

First Supplement to Memorandum 2016-6

Recognition of Tribal and Foreign Court Money Judgments (Recognition Standards)

As indicated in the main memorandum, the Commission¹ was tasked with reviewing the standards of recognition for foreign and tribal court money judgments.² The main memorandum discussed the standards for recognition of foreign court judgments related to jurisdiction. This supplement discusses the standards for recognition of tribal court judgments related to jurisdiction.

For tribal court judgments, those standards are stated in the Tribal Court Civil Money Judgment Act (hereafter, “Tribal Act”)³ and are derived from the 2005 Uniform Foreign-Country Money Judgments Recognition Act (hereafter, “Uniform Act” or “2005 Uniform Act”).⁴

As in the main memorandum, this supplement uses the term “foreign court” to refer to a court of a foreign country, but not a court of a tribe. The term “tribal court” refers generally to a court of a federally recognized tribe.⁵

TRIBAL COURT JURISDICTION, GENERALLY

Tribes have important characteristics that set them apart from foreign countries.⁶ Very generally, tribes exercise self-government, while being subject to

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. 2014 Cal. Stat. ch. 243, § 1 (SB 406 (Evans)).

3. Code Civ. Proc. §§ 1730-1742.

4. The 2005 Uniform Act is a revision of the earlier 1962 Uniform Foreign Money-Judgments Recognition Act. The text of the Acts and the associated commentary is available on the Uniform Law Commission’s website: <http://uniformlaws.org/>.

5. See Code Civ. Proc. § 1732(f) (In Tribal Act, “Tribal court” is defined as “any court or other tribunal of any federally recognized Indian nation, tribe, pueblo, band, or Alaska Native village, duly established under tribal or federal law, including Courts of Indian Offenses organized pursuant to Part 11 of Title 25 of the Code of Federal Regulations.”).

6. See generally Memorandum 2013-8, pp. 3-4, 7-10.

certain restrictions and oversight from the federal government, particularly with respect to matters involving persons who are not tribe members.⁷

Federal courts have litigated matters of tribal jurisdiction over nonmembers. While the phrase “tribal jurisdiction over nonmembers” might evoke concepts of personal jurisdiction, the federal case law on tribal court jurisdiction combines concepts that are traditionally associated with both subject matter jurisdiction (a court’s authority to hear a matter) and personal jurisdiction (a court’s ability to adjudicate as to a particular party).⁸ For instance, the federal case law describes a test purportedly for tribal court subject matter jurisdiction that focuses more on the status of the party (i.e., a nonmember) and that party’s connections with the tribe (i.e, requiring either a consensual relationship with the tribe or its members or conduct threatening or directly affecting the tribe as a whole).⁹

This supplement treats the federal doctrine as describing a test for tribal court subject matter jurisdiction, in accordance with the United States Supreme Court’s own characterization.¹⁰

In short, the general contours of the subject matter jurisdiction and personal jurisdiction inquiries discussed in this supplement are significantly different than those discussed in the main memorandum.

SUBJECT MATTER JURISDICTION FOR TRIBAL COURT JUDGMENTS

The Tribal Act precludes recognition of a tribal court judgment where the tribal court lacked subject matter jurisdiction. The relevant language of the Tribal Act is reproduced below.¹¹

