

Date of Hearing: June 17, 2014

ASSEMBLY COMMITTEE ON JUDICIARY
Bob Wieckowski, Chair
SB 406 (Evans) – As Amended: June 10, 2014

SENATE VOTE: 33-0

SUBJECT: TRIBAL COURT CIVIL MONEY JUDGMENT ACT

KEY ISSUES:

- 1) SHOULD THE TRIBAL COURT CIVIL MONEY JUDGMENT ACT, WHICH MAKES IT EASIER PROCEDURALLY TO ENFORCE TRIBAL COURT MONEY JUDGMENTS IN A CALIFORNIA COURT, BE ENACTED?
- 2) SHOULD THE BILL BE SUNSETTED TO ALLOW FOR A MORE THOROUGH REVIEW OF BOTH THE TRIBAL COURT CIVIL MONEY JUDGMENT ACT, AS WELL AS THE EXISTING UNIFORM FOREIGN-COUNTRY MONEY JUDGMENT RECOGNITION ACT, TO ENSURE CALIFORNIA APPROPRIATELY APPLIES THE PRINCIPLES OF COMITY TO FOREIGN AND TRIBAL COURT JUDGMENTS?

SYNOPSIS

This bill establishes the Tribal Court Civil Money Judgment Act to govern the process of enforcing tribal court money judgments in California state courts. Currently, claims to recognize money judgments of foreign country tribunals, including tribal courts, are governed by the Uniform Foreign-Country Money Judgment Recognition Act (UFCMJRA). That process, however, is, according to the author, costly and time-consuming. This bill, based on a proposal by the Judicial Council, provides "a discrete procedure for recognizing and enforcing tribal court civil judgments, providing for swifter recognition of such judgments while continuing to apply the principles of comity appropriate to judgments of sovereign tribes." (Report to the Judicial Council: Judicial Council-sponsored Legislation: Tribal Court Civil Judgment Act (Oct. 2012).) 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. It is co-sponsored by the Judicial Council and the Blue Lake Rancheria tribe.

The bill has raised concerns by both a tribe, on the one hand, who believes that the bill questions tribal sovereignty and the legitimacy of tribal courts, and will slow the process down, and several opponents, who believe that the bill fails to require sufficient due process of law in the underlying tribal court proceedings before the resulting judgments can be enforced in California courts. Given the concerns raised on all sides, the Committee may want to consider passing the measure, but requiring that the California Law Revisions Commission (CLRC) look at the due process requirements of both this bill and the UFCMJRA, using existing resources, and sunset

the bill in three years, after the study is complete, to allow the Legislature, with a thoughtful and thorough review by the CLRC, to more thoroughly and knowledgeably consider the concerns that have been raised on all sides.

SUMMARY: Establishes the Tribal Court Civil Money Judgment Act (TCCMJA). Specifically, this bill, among other things:

- 1) Establishes the TCCMJA to govern the procedures for applying and objecting to an application for the recognition of tribal court money judgments, as defined, of federally recognized Indian tribes in California state courts. Specifies that to the extent not inconsistent with the TCCMJA, the Code of Civil Procedure applies.
- 2) Provides that the TCCMJA does not apply to judgments:
 - a) For taxes, fines, or other penalties;
 - b) For which federal law requires that states grant full faith and credit recognition, including child support orders, as specified;
 - c) For which state law provides for recognition, as specified; or
 - d) For all Probate Code matters, including decedent's estates, guardianships, conservatorships and powers of attorney.
- 3) Requires specific information be included in the application for recognition of the tribal court money judgment, which must be signed under penalty of perjury, including the amount of the award granted by the tribal court that remains unpaid and any accrued interest. Specifies documents that must be attached to the application, including a copy of the tribal court rules of procedure pursuant to which the judgment was entered; and a declaration under penalty of perjury by the tribal court clerk, applicant, or applicant's attorney stating, based on personal knowledge, that the underlying case was conducted in compliance with those rules.
- 4) If no objections are timely filed, requires that the clerk certify that no objections were timely filed, and requires that a judgment be entered. Provides that the judgment entered by the superior court must be based on and contain the provisions and terms of the tribal court money judgment and entered in the same manner, have the same effect, and be enforceable in the same manner as any civil judgment, order, or decree of a California court.
- 5) Provides timelines for service and filing of an objection (within 30 days of service of the notice of filing), replies to the objection (to be set by the court), and for a hearing upon the matter (within 45 days from the date the objection is filed absent good cause for a later hearing).
- 6) Requires the court to decline recognition and entry of a tribal court money judgment in any of the following circumstances:
 - a) The tribal court did not have personal jurisdiction over the respondent;
 - b) The tribal court did not have subject matter jurisdiction; or

