FILE NO. ADM 09-8009

STATE OF MINNESOTA
IN THE SUPREME COURT

In Re Petition to Amend Rule 10 of the Minnesota Rules of Practice for the District Courts	)	**RESPONSE BY RANDY V. THOMPSON TO SUPPLEMENTAL INFORMATION REQUEST REGARDING RECOGNITION OF TRIBAL COURT ORDERS AND JUDGMENTS**

On April 6, 2017 the Minnesota Supreme Court Advisory Committee sent a request seeking additional information on nine questions posed by 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?**

The proposed change to make tribal court orders and judgments presumptively enforceable is both substantive and procedural. While the touchstone of whether a rule of law is substantive or procedural looks to whether it is "outcome determinative," the analysis using that criteria is often less than clear cut. *See*, *Glover v. Merck & Co., Inc.*, 345 F.Supp.2d 994 (D. Minn. 2004) discussing that while the traditional rule is that statutes of limitation issues are procedural, the more recent, modern trend is to treat statute-of-limitation issues as substantive. *Id.* at 998.

Here, the proposed rule change making tribal court orders and judgments presumptively enforceable is substantive in two ways. First, a rule which presumptively turns a tribal court judgment into a state court judgment creatives a substantive right by which an individual, acting outside the constitutional structure of both Article III of the United States Constitution and Article VI of the Minnesota Constitution, can obtain a state court judgment against a U.S. citizen or company arising within the United States. Second, the proposed rule for presumptive

recognition will be outcome determinative in at least some cases: (a) if a defendant fails to act in a timely manner or (b) is unable to meet the proposed burden of proof. If the proposed rule change was not substantive in this respect, the Petitioners would be content with a rule that tribal court judgments and orders were presumptively unenforceable, unless the proponent of that judgment or order met the burden of proof, or outcome neutral, in which the state trial court is required to consider and weigh certain factors, without placing the burden of proof or the presumption on either party.

Furthermore, the state courts have deferred to the Legislature in the matter of recognizing foreign court judgments under the Minnesota Uniform Foreign-Country Money Judgments Recognition Act, Minn. Stat. §§ 548.54-63. The proposed rule encroaches on state legislative authority which has enacted legislation to govern the recognition of money judgments from jurisdictions outside of the state and federal constitutional structures.

Minnesota is a Public Law 280 State, (Pub.L. 83-280 (1953), codified as 18 U.S.C. § 1162 (1953), 28 U.S.C. § 1360 (1953), and 25 U.S.C. §§ 1321-26 (1968)). Public Law 280 empowered certain states with civil and criminal jurisdiction, including California, Alaska, Minnesota, Nebraska, Oregon and Wisconsin, to "assume jurisdiction over reservation Indians." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 177 (1973). *See Bryan v. Itasca County*, 426 U.S. 373 (holding that the primary intent in passing Public Law 280 was to grant jurisdiction over private civil litigation involving reservation Indians in state court.) *See*, Vanessa J. Jiminez & Soo C. Song, *Concurrent Tribal Jurisdiction and State Jurisdiction Under Public Law 280*, 47 Am.U.L.Rev. 1627, 1680-91 (1998), which discusses the issues created by Public Law 280 and concurrent jurisdiction between state and tribal courts.

The Judicial Council of California through its Policy Coordination and Liaison Committee ("PCLC") proposed legislation to attempt to address the issues created by concurrent

jurisdiction in both state and tribal courts in a Public Law 280 state. *See*, Jeremy B. Freeman, *Relationships Should be Reciprocal: Enforcing Tribal and State Court Civil Judgments in California*, 36 T. Jefferson L. Rev. Online 2014 at p. 3. The Judicial Council PCLC determined that reciprocity was better left for the legislature and therefore outside the scope of its jurisdiction. *Id.*

Given that the State Legislature has acted under the Minnesota Uniform Foreign-Country Money Judgments Recognition Act to occupy this field, and the federal government has created the current context of concurrent jurisdiction (at least over tribal members), the proposed rule encroaches on both federal and state legislative authority.[1]

The question posed also does not ask whether the Petition encroaches on **tribal** legislative authority. As the testimony of Minnesota Chippewa Tribal Chairman Kevin Dupuis, Sr. and White Earth member Leonard Roy made clear, the largest group of Minnesota Bands, the Minnesota Chippewa Tribe, failed to pass a resolution supporting the Rule 10 Petition.