7. See *id.* at pp. 2-4.

8. See, e.g., *Smith v. Salish Kootenai College*, 434 F.3d 1127, 1136-1140 (9th Cir. 2006) (en banc) (acknowledging general characterization of tribal civil jurisdiction as subject matter jurisdiction in case law, while noting that aspects of tribal adjudicatory jurisdiction resemble personal jurisdiction). See also Katherine Florey, *Beyond Uniqueness: Reimagining Tribal Courts’ Jurisdiction*, 101 Cal. L. Rev. 1499, 1536-1540 (December 2013) (discussing *Smith v. Salish Kootenai College*); *id.* at 1504-1505 (“In keeping with this supposed tribal uniqueness, the Supreme Court has developed the jurisdictional doctrines that govern tribes on an entirely clean slate. In other words, the Court has never seriously examined the field of personal jurisdiction, or related doctrines like conflict of laws, when discussing Indian country — despite the fact that these doctrines are, by their nature, designed to accommodate different legal values and contexts in multi-jurisdictional disputes. Instead, the Court has developed new doctrines and categories, presumably rooted in federal common law, that bear little relation to jurisdictional concepts as applied in any other context. For example, the Court speaks of ‘legislative,’ ‘adjudicative,’ and, in some cases, ‘subject matter’ jurisdiction in scenarios that would ordinarily be conceptualized as ones involving personal jurisdiction.”) (citations omitted).

9. See generally cases cited *infra* note 15.

10. See *supra* note 8; see also *Smith*, 434 F.3d at 1137 (“The Supreme Court has referred to *Montana’s* principles as ‘pertaining to subject-matter, rather than merely personal jurisdiction.’”).

Code of Civil Procedure § 1737

1737. ...

(b) A tribal court money judgment shall not be recognized and entered if the respondent demonstrates to the superior court that at least one of the following occurred:

...

(2) The tribal court did not have jurisdiction over the subject matter.

...

Lack of Subject Matter Jurisdiction

With respect to a tribal court judgment involving only tribal members, the subject matter jurisdiction inquiry in a recognition proceeding would seem to be similar to that for a foreign country judgment, which focuses on the foreign court's authority under foreign law to hear the type of case before it.¹² According to Cohen's Handbook of Federal Indian Law (hereafter, "Cohen's Handbook"), "[t]ribal court subject matter jurisdiction over tribal members is first and foremost a matter of internal tribal law."¹³ Thus, assessing subject matter jurisdiction for a tribal court judgment involving only tribe members would require a determination of whether tribal law empowers the tribal court to hear such suits.

However, when one of the parties to a tribal court judgment is not a member of the tribe, the subject matter jurisdiction inquiry is significantly more complicated. Certainly, the question of whether tribal law authorizes the tribal court to hear the matter would still be relevant. However, for matters involving nonmembers, the jurisdictional inquiry would also involve federal case law. United States Supreme Court decisions impose limits on the jurisdictional reach of tribal courts with respect to matters involving nonmembers.¹⁴ Further, the

11. Note that the Tribal Act's rule incorporates an evidentiary burden and is stated as a restriction on the court's authority to recognize a judgment. Procedurally, however, the Tribal Act's exception for lack of subject matter jurisdiction should function the same as the exception applicable to foreign court judgments in California's Uniform Act. See Code Civ. Proc. § 1716(d) (party resisting recognition of foreign country judgment has burden of establishing that exception to recognition exists).

12. See Memorandum 2016-6, pp. 2-3.

13. Cohen's Handbook of Federal Indian Law § 7.02[1][a] (Nell Jessup Newton Editor-in-Chief, Lexis Nexis 2012).

14. See generally Florey, *supra* note 8, at 1543 ("[T]he Supreme Court does not treat tribal jurisdiction like other forms of jurisdiction, and does not treat tribal courts like other courts. Unlike most sovereigns, whose legislative and judicial powers are considered separately, the Court considers tribal legislative and judicial jurisdiction to be essentially coextensive. Further, the Court regards limits on the latter to be limits on what it calls the 'subject matter jurisdiction' of the tribal courts — even though subject matter jurisdiction in other contexts means a limit that

Supreme Court's limitations on tribal court subject matter jurisdiction incorporate concepts that are traditionally associated with personal jurisdiction (e.g., the nonmember's relationship to the tribe).