- c) The judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.
- 7) Permits the court, in its discretion, to decline recognition and entry of a tribal court money judgment on any of the following grounds:
- a) The defendant in the tribal court proceeding did not receive notice of the proceeding in sufficient time to enable the defendant to defend himself or herself;
 - b) The judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present his or her case;
 - c) The judgment or the cause of action on which the judgment is based is repugnant to the public policy of California or the United States;
 - d) The judgment conflicts with another final and conclusive judgment;
 - e) The proceeding in the tribal court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that tribal court;
 - f) In the case of jurisdiction based on personal service only, the tribal court was a seriously inconvenient forum for the trial;
 - g) The judgment was rendered under circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment;
 - h) The specific proceeding in the tribal court leading to the judgment was not compatible with the due process of law; or
 - i) The judgment includes recovery for a claim of defamation, unless the court determines that the defamation law applied by the tribal court provided at least as much protection for freedom of speech and the press as provided by both the U.S. and California Constitutions.
- 8) Defines "due process" to include, but not be limited to, the right to be represented by counsel, to receive reasonable notice and an opportunity for a hearing, to call and cross-examine witnesses, and to present evidence and argument to an impartial decisionmaker.
- 9) Provides that, if objections have been timely filed, the applicant has the burden of establishing that the tribal court money judgment is entitled to recognition. If the applicant has met the burden, shifts the burden to the party resisting recognition to establish that a ground for nonrecognition exists.
- 10) Requires the court to grant a stay of enforcement if the respondent demonstrates:
- a) An appeal is pending from the tribal court judgment or may be taken in the tribal court;
 - b) The tribal court has granted a stay of enforcement of the tribal court money judgment; or
 - c) Any other circumstances exists where the interest of justice require a stay of enforcement.
- 11) Specifies the time period for commencing an action to recognize a tribal court judgment as the earlier of either: (a) the time during which the tribal court money judgment is effective within the territorial jurisdiction of the tribal court; or (b) ten years from the date that the tribal court money judgment became effective in that tribal jurisdiction.

- 12) Permits the court, after notice to all parties, to attempt to resolve any issues raised regarding a tribal court money judgment by contacting the tribal court judge who issued the judgment, as specified.
- 13) Specifies that nothing in this Act shall be deemed or construed to expand or limit the jurisdiction of either the state or any Indian tribe.
- 14) Excludes tribal courts from the Uniform Foreign-Country Money Judgment Recognition Act.

EXISTING LAW:

- 1) Requires, under federal law, that each state give full, faith and credit to the public acts, records and judicial proceedings of every other state. (U.S. Constitution, Art. IV, Section 1; 28 U.S.C. Section 1738.)
- 2) Provides, under federal law, that, as a general rule, the recognition of a tribal court order within U.S. federal courts is governed by the principles of comity. Provides that federal courts must neither recognize nor enforce tribal judgments if: (1) the tribal court did not have both personal and subject matter jurisdiction; or (2) the defendant was not afforded due process of the law. Provides that a federal court may, in its discretion, decline to recognize and enforce a tribal judgment on specified grounds. (*Wilson v. Marchington* (9th Cir. 1997) 127 F.3d 805.)
- 3) Governs, through the UFCMJRA, the enforcement of judgments of foreign countries within California courts. Does not apply to a judgment for taxes; a fine or other penalty; or a family law judgment. (Code of Civil Procedure Section 1713 *et seq.* Unless stated otherwise, all further statutory references are to that code.)
- 4) Defines “foreign-country judgment” to mean a judgment of a court of a foreign country, as otherwise defined, including a judgment by any Indian tribe recognized by the United States. (Section 1714.)
- 5) Provides mandatory and discretionary grounds for nonrecognition of a foreign country money judgment under the UFCMJRA, which mirror the grounds set forth in this bill. (Section 1716.)

FISCAL EFFECT: As currently in print this bill is keyed fiscal.

COMMENTS: This bill establishes the Tribal Court Civil Money Judgment Act, a new procedural framework for enforcement of tribal court money judgments under procedures that are modeled on the procedures applicable to judgments from other states, while still applying the principles of comity consistent with existing law and the Ninth Circuit decision in *Wilson v. Marchington*. In doing so, the author argues that the bill makes the enforcement of these rights more efficient and economical for both litigants and the courts. The author states:

Under existing law, a party seeking enforcement of a civil tribal court money judgment in a state superior court currently must do so under the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA). The UFCMJRA process can be costly and time-consuming for

both the parties and the court, in some cases even causing parties to unnecessarily re-litigate what the tribal court has already decided.

