COMMENTS ON COMMITTEE QUESTIONS FROM PETITIONERS SCHEFFLER, SMITH, AND RADEMACHER AND TRIBAL JUDGES

April 24, 2017

The Petitioners and Tribal Judges respectfully submits this supplemental brief in response to questions presented by the Supreme Court Advisory Committee on General Rules of Practice (the Committee):

1. Is the proposed change making tribal court orders and judgments presumptively enforceable substantive or procedural, and does it encroach on federal or state legislative authority?

We respectfully submit that the proposed amendments continue to embrace the principles of comity, do not create a new cause of action or new rights, and remain well within the Supreme Court's procedural rule-making authority.

In 2002, the Committee opposed the Minnesota Tribal Court/State Court Forum's (the Forum) proposal for full faith and credit for tribal court orders on the ground that "the proposed rule is fundamentally substantive in nature." After the Supreme Court declined to adopt the proposed rule, the Committee changed course and proposed a form of the current rule, which was "to provide some structure to the application of comity principles . . . where there is no statutory requirement" to enforce tribal court orders. In December 2003, mindful of the substantive v. procedural deliberations, the Court adopted the current rule. The rule of comity was considered procedural.

The Minnesota Court of Appeals' application of Rule 10 in *Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise v. Prescott*, 779 N.W.2 320 (Minn. Ct. App. 2010), reinforced the validity of the rule of procedure. There, the Court held that Rule 10, rather than

the Minnesota Uniform Foreign-Country Money Judgments Recognition Act, governed the enforceability of a tribal court money judgment in state court.

Moreover, Rule 10 has been on the books for nearly 14 years and the Minnesota Legislature has not taken any action to supersede the rule, suggesting that the Legislature is comfortable deeming the subject matter procedural, not substantive.

While the proposed changes to Rule 10 would clarify and streamline the rule, and require the party challenging the order to prove significant irregularities in the tribal court process, the rule remains fundamentally a rule of comity. The courts would retain significant discretion not to enforce the tribal court order if the objecting party demonstrated these prescribed irregularities.

"Substantive law is that part of law which creates, defines, and regulates rights, as opposed to 'adjective or remedial' law, which prescribes method [sic] of enforcing the rights or obtaining redress for their invasion." *Stern v. Dill*, 442 N.W.2d 322, 324 (Minn. 1989) (citation omitted). In contrast, procedural law "neither creates a new cause of action nor deprives defendant of any defense on the merits." *Id.* (citing *Strauch v. Superior Court*, 107 Cal. App. 3d 45 (1980)). Proposed Rule 10 does not create new substantive rights, it prescribes a method for enforcing those rights. The substantive rights that are enforced in the order or judgment were created by tribal law. As stated in the Advisory Committee Comment to current Rule 10: "Rule 10.02(a) does not create any new or additional powers but only begins to describe in one convenient place the principles that apply to recognition of orders and judgments by comity."

Creating a presumption that a tribal court order should be enforced unless the party objecting to the order demonstrates one of the specific reasons not to enforce the order does not change Rule 10 from procedural to substantive. The rule's allocation of the burden of proof

acknowledges that the substantive dispute should not be re-litigated in state court and recognizes that the burden should be placed on the objecting party, such as in collateral proceedings to contest tribal court authority or to enforce a judgment. *See* discussion in response to Question #8 below.

Other courts have adopted similar rules that establish a presumption in favor of enforcing the tribal court order or require the objecting party to demonstrate grounds not to enforce the order. The adoption of these rules by these courts reinforces the conclusion that proposed Rule 10 is procedural.

- Ariz. R. P. Recognition Tribal Ct. Civ. Judgment 5 – "A tribal judgment shall not be recognized and enforced if the objecting party demonstrates to the court at least one of the following: 1. The tribal court did not have personal or subject matter jurisdiction. 2. The defendant was not afforded due process."

- Mich. Ct. R. 2.615 – "(C) A judgment, decree, order, warrant, subpoena, record, or other judicial act of a tribal court of a federally recognized Indian tribe that has taken the actions described in subrule (B) is presumed to be valid. To overcome that presumption, an objecting party must demonstrate that (1) the tribal court lacked personal or subject-matter jurisdiction, or (2) the judgment, decree, order, warrant, subpoena, record, or other judicial act of the tribal court (a) was obtained by fraud, duress, or coercion, (b) was obtained without fair notice or a fair hearing, (c) is repugnant to the public policy of the State of Michigan, or (d) is not final under the laws and procedures of the tribal court."