Under the federal case law, the general rule, subject to two exceptions, is that tribal courts do not have subject matter jurisdiction over suits involving nonmembers. The two exceptions address (1) "nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" and (2) the conduct of nonmembers "on fee lands within [the tribes's] reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe."¹⁵

The exact contours of this doctrine are not well defined. In particular, it is not clear how narrowly the subject matter limitations should be construed. Further, this area of the law may be in flux. There is currently a case pending before the United States Supreme Court regarding a tribal court's jurisdiction over a matter involving a nonmember corporation, *Dollar General Corp. v. Mississippi Band of Choctaw Indians*.¹⁶ While the final outcome of the case is uncertain, the

is imposed by the sovereign that creates the courts, not one imposed by an external power.") (citations omitted).

15. See *Montana v. United States*, 450 U.S. 544, 565-566 (1981) (setting forth this test in describing limits on tribe's civil regulatory authority); *Strate v. A-1 Contractors*, 520 U.S. 438, 453 (1997) (concluding that tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction, thereby applying *Montana* test to tribal court jurisdiction).

16. See <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13-1496.htm>. The case was argued before the Supreme Court on December 7, 2015. The following is a brief summary of the facts and procedural history of the case.

"Dollar General Corporation (Dollar General) operates a store on land held in trust for the Mississippi Band of Choctaw Indians (Tribe). The store operates pursuant to a lease and business license agreement with the Tribe. In the spring of 2003, John Doe, a 13-year-old member of the Tribe alleged that he was sexually molested by the store manager, Dale Townsend, while he was working at the store as part of an internship program that the Tribe runs and in which the [*sic*] Townsend agreed to participate.

In 2005, Doe sued Townsend and Dollar General in tribal court. Both defendants moved to dismiss the case for lack of subject matter jurisdiction, and the tribal court denied the motions. The Choctaw Supreme Court upheld the denial of the motions by finding that the U.S. Supreme Court's decision in *Montana v. United States*, which allowed a tribe to regulate the activities of nonmembers who enter into a consensual arrangement with the tribe, applied in this case. The defendants then sued the Tribe in federal district court and sought injunctions to stop the suit in tribal court. The district court granted the injunction for Townsend but not for Dollar General because the company had failed to carry its burden to show that the *Montana* decision did not apply in this case. The U.S. Court of Appeals for the Fifth Circuit affirmed."

<https://www.oyez.org/cases/2015/13-1496>.

petitioners' argument calls into question the grounds for jurisdiction presented above.¹⁷

Need for Reform?

Generally, precluding recognition of a tribal court judgment for lack of subject matter jurisdiction makes sense for the same reasons discussed in the main memorandum in connection with foreign court judgments.¹⁸ In short, a judgment where the rendering court lacked subject matter jurisdiction is invalid.¹⁹

The staff's main concern is that the Tribal Act's subject matter jurisdiction provision essentially looks identical to the subject matter jurisdiction provision of the Uniform Act, but the jurisdictional inquiry that would occur under that language is significantly different. The main difference is that, under the Tribal Act, the inquiry will, in some cases, involve federal law issues.²⁰

Even so, the staff sees no need to adjust the subject matter jurisdiction provision in the Tribal Act. In each recognition proceeding, the relevant law on tribal court subject matter jurisdiction should simply be identified and applied to the facts of the case.

PERSONAL JURISDICTION FOR TRIBAL COURT JUDGMENTS

The Tribal Act precludes recognition of a tribal judgment where the tribal court lacked personal jurisdiction. The relevant language of the Tribal Act is reproduced below.²¹

Code of Civil Procedure § 1737

17. See generally Transcript of Oral Argument in *Dollar General Corp. v. Mississippi Band of Choctaw Indians* (Dec. 7, 2015), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-1496_j4ek.pdf. *Id.* at p. 8, ln. 13-16 (Justice Ginsburg questioning whether petitioners, Dollar General and Dolgencorp LLC, are arguing for rule that tribal court has no tort jurisdiction over nonmember); *id.* at p. 61, ln. 21-25 (petitioners argue that standard for tribal court jurisdiction should be express contractual consent to court's jurisdiction by nonmember); see also Adam Liptak, *Justices Weigh Power of Indian Tribal Courts in Civil Suits*, N.Y. Times (Dec. 7, 2015), available at http://www.nytimes.com/2015/12/08/us/politics/justices-weigh-power-of-indian-tribal-courts-in-civil-suits.html?_r=0.