This bill proposes to establish the Tribal Court Civil Money Judgment Act, a new legal framework for seeking enforcement of tribal court money judgments under procedures that are modeled upon the simpler procedures applicable to judgments from the courts of other states, while still applying the principles of comity currently required for judgments from sovereign nations. The framework would not alter the legal standards that state courts apply in recognizing and enforcing tribal court money judgments, but merely clarify and consolidate the procedures for doing so into a uniform and streamlined statutory scheme.

In particular, the procedures set forth in this bill: (1) provide timelines for both submitting an application for recognition and timely objecting to recognition; (2) provide rules for proper venue; (3) specify notice requirements; (4) list the requisite contents of an application and supporting documentation; (5) mandate grounds for declining recognition and provide discretionary grounds for declining recognition; and (6) specify grounds for staying enforcement of a judgment.

As a matter of public policy, insofar as California courts already recognize the judgments of tribal courts under the UFCMJRA, the author argues that it is reasonable to provide clear, distinct, streamlined, and uniform procedures throughout the state as to the process for seeking enforcement of such judgments. In doing so, the author continues, the bill will make the process more efficient and economical for both the parties and the courts — the courts will obtain the information they need in a timely fashion, the parties will receive notice of claims and objections in a timely fashion, and all involved will avoid the added expense of unnecessary delays. It is worth noting that only 18 states have enacted some version of the UFCMJRA.

Distinction Between Full, Faith & Credit Given to Other States and Comity Given to Other Countries and Tribes: The U.S. Constitution requires that each state give full, faith and credit to the public acts, records and judicial proceedings of every other state and territory. Thus a judgment in one state can be fully enforced in any other state. A tribe, however, is not another state and is, in fact, a sovereign entity. Thus tribes are not required, under any standard, to enforce state court judgments. State courts, with specific exceptions, are not required to give tribal court judgments full, faith and credit.

Tribal judgments are generally treated like judgments from other countries and are governed by comity: "No law has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.'" (*Hilton v. Guyot* (1895) 159 U.S. 113, 163.) Comity is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, on the other." (*Id.* at 163-64.)

Under the rules of comity, the Ninth Circuit has opined that a federal court should reject a tribal judgment if the tribal court lacked jurisdiction or if the defendant in the underlying action was denied due process: "The guarantees of due process are vital to our system of democracy. We demand that foreign nations afford United States citizens due process of law before recognizing foreign judgments;

we must ask no less of Native American tribes." (*Wilson v. Marchington*, 127 F.3d at 811.) While comity does not mandate that a tribe use procedures that are identical to those provided by a California court, the Ninth Circuit found that due process includes an opportunity for a full and fair hearing before an impartial tribunal, with proper service on the defendant and "no showing of prejudice in the tribal court or in the system of governing laws." (*Id.*)

The Sponsor Argues that the Bill Streamlines, But Does Not Change, Legal Standards for Seeking Enforcement of Tribal Court Judgments in California Courts: The Judicial Council, one of the bill's co-sponsors, argues that "this bill would not change the legal standards state courts apply in recognizing and enforcing specified civil tribal court judgments, but would only clarify the procedures for doing so and consolidate them into a single, streamlined statutory scheme."

Any money judgment that is non-enforceable under existing law would continue to be non-enforceable under this legislation — the bill just simplifies the procedures for seeking enforcement of a tribal court judgment. To that end, this bill, as now amended, exactly tracks the UFCMJRA as to the grounds upon which a California court either must deny recognition of a tribal court order or may, in the court's discretion, deny such recognition. The court must decline recognition if: (1) the tribal court did not have either personal or subject matter jurisdiction; or (2) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.

Additionally, the courts of this state have discretion to decline recognition for any of nine reasons, including:

- 1) The defendant in the proceeding in the tribal court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;
- 2) The judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case;
- 3) The judgment or the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of California or the U.S.;
- 4) In the case of jurisdiction based on personal service, the tribal court was a seriously inconvenient forum;
- 5) The judgment was rendered under circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or
- 6) The specific proceeding in the tribal court leading to the judgment was not compatible with the due process of law.

This bill, unlike the UFCMJRA, defines due process. It is defined to include, but not be limited to, the right to be represented by counsel, to receive reasonable notice and an opportunity for a hearing, to call and cross-examine witnesses, and to present evidence and argument to an impartial decisionmaker. It is important to note that the definition does not specifically include important considerations like transparency of proceedings and reasonable discovery, all hallmarks of our legal system.

