THE THREE-BILLION-DOLLAR QUESTION

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TABLE OF CONTENTS

I. Introduction 324
II. Factual Background 326
A. Indian Gaming in New York 326
B. History of the Tribe's Attempts to Open a Casino 327
C. The Lawsuit in Tribal Court 330
D. The Tribal Government Dispute and the Tribal Court's Validity 333
1. Tribal Government History and Controversy 333
E. Previous Litigation 336
1. Litigation over the Validity of the Tribal Court 336
2. Previous Developer Litigation in Federal Courts 338
a. The District Court Actions… 338
b. Appeal to the Court of Appeals for the Second Circuit.. 340
c. Final Judgment of the Second Circuit Court of Appeals 341
F. Attempts to Enforce the Tribal Judgment in Federal Court: *Vacco v. Harrah's* 341

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III. Enforcing Tribal Judgments in Federal Court 342
A. Full Faith and Credit 344
B. Comity 345
1. Applying Comity Principles to Tribal Judgments 346
C. The Erie Conundrum 349
D. New York Law 351
IV. Applying the Law to *Vacco v. Harrah's* 352
A. Subject Matter Jurisdiction of the Tribal Court 353
B. Personal Jurisdiction 355
C. Due Process Considerations 356
D. The Discretionary Factors 357
1. Public Policy 357
2. Conflicting Final Judgments 357
a. The Park Place Litigation 357
b. The Catskill Litigation 358
E. Collateral Attack 359
V. Conclusion 359

I. INTRODUCTION

This Article tells the long and complex story behind a 2001 tribal court judgment arising out of a failed casino deal between the St. Regis Mohawk Tribe and a casino developer. The *New York Times* describes this story as one "fraught with intrigue, double-dealing, allegations of fraud, and, ultimately, enormous disappointment, all in search of . . . a potential gold mine: a casino in the Catskills, close by New York City."[1] This Article poses the following question: Will the Northern District Court of New York enforce the $3 billion default judgment[2] entered against

1. Charles V. Bagli, *Despite Law, Catskill Casino Is Not Likely Anytime Soon*, N.Y. TIMES, Mar. 18, 2003, at B1, *available at* http://query.nytimes.com/gst/fullpage.html?res=9403E7D71431F93BA25750C0A9659C8B63.

2. The original judgment was in the amount of $1.78 billion in actual damages and $5 million in punitive damages. The parties are not attempting to collect the punitive damages. Interest of approximately $1 billion was added in mid-2007 and continues to accrue. Thus, $3 billion is an estimate used throughout this Article for the value of judgment. The plaintiff in the lawsuit, the Catskill Litigation Trust, used the $3 billion figure as of late December 2007. Its website, however, recently posted an announcement that it is seeking $5 billion in the lawsuit without explaining why the

Harrah's[3] by the St. Regis Mohawk Tribal Court? That is the weighty question facing Harrah's Operating Company today, and the answer is unclear.

At the center of this story is the St. Regis Mohawk Tribe (Tribe). The Tribe is federally recognized[4] and has approximately 3,000 enrolled members.[5] Its 15,000-acre reservation is located along the Canadian border in upstate New York.[6] The Tribe had been embroiled in an internal governance dispute for years, and the dispute has spilled over into its attempts to open a casino.[7] During the period covering this dispute, the Tribe had two governments both claiming to be its rightful leadership.[8]

On the other side is Harrah's Operating Company (Harrah's), the parent company behind Harrah's casinos and various other gaming establishments.[9] Harrah's inherited its current situation from Park Place Entertainment, Inc. (Park Place), its predecessor-in-interest in this saga.[10] Park Place sought to develop a tribal casino near New York City in partnership with the Tribe.[11] (As an aside, when Harrah's was purchased in 2008 by Apollo Global Management and TPG Capital, the looming judgment almost unraveled the $17.1 billion deal.[12])

Now, eight years after the original judgment was entered in tribal court, the Tribe still has not brought any casino to fruition. Given the current political issues swirling around off-reservation gaming, the Tribe

figure has increased by $2 billion during the past year. *See* Catskill Litigation Trust (CLT), http://www.catskilltrust.com (last visited Feb. 24, 2009).