18. See Memorandum 2016-6, pp. 2-3.

19. See Memorandum 2015-38, p. 3.

20. The staff notes that, given the federal law overlay, a California court, in a recognition proceeding, may be asked to consider issues of preemption or exhaustion requirements under federal law. The staff has not evaluated the preemptive effect of federal law in this area, but recognizes that these issues may need to be evaluated by the courts.

21. See *supra* note 11. The language of this rule differs slightly from the language in the Uniform Act. With respect to the evidentiary burden and court's process, however, this provision should operate in the same manner as the corresponding provision in the Uniform Act.

1737. ...

(b) A tribal court money judgment shall not be recognized and entered if the respondent demonstrates to the superior court that at least one of the following occurred:

(1) The tribal court did not have personal jurisdiction over the respondent.²²

...

Perhaps the most obvious difference between the personal jurisdiction provisions in the Tribal Act and the Uniform Act is that the Tribal Act lacks a provision akin to Section 5 of the Uniform Act (listing sufficient grounds for jurisdiction). Before addressing the personal jurisdiction inquiry under the Tribal Act, the relevance of the omission of Section 5 will be discussed briefly.

Lack of Section 5

Uniform Act Section 5 lists several grounds of personal jurisdiction that are deemed sufficient for the purposes of judgment recognition, while permitting courts to find other jurisdictional grounds sufficient.²³ The language of this provision in California's enactment is reproduced on pages 4 and 5 of the main memorandum. As discussed in the main memorandum, courts applying Section 5 to foreign court judgments have generally been deeming sufficient any grounds for personal jurisdiction on which the state's own courts could exercise jurisdiction.²⁴ The Tribal Act includes no analogous provision. What might be the reason for this omission?

The staff does not have a definitive answer. However, the staff notes that Section 5, as written, seems inapt for certain tribal court judgments. In particular, for judgments involving nonmembers, Section 5 would seem to grant personal jurisdiction in situations where the tribal court would not have subject matter jurisdiction (under the federal case law discussed above, which involves the nonmember's contacts with the tribe).²⁵ The subject matter jurisdiction inquiry, described above, appears to require more significant connections between the nonmember and the tribe than, say, the minimum contacts permissible under

22. The wording of this provision differs slightly from the Uniform Act. The provision refers to a lack of jurisdiction over the "respondent" (the party opposing recognition of the judgment), while the Uniform Act provision refers to a lack of jurisdiction over the "defendant," presumably in the foreign proceeding. 2005 Uniform Act § 4(b)(2). This different wording is unlikely to have practical consequences.

23. 2005 Uniform Act § 5; see also Memorandum 2016-6, pp. 4-5 (reproducing Code of Civil Procedure 1717 from California's enactment, which corresponds to Section 5 of the Uniform Act).

24. See Memorandum 2016-6, pp. 13-16.

25. See discussion of "Lack of Subject Matter Jurisdiction" *supra*.

International Shoe v. Washington.²⁶ Thus, the inclusion of Section 5 would, at a minimum, be confusing. For this reason it makes sense that Section 5 was not included in the Tribal Act.

Further, the omission of Section 5 altogether seems to be a much better option than replacing Section 5 with a provision that is compatible with the tribal court subject matter jurisdiction doctrine. Given the complexities of the subject matter jurisdiction doctrine for nonmembers and its unsettled status, an effort to distill and codify the doctrine seems fraught with potential pitfalls.