Do the Mandatory Grounds for Nonrecognition Raise Concerns About Tribal Sovereignty?: The Habematolel Pomo of Upper Lake ("Upper Lake"), while not opposed to the bill, is concerned that the

mandatory nonrecognition provisions have “the potential to negate a tribal judgment simply because a superior court judge finds the judgment incongruous with the State’s idea of due process or impartiality, without regard for the basic tenants of Tribal Sovereignty.” As discussed above, the mandatory nonrecognition provisions in this bill are identical to the nonrecognition provisions under existing law from the UFCMJRA. This bill just simplifies the procedural rules – thus making it easier to enforce tribal court orders, but not changing the rules for mandatory or discretionary nonrecognition of those orders. Thus, Upper Lake actually raises concerns about both this bill and the existing UFCMJRA.

Should Some or All of the Discretionary Grounds for Declining Recognition of a Tribal Court Order be More Appropriately Treated as Mandatory Grounds for Nonrecognition?: By contrast, Stand Up For California (SUFC) opposes the bill, arguing that the discretionary grounds for nonrecognition of tribal court orders should be mandatory. SUFC believes that the discretionary grounds “are just as serious (e.g., fraud, doubts about the integrity of the judgment, etc.)” as the mandatory grounds for nonrecognition and thus “should be among those grounds that can be raised and proved up by the respondent, with a *mandatory duty* on the court to not recognize the tribal court money judgment if any of these grounds are demonstrated.” Since this bill makes it easier to enforce orders from tribal courts by, according to the author and sponsor, making the process faster and easier and eliminating the need to re-litigate the underlying case, it is reasonable to ask whether the recognition standards copied from existing law are the appropriate standards in this faster and simpler process environment.

Even a cursory review of the grounds for discretionary nonrecognition raise legitimate questions as to the fairness and due process provided in the underlying action and what should the appropriate standard be for recognition in state court. For example, the bill (and the UFCMJRA) allows a court, in its discretion, to recognize and enforce a tribal court money judgment even when the specific proceedings in the tribal court leading to the judgment were not compatible with due process of law. Currently the bill – and the UFCMJRA – require mandatory nonrecognition of a tribal order if it was rendered under a judicial system that does not provide procedures compatible with the requirements of due process. However, if the system provides procedures that, at least on paper, provide due process of law, but the actual procedures used in a particular case do not, the defendant has not been afforded due process of the law and thus, the proceeding would not, under the Ninth Circuit decision in *Wilson v. Marchington*, be entitled to recognition in federal court. Is it reasonable policy – under both this bill and the UFCMJRA – to permit such an order to be enforced by a California court? This is obviously a very important question calling for further study.

While Requiring California Courts to Recognize and Enforce Tribal Court Money Judgments, This Bill Does Not Require Reciprocity From Tribal Courts: While this bill requires California to recognize tribal court money judgments, it does not require that tribal courts recognize money judgments from California courts. One individual who is unable to enforce her California child support order through a tribe writes that she opposes the bill unless a requirement for reciprocity is added:

As a mother of three tribal children, I have been tasked with the full financial responsibility of a custodial parent. SB 406 presents an opportunity to address a serious issue in Indian Country. I ask that SB 406 be amended to limit state court comity to only those tribal courts that have reciprocal provisions recognizing California Court judgments for child support. Current state

law is inadequate to enforce child support orders if the non-custodial parent is a tribal member shielded by the sovereign immunity of the Tribe. . . .

Tribal governments because of their lack of political will to act are forcing mothers and tribal children, onto California State welfare rolls are an expense to the non-Indian taxpayers. There is no reason for this, when casino tribes are paying hefty 5 and 6 figure monthly stipends to members per month, and non-gaming tribes [] receive 1.1 million annually. Amending SB 406 to include reciprocity for child support orders provides a measurable savings to California taxpayers by lifting mothers and children off of welfare.

This opponent argues that this bill provides an opportunity for the Legislature to encourage tribes, should they want easier enforcement of their money judgments in California courts, to agree to recognize and enforce child support orders.

The Ninth Circuit declined to require reciprocity before agreeing to recognize a tribal court judgment because it opined that the "question of whether a reciprocity requirement ought to be imposed on an Indian tribe before its judgments may be recognized is essentially a public policy question best left to the executive and legislative branches." (*Wilson v. Marchington*, 127 F.3d at 812.) However the court did note that other states, including South Dakota, Oklahoma and Wisconsin, require reciprocity before allowing enforcement of tribal court orders in state court. The Judicial Council elected not to include a reciprocity requirement when it proposed this bill to the author because it is "outside the scope of the judicial branch proposal," but did not opine on the merits of this proposal. (Judicial Council, *Judicial Council-sponsored Legislation: Tribal Court Civil Judgment Act 9* (Oct. 2012.)