3. Harrah's Inc. is the successor in interest to Park Place, the casino developer originally sued in tribal court.

4. St. Regis Mohawk Tribe, http://srmt-nsn.gov/gov.htm (last visited Feb. 24, 2009).

5. Decision of Assoc. Deputy Sec'y of the Interior, Jan. 4, 2008, at 2, *available at* http://www.indianz.com/docs/bia/mohawk010408.pdf.

6. *Id.*

7. DARREN BONAPARTE, *A Controversy Revived*, *in* TOO MANY CHIEFS, NOT ENOUGH INDIANS: THE HISTORY OF THE THREE CHIEF SYSTEM AND THE CONSTITUTION OF THE ST. REGIS MOHAWK TRIBE (2007), http://www.wampumchronicles.com/toomanychiefs0.html (last visited Feb. 25, 2009).

8. *Id.*

9. CLT, Harrah's Possible Buyout Breakdown, http://www.catskilltrust.com/news/harrahs-possible-buyout-breakdown/ (last visited Feb. 25, 2009).

10. *Id.*

11. *Id.*

12. *See, e.g.*, Ryan Nakashima & William Kates, *A Tribe, A Casino, A $2.8B Headache*, TIMES (Trenton, N.J.), Oct. 28, 2007, at D1.

faces an uphill battle. On the positive side, the tribal members still have a $3 billion dollar judgment entered by the tribal court.[13] The question is whether it will be enforced by the federal court in the Northern District of New York.

Part II of this Article gives an extensive summary of the twists and turns this story has taken. Part III examines the legal analysis that the federal court is likely to engage in when deciding whether to enforce the judgment. Part IV discusses the possible results of that analysis.

II. FACTUAL BACKGROUND

A. *Indian Gaming in New York*

While casino gambling is generally illegal in the state of New York,[14] the federal Indian Gaming Regulatory Act (IGRA) passed by Congress in 1988 allows such gambling on Native American land under certain circumstances.[15] The IGRA permits casino gambling on "off-reservation" land only in very limited circumstances.[16] In the instant situation, both parcels contemplated for the development of a tribal casino were outside the St. Regis Mohawk Reservation.[17]

To date, only three Indian tribes in the state of New York have successfully negotiated Class III gaming compacts with the state: the

13. *See* CLT, *supra* note 2.

14. Catskill Dev., L.L.C. v. Park Place Entm't Corp. (*Catskill I*), 144 F. Supp. 2d 215, 218–20 (S.D.N.Y. 2001).

15. Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 (1988). The IGRA establishes a federal statutory framework for the conduct of gaming on Indian lands. *Id.*

16. *See generally id.* §§ 2703, 2710. The IGRA creates three classes of gaming. *Id.* Class I includes social and traditional games. *Id.* § 2703(6). Those games are within the exclusive jurisdiction of Indian Tribes. *Id.* § 2710(a)(1). Class II includes bingo and games similar to bingo. *Id.* § 2703(7). Class II gaming may be conducted by a tribe if the state permits bingo for any purpose by any person and if it is authorized by the tribe. *Id.* § 2710(b). Class III gaming includes all types of gaming that are neither class I nor class II gaming. *Id.* § 2703(8). Class III gaming may only occur in a state that permits that type of gaming for any purpose by any person and if it is authorized by the tribe. *Id.* § 2710(d). Class III gaming also requires a tribal–state compact prescribing how the class III gaming should be conducted. *Id.*

17. Nakashima & Kates, *supra* note 12. Originally a racetrack in Monticello, New York, and the Kutsher's County Club, a Catskills resort, were considered for the casino. *Id.*

Oneida Nation, the Seneca Nation, and the St. Regis Mohawk Tribe.[18] Although the St. Regis Mohawk Tribe had opened a Class II gaming facility (a bingo operation) at Akwesasne, New York, by 1996, the bingo operation was not able to properly tap into the potentially lucrative market of New York City gamblers, and it could not generate the amount of revenue that a Class III facility could.[19] The Tribe and casino developers continued to seek an agreement that would allow a Class III facility near New York City.