In terms of the Legislature's intent with regard to the omission of Section 5, the legislative analyses of the Tribal Act do not directly address the issue. However, the analyses repeatedly indicate that the Act was intended to establish procedures for the recognition of tribal court judgments, while leaving the substantive law governing the recognition of tribal court judgments *unchanged*.²⁷

Thus, while the omission might be read to impliedly change the scope of the personal jurisdiction inquiry for tribal court judgments, the staff believes that such a reading is at odds with the Legislature's stated intent. Further, nothing in the Tribal Act would appear to *preclude* a court in a judgment recognition proceeding from considering whether a tribal court's exercise of personal jurisdiction is inconsistent with federal notions of due process.

Lack of Personal Jurisdiction

For the purposes of this discussion, the focus is on the grounds for personal jurisdiction. As indicated in the main memorandum,²⁸ personal jurisdiction can be conceived as having two separate and distinct components: grounds for jurisdiction and service of process. Service of process will be discussed briefly later in this memorandum.²⁹

26. 326 U.S. 310 (1945).

27. See, e.g., Assembly Committee on Judiciary Analysis of SB 406, p. 1 (Jun. 13, 2014) ("While, this bill establishes a new procedural framework for seeking recognition of tribal court money judgments in California courts, it does not significantly change the legal grounds for recognition or nonrecognition of these judgments."); see also Assembly Floor Analysis of SB 406, p. 3 (Aug. 6, 2014) ("Any money judgment that is non-enforceable under existing law would continue to be nonenforceable under this legislation — this bill just simplifies the procedures for seeking enforcement of a tribal court judgment."); Senate Floor Analysis of SB 406, p. 7 (Aug. 8, 2014) (according to Judicial Council (sponsor of SB 406), bill would "continu[e] to apply the principles of comity appropriate to judgments of sovereign tribes."); .

28. See Memorandum 2016-6, p. 3.

29. See discussion of "Service of Process" *infra*.

Overall, as with subject matter jurisdiction, precluding recognition of a tribal court judgment for lack of personal jurisdiction makes sense.³⁰

Because a party's status as a member or nonmember of the tribe affects the scope of the subject matter jurisdiction inquiry (and the scope of that inquiry appears to have implications for the personal jurisdiction analysis), the personal jurisdiction inquiries for tribe members and nonmembers are discussed separately below.

Personal Jurisdiction Inquiry for Tribe Members

For judgments involving only tribe members, the personal jurisdiction inquiry is, according to Cohen's Handbook, "first and foremost a matter of tribal law."³¹

To the extent that tribal law authorizes jurisdiction over a member, the tribe would also have to consider whether the exercise of jurisdiction comports with due process. Tribes are obligated under a federal law, the Indian Civil Rights Act (25 U.S.C. §§ 1301-1303; hereafter, "ICRA"), to provide due process protections.³² Under ICRA, the tribal court is the final arbiter of the meaning of ICRA.³³ However, in interpreting ICRA, tribal courts "often consult Supreme Court precedents defining the parameters of personal jurisdiction under the fourteenth amendment's due process clause."³⁴

Personal Jurisdiction Inquiry for Nonmembers

For judgments involving nonmembers, the personal jurisdiction inquiry may be largely subsumed within the subject matter jurisdiction inquiry.³⁵ This is

30. See generally Memorandum 2015-38, pp. 2-3.

31. Cohen's Handbook, *supra* note 13, § 7.02[2].

32. *Id.*

33. See *id.*; Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 (1978) ("Congress retains authority expressly to authorize civil actions for injunctive or other relief to redress violations of [ICRA] § 1302, in the event that the tribes themselves prove deficient in applying and enforcing its substantive provisions. But unless and until Congress makes clear its intention to permit the additional intrusion on tribal sovereignty that adjudication of such actions in a federal forum would represent, we are constrained to find that [ICRA] § 1302 does not impliedly authorize actions for declaratory or injunctive relief against either the tribe or its officers.").