- N.D. R. Ct. 7.2 – "(b) Recognition. The judicial orders and judgments of tribal courts within the state of North Dakota, unless objected to, are recognized and have the same effect and are subject to the same procedures, defenses, and proceedings as judgments of any court of record in this state. If recognition of a judgment is objected to by a party, the recognizing court must be satisfied, upon application and proof by the objecting party with respect to subsections 1 through 5, that the following conditions are present: (1) The tribal court had personal and subject matter jurisdiction; (2) The order or judgment was obtained without fraud, duress, or coercion; (3) The order or judgment was obtained through a process that afforded fair notice and a fair hearing; (4) The order or judgment does not contravene the public policy of the state of North Dakota; and (5) The order or judgment is final under the laws and procedures of the rendering court."

- Wash. Civ. R. 82.5 – "(c) Enforcement of Indian Tribal Court Orders, Judgments or Decrees. The superior courts of the State of Washington shall

recognize, implement and enforce the orders, judgments and decrees of Indian tribal courts in matters in which either the exclusive or concurrent jurisdiction has been granted or reserved to an Indian tribal court of a federally recognized tribe under the Laws of the United States, unless the superior court finds the tribal court that rendered the order, judgment or decree (1) lacked jurisdiction over a party or the subject matter, (2) denied due process as provided by the Indian Civil Rights Act of 1968, or (3) does not reciprocally provide for recognition and implementation of orders, judgments and decrees of the superior courts of the State of Washington."

2. Do tribal court civil monetary judgments immediately become liens on real property when filed in MN? (e.g., Wisconsin requires a court to approve it; Iowa says must wait until any filed objections are resolved)?

3. How would the proposed change making tribal court orders and judgments presumptively enforceable, address the problem of law enforcement not honoring lawful tribal court orders when people would still need to get "cover orders" from the state courts?

We would not expect law enforcement to begin enforcing tribal court orders if Rule 10 were changed. We would expect that it would be easier and quicker to obtain a state court order adopting the tribal court order if the rule were changed. In most instances, we believe, there would be no challenge to entering the state court order, and therefore the order may be entered quickly without need of a hearing.

4. To what extent would there be reciprocal recognition for state court orders in tribal court?

We believe that most, if not all, of Minnesota's tribes already recognize state court orders in tribal court proceedings. Some of our judges have commented that they routinely recognize state court orders and have done so hundreds of times. Most, if not all, tribes have specific reciprocity provisions in their judicial codes. For example, the White Earth Band of Chippewa Rules of Civil Procedure provides that state court orders must be given full faith and credit when, among other factors, the court in which the order was granted had jurisdiction, the order was not fraudulently obtained, and the process under which the order was obtained assures due process.

5. What model does the current proposal follow and what has been the experience in those jurisdictions?

Proposed Rule 10 most closely resembles the rules promulgated in Arizona, Michigan, and North Dakota. *See* discussion in response to Question #1. Arizona's rule has been in place since 2000, Michigan's since 1996, and North Dakota's since 1995. To our knowledge, these rules have been effective in their respective jurisdictions. Judge Ralph Erickson from the United States District Court for the District of North Dakota provided the following comments regarding N.D. R. Ct. 7.2:

> When the rule was proposed there was widespread grumbling and opposition by the bar, trial judges and businesses in communities located near tribal lands. The complaints included concerns that there was a lack of due process, that the method for selection and retention of judges lacked stability, and that manifest injustice would certainly ensue. Many expressed concerns that the rule would lead to widespread and expensive litigation.
>
> What we found was that there were very rarely objections when the cases are presented for full faith and credit. The vast majority of objections raised are in child custody cases which are governed by Federal Law. Even though there are Tribal Courts in North Dakota that have awarded large money judgments arising out of the oil business, there have been few objections and none, to my knowledge, have been successful. The largest number of cases objected to in the State are in Ramsey County, ND and the average is 2-3 per year with over 90 percent of the objections arising in custody cases. In short, nearly all Tribal Court judgments and orders presented in the state courts are recognized without objection--and any litigation related to objections is negligible. As a practical matter Tribal Orders are routinely given full faith and credit under the rule with no controversy whatsoever.

Although proposed Rule 10 is premised on comity, not full faith and credit, we believe that it will render a similar experience Minnesota.