B. *History of the Tribe's Attempts to Open a Casino*

In 1995, the St. Regis Mohawk Tribe entered into talks with Catskill Development LLC (Catskill Development), a company that was looking to develop a casino near Monticello Raceway in New York.[20] Because of the location of the reservation, the Tribe and Catskill Development wanted to place additional land in trust in order to open a casino in the Catskills.[21] Trust land is land held by the federal government in trust for the benefit of tribes and their members.[22] This land is usually within the boundaries of a reservation, but it can be located elsewhere.[23] Land held in trust is generally not subject to state law, allowing gaming to occur under the authority of the IGRA.[24]

The governmental approval process for taking land into trust for gaming is notoriously difficult—after four years the Tribe still did not have final approval for the agreements or the land.[25] Indeed, the IGRA

18. New York State Racing and Wagering Board, Indian Gaming Frequently Asked Questions, www.racing.state.NY.us/indian/faq.html (last visited Feb. 25, 2009).

19. *See* Bagli, *supra* note 1, at 2.

20. *Catskill I*, 144 F. Supp. 2d 215, 220 (S.D.N.Y. 2001).

21. *Id.* The IGRA generally prohibits gaming on Indian land acquired in trust after October 17, 1988 (the date the IGRA was enacted) unless certain narrow exceptions apply. 25 U.S.C. § 2719 (2000). If none of these exceptions apply, then a two-part determination by the Secretary is necessary. *Id.* § 2719(b)(1)(A).

22. *See* Office of the Special Trustee for American Indians, Trust Principles, http://www.doi.gov/ost/about_ost/trust.html (last visited Feb. 25, 2009).

23. National Congress of American Indians, *Land-Into-Trust*, http://www.ncai.org/index.php?id=57&=123 (last visited Feb. 25, 2009).

24. *See* 25 U.S.C. § 2710 (providing exclusive jurisdiction to Indian tribes for Class I gaming on Indian lands and general jurisdiction to Indian tribes, subject to certain provisions, for Class II gaming on Indian lands); 25 C.F.R. § 502.12(b)(1) (2008) (defining "Indian lands" as lands "[h]eld in trust by the United States for the benefit of any Indian tribe or individual").

25. *Catskill I*, 144 F. Supp. 2d at 224–26.

prohibits gaming on Indian land acquired in trust after October 17, 1988 (the date the IGRA was enacted) unless: (1) the "lands are located within or contiguous to the boundaries of the reservation of the Indian tribe" in existence on October 17, 1988, (2) the Indian tribe had no reservation on October 17, 1988 and the "lands are located . . . within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located," (3) the "lands are taken into trust as part of . . . a settlement of a land claim," (4) the tribe has been newly acknowledged by the Secretary under the federal acknowledgment process and has had land taken into trust as a result of its new acknowledgement, or (5) the lands are taken into trust as part of the restoration of lands for the tribe and the tribe has been restored to federal recognition.[26]

If none of these exceptions apply, then a two-part determination by the Secretary is the only way for lands acquired after 1988 to be used for gaming.[27] The two-part determination, used successfully only a few times to date, allows the Secretary to take land into trust for the benefit of a tribe even if there is no applicable exception.[28] Under the two-part test, the Secretary must determine that acquiring the land: (1) is in the "best interest of the Indian tribe and its members," and (2) is not "detrimental to the surrounding community."[29] The Secretary must consult with state, local, and "nearby" tribal officials in this evaluation.[30] Finally, the governor of the state where gaming is to take place must concur with the Secretary's determination.[31]

On July 31, 1996, the Tribe allegedly entered into five agreements with Catskill Development, Mohawk Management LLC, and Monticello Raceway Development LLC:[32] (1) the Land Purchase Agreement, (2) a Mortgage Agreement, (3) a Gaming Facility Management Agreement, (4)

26. 25 U.S.C. § 2719(a)–(b).