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)?

This author knows of no basis that a tribal court civil monetary judgment would become a lien on real property until it became a Minnesota civil court judgment. Arguably a civil litigant could file a Notice of Lis Pendens when the tribal court judgment was filed in the state court, but before it was recognized as a state court judgment, but any other rule would affect substantive rights of real estate holders in Minnesota without any opportunity to challenge the tribal court judgment in the state court proceeding.

[1] As set forth in this author's initial submittals, the proposed rule, by placing the burden of proof on a nonmember, at least on the issue of jurisdiction, also contravenes the United States Supreme Court's decision in *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008).

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?

This author understood from the testimony of proponents for the Petition that having a tribal court order or judgment be presumptively enforceable would impact the willingness of law enforcement officers to take a tribal court judgment or order more seriously before it was turned into a state court order. The author believes, however, that state law enforcement officers, not wanting to act before receiving a valid state court order or "cover order," would treat tribal court orders in the same manner as the orders are currently treated, to avoid potential liability issues that might ensue if the officer acted on a tribal court order alone.

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

This question highlights a significant problem that arises with meaningful reciprocity. Tribal governments and tribal officials both enjoy sovereign immunity. Without a waiver of that immunity, reciprocity is meaningless as to tribal government and tribal officials acting in their official capacity. What sets tribal governments apart from state and local governments is that the majority of economic activity on tribal lands is usually owned and controlled by tribal governments: casinos, hotels, restaurants, gas stations, etc. This means that all of those business enterprises also enjoy sovereign immunity from suit.

Furthermore, tribal members may enjoy significant immunity from money judgments, as a result of tribal laws. *See,* 24 Mille Lacs Band Statutes Annotated (MLBSA), §§ 3352-53 limiting the ability to garnish wages or per capita payments of Mille Lacs Band members. Similarly, the Shakopee Mdewakanton Band prohibits the collection by creditors of the significant amounts paid to each tribal member annually. *See*, *Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise v. Prescott*, 779 N.W.2d 320, 322 (2010) ["Because Prescott lives

on tribal land and the monthly payments he receives from the tribe are exempt from liens, the Enterprise is unable to execute on the money judgment within the community."] Tribal lands held in trust by the United States are exempt from judgments.

The proposal for California legislation to provide reciprocity would recognize some instances of sovereign immunity, but require a limited waiver of sovereign immunity to insure that reciprocity is not abrogated by claims of sovereign immunity where the judgment did not infringe on legitimate tribal interests. *See, Freeman,* 36 T. Jefferson. L. Rev. Online 2014, at p. 13-16.

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

The research by this author has not found any rigorous, objective analysis of the experience of other jurisdictions in recognizing tribal court judgments. In part, this is because the recognition of tribal court judgments in most jurisdictions is in its relative infancy. The result is that most reviews would be anecdotal or driven by the motivation of the author. For example, in Minnesota, where there has been a process for the recognition of tribal court judgments since 2004, or 13 years, there has been no analysis of whether the current process is working well or poorly, or working well in some instances and poorly in others, nor have particular deficiencies been highlighted except by anecdotal comments. This counsels for legislative oversight in which public hearings can be held to explore these issues.

The current proposed Rule amendment parallels some jurisdictions, i.e. North Dakota for example, but also goes beyond those proposals in certain respects. For example, the current Petition proposal recognizes the tribal court judgments of all 566 federally recognized tribes, as opposed to just the tribal court judgments in North Dakota. Furthermore, the current proposal does not contain the public policy exception in all non-federally mandated cases, nor is North

Dakota's requirement that the order or judgment be final under the laws and procedures of the rendering court incorporated in the Petition before this Court.