While reciprocity may be outside the judicial branch's purview, it is certainly not outside the Legislature's purview, and thus this Committee may reasonably conclude such momentous issues should receive a more thorough examination than can occur in the normal legislative process.

Given the Substantial Open and Consequential Questions About Both This Bill and The UFCMJRA, Might It Be Wise and Appropriate to Study the Best Ways to Recognize Foreign and Tribal Money Judgments, While Ensuring Due Process of Law, and to Sunset the Bill So That the Legislature Can More Effectively Evaluate These Important Issues? Given that there are significant questions on the appropriate amount of due process to require, both from those urging an easier recognition of tribal court orders and those urging that a higher standard be met before enforcing these orders in California courts, this Committee may wish to discuss with the author the possibility of enacting the bill, but directing a more in-depth study of the concerns, about both the TCCMJA and the UFCMJRA, raised by both supporters and opponents and sunseting the bill to allow for a legislative review after completion of the in-depth study. Given the subject matter of the bill and the UFCMJRA, it appears that the California Law Revisions Commission (CLRC) is best suited to conduct the in-depth evaluation of both the TCCMJA and the UFCMJRA and the appropriate level of due process that should be required from foreign and tribal judgments. Given the issues involved and the CLRC's existing workload, two years appears to be adequate time to study the issue. The TCCMJA could then be sunsetted in three years, to allow the Legislature another year to act, after consideration of the CLRC's study.

ARGUMENTS IN SUPPORT: The Judicial Council, co-sponsor of the bill, writes: “The establishment of this process and timeline for considering these applications will make enforcement of existing rights more efficient and economical for both litigants and the courts without altering any party’s substantive rights under current law. Thus, SB 406 will ensure appropriate recognition of tribal court civil money judgments in state courts in a manner that will benefit both court systems.”

ARGUMENTS IN OPPOSITION: In addition to the opposition arguments discussed above, SUFC raises additional concerns, including that the bill provides no opportunity for the respondent to challenge or for the superior court to take into consideration the underlying merits supporting the money judgment, and that while the principles of comity do not call for re-examination of the underlying merits of a claim, “there are unique factors relating to federal Indian law that require the declination of comity in on-going federal-state-tribal disputes.”

The West Bank Homeowners Association writes that “the replacement of current law with S.B. 406 will have dire consequences to citizens, both tribal and non-tribal, of this great state that happen to find themselves in the crosshairs of an Indian tribal court.” The group raises several questions as to the wisdom of the bill, including concerns about reciprocity, discussed above, and:

1. Do you believe that tribal court money judgments should be recognized and enforced by California courts when a tribal court denies both California and U.S. constitutional rights?
2. Do you believe that due process is provided by a tribal court when that tribal court cannot demonstrate impartiality toward non-tribal members?
3. Do you believe that S.B. 406 is appropriate for a domestic dependent sovereign that regularly employs sovereign immunity to avoid answering questions pertinent to the assertion of tribal jurisdiction, or financial schemes such as payday loans, or reimbursement of workers compensation funds? ...
5. Do you believe that impartiality is likely where tribal judges are hired by tribal councils . . . ?
6. Do you believe that impartiality is likely where tribal courts are controlled by the tribal council?

Stop Graton Casino opposes the bill because of concerns of tribal corruption. The group states that (1) tribal governments are “by and large not open and transparent like their non-tribal counterparts”; (2) “California’s numerous, small tribes are too often dominated by a few powerful families”; and (3) “when tribal governments behave badly, there is no recourse through any channels except, sometimes, federal court.” As a result, Stop Grafton Casino argues that until “tribal governments become open and transparent at least to the extent of other U.S. elected governments, there cannot exist a fair Native American trial court system. There will always be the opportunity for judicial corruption when the tribal governments are corrupt.”

Additionally, while not opposed, Upper Lake is also concerned with the petition process proposed in the bill. Upper Lake believes that the “very long application list” and the requirement that tribal rules of court be included will “cause substantial delay” and “could cause complications and confusion for petitioner.” Upper Lake also believes that the bill as now drafted shifts the burden to the petitioner to prove that the judgment is entitled to recognition, as opposed to current law, which the group states, first requires the party opposing recognition to prove the judgment is invalid.

REGISTERED SUPPORT / OPPOSITION:

Support

Judicial Council (co-sponsor)
Blue Lake Rancheria (co-sponsor)

Opposition

Stand Up for California
Stop Graton Casino
West Bank Homeowners Association
Several individuals

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