6. How can a tribal court ordering a civil commitment do so without making the commitment facility a party to the proceedings?

With limited secure facilities for women who are abusing alcohol and drugs during pregnancy, a pregnant mother who is a ward of a tribal court is referred to one of the State of Minnesota Department of Human Service's Community Addiction Recovery Enterprise

("CARE") facilities around the State. A tribal court judge will order a person picked up and placed in a CARE facility. The CARE facility will not recognize a tribal court order. Therefore, a tribal attorney files under Rule 10 to have the tribal court order recognized so that the CARE facility will take the woman. The facility is not a party. It simply has its policy that has to be worked around.

7. How are tribal court judges selected?

We are perplexed as to the motive for this question. Minnesota's tribes are sovereigns and are entitled to choose their forms of government and institutions. A Minnesota court is not likely to inquire as to how judges are selected in France (when comity is invoked to enforce a French court order) or in Louisiana (when full faith and credit requires enforcement of an order). We are hopeful that the State of Minnesota and its courts would be respectful of Indian tribes and their courts, regardless of the system for choosing judges.

Nevertheless, this topic was addressed at the hearing on March 31. Generally, the tribes' tribal councils appoint tribal court judges and tribal codes often have onerous provisions to prevent removal of judges for political reasons. For example, at White Earth, the Tribal Council appoints judges for a four-year term. Judges must be "experienced in the practice of Tribal and federal Indian law and licensed to practice in the highest court of any state." Judges may be removed only by petition and two-thirds vote of on-reservation tribal members.

If this question is aimed at determining whether tribal government agencies or leaders exert influence tribal court judges in their decisions, that topic was addressed too on March 31. All of the judges who testified reported that they were not aware of a single incident in which a tribal official attempted to influence a tribal court case.

8. What meets the burden to "demonstrate" one of the veto items, such as lack of jurisdiction? I was never there, I was never served, you have the wrong Mike Johnson?

Subject matter jurisdiction of tribal courts over non-Indians is limited, *see Montana v. United States*, 450 U.S. 544 (1981), so there are few cases against nonmembers litigated in tribal court. The vast majority of cases in tribal courts involve Indians. The cases in which the burden of proof determines the outcome of a challenge to a tribal court order are also likely to be very few.

In tribal court, the plaintiff (sometimes the tribe) has the burden of proving subject-matter jurisdiction in a case involving a nonmember. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008). When there is a collateral challenge to tribal court authority in federal court, however, the party seeking to avoid the order has the burden of proving lack of jurisdiction. *United States v. Nichols*, No. 13-30158-MAM, 2014 WL 4294529 (D.S.D. 2014) (personal jurisdiction) (citing *United States V. Bigford*, 365 F.3d 859 (10th Cir. 2004) (in collateral attack on default judgment, burden is on defendant to prove personal jurisdiction was lacking in court in which judgment was obtained); *Philos Technologies, Inc. v. Philes & D, Inc.*, 645 F.3d 851 (7th Cir. 2011); *Miller v. Jones*, 779 F. Supp. 207 (D. Conn. 1991)); *see also Corporation of President of the Church of Jesus Christ of Latter-Day Saints v. RJ*, ___ F. Supp. 3d ___, 2016 WL 6783217 (D. Utah Nov. 16, 2016) (where tribal exhaustion rule is avoided by proof that it is patently obvious the tribal court lacks jurisdiction, the burden is on party seeking to avoid tribal court authority to prove the court clearly lacks jurisdiction).

Thus, while the burden in tribal court may be on the plaintiff to prove jurisdiction, when the tribal court proceeding results in an order or judgment, it is reasonable to impose the burden on the party challenging jurisdiction in a collateral attack on the order or judgment. Thus, the proposed amended Rule 10 properly places that burden on the party challenging the order or judgment.

9. Are tribal court records public so that litigants can verify what is and is not there?

Parties in tribal courts have access to their specific court file and each tribal court may have specific court rules, rules of procedure, and applicable laws, e.g. judicial codes promulgated by the tribe's governing body. If a litigant or party wants a transcript of a hearing, there is usually a fee for transcription not unlike state courts. Tribal court children's cases and conservatorships are generally closed hearings and the files confidential.

CONCLUSION

Now is the time for this Court to revisit Rule 10. And the Forum believes that its proposal best addresses the concerns presented in Rule 10. Therefore we respectfully request that the Court adopt the proposed amendments.