At least one author, in surveying the variety of provisions by the various states for the recognition of tribal court judgments, finds a "fair amount of variance" between states, ranging from full faith and credit to comity statutes. *See,* Scott A. Taylor, *Enforcement of Tribal Court Tax Judgments Outside of Indian Country: The Ways and Means,* 34 N.M.L.Rev. 339 (2005), http://lawschool.unm.edu/nmlr/volumes/34/2/05_taylor_enforcement.pdf at p. 364. Minnesota's current Rule 10 was reviewed as follows:

> "Minnesota, whose Supreme Court recently adopted a procedural rule for the enforcement of tribal court judgments, has endorsed a comity approach. A specific rule, like Minnesota's rule, is beneficial because it gives parties a specific set of criteria to determine whether comity should apply." *Id.* at p. 366 [footnotes omitted].

The features Mr. Taylor found laudable are those the Petition seeks to abbreviate. That article also highlights the particular issues implicated when state courts (and, under reciprocity, tribal courts), are asked to recognize tax court judgments.

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

Presumably tribal courts would have civil commitment powers only over members of that band or tribe. The problem faced by a tribal court is likely that the commitment facility is outside of tribal lands. Under those circumstances, the Supreme Court Committee might look at the possibility of creating a pilot program for a joint state court/tribal court protocol in which the matter heard was heard jointly and simultaneously by a state and tribal court judge, and a civil commitment, or for example a protective order in a domestic abuse case, being issued jointly and simultaneously with enforcement under both state and tribal court system.[2]

[2] This proposal is parallel to the "Teague Protocol" or "Teague Conference" in which tribal and state court judges meet to allocate jurisdiction when the parties are identical and courts have

7. How are tribal court judges selected?

In most, if not all, Minnesota tribes and bands, tribal court judges are selected by the Tribal Council, a body and members with both legislative and executive functions. For example, the Leech Lake Tribal Court Code, Title I, Part III, § 5 provides that the Reservation Tribal Council appoints the Chief Judge and Associate Judge. *See*, Leech Lake Band of Ojibwe Judicial Code found at http://www.llojibwe.org/court/tcCodes.html. The Lower Sioux Indian Community in Minnesota, Judicial Code, Title I, Chapter 3, § 2 provides that Judges are selected by contract or appointment by the Lower Sioux Community Council. The Lower Sioux Code is found at www.narf.org/nill/codes/lower_sioux. *See also*, B.J. Jones, *The Independence of Tribal Justice Systems and the Separation of Powers*, found at http://www.law.und.edu/tji/_files/docs/bjones-jud-indep-memo.pdf in which he discusses tribal independence in the context of a tribal council rather than a tribal court interpreting a tribal constitution of the law, and even hearing appeals under tribal law. *Id.* at p.2. The author describes tribal courts as "legislative courts" rather than "constitutional courts." *Id.* at p.3. *See also,* Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 Tulsa L.J. 1, 5 (1997):

> "Tribal courts are often subject to the complete control of the tribal councils, whose powers often include the ability to select and remove judges. Therefore, the courts may be perceived as a subordinate arm of the councils rather than as a separate and equal branch of government."

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?

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concurrent jurisdiction. *See,* Judge Robert A. Blaeser with Andrea L. Martin, *Engendering Tribal Court/State Court Cooperation,* found at: http://www.mncourts.gov/mncourtsgov/media/scao_library/TCSCF/Engendering-Tribal-Court-State-Court-Cooperation.pdf

Presumably the burden of proof under the proposed Rule 10 amendment would be the standard civil burden of proof, by a preponderance of the evidence.

The second part of the question, dealing with whether the individual was served or the wrong individual was named, only highlights the tip of the jurisdiction iceberg. There are three categories of individuals where a tribe may claim to have jurisdiction:

(a) Tribal members residing on tribal lands;

(b) Tribal members residing outside of tribal lands (reservation); and

(c) Nonmembers including nonmembers who are members of other federally recognized tribes.

