these existing remedies, the Committee still does not see the need for a new Uniform Rule on recognition of tribal court judgments.

But if a new special proceeding for recognition of tribal-court judgments is to be created, that should be done by legislation, not by administrative rule. Article VI, § 30 of the New York State Constitution provides that

> The legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised. The legislature may, on such terms as it shall provide and subject to subsequent modification, delegate, in whole or in part, to a court, including the appellate division of the supreme court, or to the chief administrator of the courts, any power possessed by the legislature to regulate practice and procedure in the courts.

The Committee is not aware of any delegation that would allow the Chief Administrative Judge ("CAJ") or the Office of Court Administration to create a new type of special proceeding under CPLR Article 4. With the repeal of Judiciary Law §229(e)(3) in 1978, the Legislature withdrew its previous delegation to the Judicial Conference of the power to amend those provisions of the CPLR designated "Rules."

Before and after the 1977 amendments to Article VI, §§ 28 and 30 of the New York State Constitution, the express delegation of the power to regulate practice and procedure in the courts by the Legislature has been a *sine qua non* of the exercise of such power by court administrators. *See Cohn v. Borchard Affiliations*, 25 N.Y.2d 237, 247-248 (1969), which holds that power of the type sought to be exercised here by the CAJ lies with the Legislature:

> Indeed, the general power of the Legislature to formulate rules of practice for our courts is so firmly embedded in the tradition of this State that the defendants have been able to find only one case in which a procedural statute has ever been found to be an unconstitutional infringement upon judicial prerogatives. [Internal citations omitted.]

In *Cohn*, the Court of Appeals expressed its concern that the entire statutory framework of the CPLR could be undermined were the Legislature to be treated as if it had delegated power over practice and procedure to court administrators. After *Cohn* – and after the current version of Article VI, §30, became effective – courts have adhered to *Cohn* in recognizing the reserved power of the Legislature to regulate practice and procedure in the courts. To cite only one example, a CAJ rule requiring submission of an affidavit in residential mortgage foreclosures was held unconstitutional as an exercise of undelegated legislative power. *LaSalle Bank, NA v. Pace*, 31 Misc.3d 627 (Sup. Ct. Suffolk Co. 2011), *aff'd*, 100 A.D.3d 970 (2d Dept. 2012). *See also Harbolic v. Berger*, 43 N.Y.2d 102, 109 (1977); *Sciara v Surgical Assoc. of W. N.Y., P.C.*, 104 A.D.3d 1256, 1257 (4th Dep't 2013); *City of New York v. Stone*, 11 A.D.3d 236, 237 (1st Dep't 2004); *Motor Vehicle Mfrs. Asso. v. State*, 146 A.D.2d 212, 220 (3d Dep't 1989); *Bank of New York Mellon v. Izmirligil*, 43 Misc.3d 409 (Sup. Ct. Suffolk Co. 2014).

The Chief Administrator's power to "'adopt *administrative* rules for the efficient and orderly transaction of business in the trial courts, including but not limited to calendar practice'" is limited to rules that are "administrative in nature and [that do] not concern the performance of an adjudicative function." *Levenson v. Lippman*, 4 N.Y.3d 280, 288, 290 (2005) *citing* 22 NYCRR 80.1(6) (emphasis added.) The Revised Proposed Rule would create a new form of special proceeding and is inescapably "adjudicative." In the absence of any express delegation of relevant power to regulate practice and procedure in the courts by the Legislature, promulgation of such rule falls beyond the power of the CAJ and would be *ultra vires*.

Some New York Nexus Should Be Required for Recognition of Tribal Judgments Here

For the reasons set forth in my September 14, 2014 letter, if New York is to domesticate tribal judgments from anywhere in the United States, and not just from New York's eight federally-recognized tribes, some New York nexus should be required. *Cf. Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting and Financial Services Co.* 117 A.D.3d 609 (1st Dep't 2014); *Lenchyshyn v. Pelko Elec., Inc.* 281 A.D.2d 42 (4th Dep't 2001) (neither New York personal jurisdiction over judgment debtor, nor property of judgment debtor in New York, is required for New York recognition of foreign-country money judgment under CPLR Article 53.)