34. Cohen's Handbook, *supra* note 13, § 7.02[2].

35. See *id.* ("It is conceivable, although unlikely, that a tribal court could have subject matter jurisdiction over a case but lack personal jurisdiction over the defendant. This might occur, for example, if a non-Indian defendant's 'conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe' and thus fits within the second *Montana* exception establishing subject matter jurisdiction, while the tribal court lacks personal jurisdiction over the defendant because that conduct occurred outside the tribal territory such that the defendant lacks 'minimum contacts' with the forum sufficient to establish personal jurisdiction over her. As a practical matter, however, a non-Indian defendant whose conduct

because satisfaction of the subject matter jurisdiction inquiry generally requires the nonmember to have specific types of contact with the tribe or its members (e.g., a consensual relationship with the tribe or its members). Presumably, such contact with the tribe would be enough to support personal jurisdiction.³⁶ In other words, satisfying the test for tribal court jurisdiction described in the federal case law may be sufficient to establish that the tribal court has both subject matter *and* personal jurisdiction. However, the case law reviewed by the staff makes no clear statement to this effect. The federal case law generally involves questions of subject matter jurisdiction and does not address personal jurisdiction.³⁷

Further, ICRA would apply in cases involving nonmembers. Thus, if the rare case occurs where the tribal court has subject matter jurisdiction, but the nonmember defendant objects to personal jurisdiction, the tribal court would be required to assess whether the exercise of jurisdiction comports with due process. As indicated above, Cohen's Handbook suggests that tribal courts often look to U.S. Supreme Court precedent when deciding personal jurisdiction issues.³⁸

Need for Reform?

In the staff's view, the personal jurisdiction provision of the Tribal Act does not appear to require adjustment.

An argument could be made that the Tribal Act's omission of a provision akin to Uniform Act Section 5 should be read as substantively changing the scope of the jurisdictional inquiry conducted by a California court in a judgment recognition proceeding. In the staff's view, such an argument seems incongruous with the legislative history of the Tribal Act. For that reason, the staff does not see a need for statutory clarification of this point.

threatens or directly affects tribal interests within the meaning of *Montana's* second exception, is very likely to have minimum contacts with the forum sufficient to justify the tribal court's personal jurisdiction.") (citations omitted).

36. See *supra* note 35.

37. See generally David A. Castleman, Comment, *Personal Jurisdiction in Tribal Courts*, 154 U. Pa. L. Rev. 1253 (2006); see also *id.* at 1254 ("Although federal courts have paid close attention to the limits of tribal subject matter jurisdiction, personal jurisdiction is often overlooked.").

38. See Cohen's Handbook, *supra* note 13, § 7.02[2] ("Because the constitutional rules that define the boundaries of personal jurisdiction are premised on the due process clause, tribal courts are obligated under federal law to determine whether they have personal jurisdiction over defendants haled into tribal court. Because ICRA is intended both to protect individual rights and to preserve tribal sovereignty, tribal courts are the final arbiters of the meaning of ICRA. Nevertheless, tribal courts often consult Supreme Court precedents defining the parameters of personal jurisdiction under the fourteenth amendment's due process clause.") (citations omitted).

Service of Process

The main memorandum discussed clarifying that a defect in service of process could be the basis for finding a foreign court lacked personal jurisdiction for the purposes of judgment recognition under the Uniform Act.³⁹

The primary need for this clarification arises from Section 5(a) of the Uniform Act, which appears to preclude any consideration of service deficiencies if a listed jurisdictional ground is established.

The Tribal Act does not include the language of Uniform Act Section 5(a). Thus, the Tribal Act does not appear to preclude a court from finding that a tribal court lacked jurisdiction for service-related deficiencies.

If the Commission directs the staff to prepare a revision to address the service of process issue for foreign courts, the staff will consider whether similar revisions to the Tribal Act should be proposed for parallelism or to avoid confusion.

CONCLUSION

This supplement discusses the exceptions to recognition for tribal court judgments pertaining to a tribal court's lack of jurisdiction. As discussed above, the staff sees no need to modify these provisions.

Respectfully submitted,

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39. See Memorandum 2016-6, pp. 16-17.