Federal law governs whether tribal court has adjudicative authority over nonmembers. If the tribal court lacks such jurisdiction, any judgment as to the nonmember is necessarily null and void. *Plains Commerce Bank*, 554 U.S. at 324.

Beyond the issue of personal jurisdiction is subject matter jurisdiction. In *Nevada v. Hicks*, 533 U.S. 353 (2001), the Court determined that a tribe's adjudicative authority could not exceed its regulatory authority, but had avoided reaching the decision whether those jurisdictions were coextensive. *Id.* at 374. In *Nevada v. Hicks* the United Supreme Court determined that a tribe lacked the "general jurisdiction" necessary to adjudicate cases invoking federal statutes [presumably in the absence of a specific grant of authority from Congress]. For these reasons, the burden must be on the proponent of a tribal court judgment (frequently the tribe) to demonstrate that the tribal court had personal and subject matter jurisdiction over the party and the cause of action. The proposed Petition to Amend Rule 10 fails to meet this requirement.

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

The author's experience with tribal court records are that they are handled and available in unequal ways. Some (but not the majority) of tribal court decisions are published, at least by a

few tribal courts. As counsel for parties with cases in tribal court, the author has never encountered an issue in obtaining a copy from the tribal court of any court order or pleading filed by a party. At the same time, the author is aware of numerous claims by individuals in the 2003-2004 process that cases filed in tribal courts have never been given hearings, or if given hearings, no decisions have ever been rendered. While neither circumstance is representative of what usually happens in tribal court, those instances appear (to this author's observation) to occur when there are issues in a lawsuit that implicate politically difficult issues: those where the tribal court may not want to go on record, cases where a decision may be viewed adversely by a tribal council, or issues where there is otherwise a desire to avoid a public decision on a matter.

CONCLUSION

The author urges the Committee to investigate, in an objective manner, the following:

(a) Whether the current rule in Minnesota is working or not working, and if not, can the current rule be improved by amendments to address particular areas (i.e. civil commitments, protective orders, etc.);

(b) A survey of the cases filed in each of Minnesota's tribal courts to better determine how those matters have been handled and to address the anecdotal claims raised by tribal members of political influence, the failure to give matters hearings, and the failure to render decisions; and

(c) Obtain testimony in and around reservation areas from tribal members and others about their experience with tribal courts.

The U.S. Supreme Court is likely to further restrict the adjudicative authority of tribes over nonmembers as foreshadowed by the decisions in *Nevada v. Hicks* and *Plains Commerce Bank.* Last term, in *Dollar General Corp. v. Mississippi Band of Choctaw Indians* (No. 13-1496), 579 U.S. _____ (June 23, 2016), an equally divided U.S. Supreme Court, without opinion, left in

place the 5th Circuit Court of Appeals' decision. The case involved a civil tort claim by a youth who was a tribal member who claimed that he was sexually assaulted by a Dollar General employee while participating in a job training program sponsored by the tribe and assigned to work at Dollar General. The 5th Circuit decision that the tribal court had jurisdiction will presumably be revisited following a trial in the tribal court and subsequent appeal. Among the issues will be whether tribal courts present inherently unconstitutional due process problems that make tribal jurisdiction over nonmembers unfair.

Clearly four members of the current Supreme Court were prepared to rule that the Mississippi Choctaw tribal court did not have jurisdiction over Dollar General, despite the written agreement by Dollar General consenting to the jurisdiction of tribal courts. Since the decisions on tribal court jurisdiction have tended to divide, at the U.S. Supreme Court level, along the liberal/conservative axis, the appointment of Justice Gorsuch to the Court may portend a further restriction in tribal court jurisdiction over nonmembers.

All of this makes it extremely important that this Committee weigh and consider the interests of tribal members in determining whether to recognize tribal court orders and judgments in state courts, since the interests of tribal members will likely be those implicated most often by Rule 10.

Respectfully submitted,

Dated: April 24, 2017

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