The Revised Proposed Rule, providing for New York recognition of any "judgment, decree or order rendered by a court duly established under tribal or federal law by any Indian tribe, band or nation recognized … by the United States," irrespective whether the underlying controversy has any New York connection or whether the judgment debtor has any New York property, could make New York a nationwide clearinghouse for conversion of tribal judgments into purported full faith and credit judgments. Although as indicated above the New York courts have not required any New York nexus for domestication of a foreign-country money judgment under CPLR Article 53, the resulting New York "judgment on a judgment" may itself be denied full faith and credit by the courts of other states. *Compare Reading & Bates Construction Co. v. Baker Energy Resources Corp.*, 976 S.W.2d 702 (Tex. Ct. Appeals, 1998) (declining to recognize a Louisiana judgment recognizing a Canadian judgment: "We will not permit a party to clothe a foreign country judgment in the garment of a sister state's judgment and thereby evade … our own recognition process") *with Standard Chartered Bank v. Ahmad Hamad Al Gosaibi and Brothers Company, et al.*, 2014 P.A. Super. 179, 99 A.3d 936 (2014) (according "full faith and credit to a New York judgment recognizing a Bahraini money judgment") *with Ahmad Hamad Al Gosaibi & Brothers Company, et al. v. Standard Chartered Bank*, 98 A.3d 998 (D.C. Ct. App. 2014) ("the New York recognition judgment is not entitled to full faith and credit," despite cited Pennsylvania decision involving same judgment, because of "New York's lack of a jurisdictional requirement for recognition actions and the essential nature of its judgment."). It would be of no benefit to anyone to carry this controversy over to recognition of tribal-court judgments and some New York nexus should therefore be required for any recognition proceeding to be brought here.

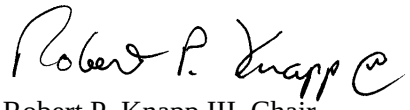
Conclusion

Sufficient procedures already exist for the recognition and enforcement of tribal-court judgments in New York, *viz.* filing pursuant to CPLR Article 54 for those tribal-court judgments entitled to full faith and credit under federal law; enforcement of Seneca Peacemakers' Court judgments pursuant to Indian Law §52; and a motion for summary judgment in lieu of a complaint pursuant to CPLR 3213, or a common-law action on the judgment, for any tribal-court judgment entitled to comity under federal law. A new special proceeding for recognition of tribal judgments is unnecessary and (if adopted in the form of the Revised Proposed Rule) would create more problems than it would solve.

If the Tribal Courts Committee and the OCA still believe a new special proceeding is required, they should explain why these existing remedies are inadequate. In any event any new special proceeding must be created by statute, not by administrative rule, and should incorporate the procedural protections set forth above, including requirements of personal and subject matter jurisdiction for the underlying judgment, decree or order; proper authentication of the underlying judgment, decree or order, and proof that it has not been satisfied; notice to the judgment debtor of the special proceeding for recognition, and an opportunity to be heard; limitation of recognition proceedings to those judgments, decrees and orders that would be entitled to full faith and credit if entered by the court of a sister state; stay of enforcement pending any appeal of the underlying judgment, decree or order in the original jurisdiction, subject to reasonable bonding requirements; and some New York nexus in order of the recognition proceeding to be brought here. Should the Tribal Courts Committee and the OCA wish to propose such legislation (perhaps a new CPLR Article 54A) the CPLR Committee would be happy to comment on same and to assist in drafting.

The CPLR Committee thanks you again for this opportunity to offer our comments and looks forward to working with you in the future.

Regards,



Robert P. Knapp III, Chair