27. *Id.* § 2719(b)(1)(A).

28. *Oversight Hearing on Taking Land into Trust: Hearing Before the Senate Comm. on Indian Affairs*, 109th Cong. 3 (2005) (statement of George Skibine, Acting Deputy Assistant Sec'y for Policy and Econ. Dev., Office of Indian Affairs, U.S. Dep't of the Interior).

29. 25 U.S.C. § 2719(b)(1)(A).

30. *Id.*

31. *Id.*

32. Empire Resorts, Inc. is the successor-in-interest to all of these entities. Business Editors, *Empire Resorts Announces New Decision in Park Place Litigation*, BUS. WIRE, Oct. 8, 2003, *available at* http://www.allbusiness.com/legal/trial-procedure-decisions-rulings/5766114-1.html.

a Shared Facilities Agreement, and (5) a Development and Construction Agreement.[33] These agreements to build a joint casino near Monticello Raceway were not legally binding until formally reviewed by the National Indian Gaming Commission (NIGC).[34]

On April 6, 2000, the Catskill casino project passed an important milestone: the Department of the Interior (DOI) Assistant Secretary for Indian Affairs wrote a letter to then-New York Governor George Pataki urging his approval of the casino and declaring the project to be "in the best interest of the Tribe and not detrimental to the surrounding community."[35] On this basis, it appeared that the proposed Catskill casino project was finally moving forward.

Notwithstanding the DOI support, the Tribe walked away from its agreements with the Catskill developers just days after receiving the important DOI approval.[36] On April 14, 2000, the Tribe entered into an agreement with another developer, Park Place,[37] whereby Park Place was granted the exclusive rights to develop and manage any casinos developed by the Tribe in New York State, excluding certain existing or planned casinos.[38] The agreement with Park Place further provided that:

> the Tribe would receive 70% of the profits after paying back Park Place for "advances" for the costs of development and construction; that Park Place would begin construction of the Catskill Casino within 36 months; and that Park Place would "loan" the Tribe $3,000,000 and indemnify it from litigation losses arising from the abandoning of its 1996 contracts with the [Catskill developers].[39]

The Park Place deal pertained to a different parcel of land, making the April 6, 2000 DOI approval letter—which took four years to secure—

33. *Catskill I*, 144 F. Supp. 2d 215, 220 (S.D.N.Y. 2001).

34. The Second Circuit Court of Appeals has ruled that these contracts are void because of the failure to obtain NIGC approval. Catskill Dev., L.L.C. v. Park Place Entm't Corp. (*Catskill VI*), 547 F.3d 115, 125–27 (2d Cir. 2008).

35. DENNIS C. VACCO, INVESTIGATIVE REPORT PRESENTED TO THE ST. REGIS MOHAWK TRIBAL COUNCIL 16 (2007), http://www.catskilltrust.com/vaccoreport/investigative-report.doc. This report was written for the Catskills Litigation Trust on behalf of the Tribe's counsel. It cannot be considered impartial.

36. *Id.* at 13.

37. Park Place is the predecessor-in-interest to Harrah's Inc. *See supra* notes 11–14 and accompanying text.

38. Motion to Dismiss at 3, Vacco v. Harrah's Operating Co., No. 07-CV-00663 (N.D.N.Y. Aug. 13, 2007).

39. VACCO, *supra* note 35, at 16.

inapplicable.

Why did the Tribe walk away from the initial Catskill deal just days after obtaining an important approval for the Catskill casino? This question has been fodder for considerable litigation and speculation; however, some indices point to financial pressure as a main factor in the Tribe's decision to sign an exclusive deal with Park Place.[40] The Tribe's bingo operation at Akwesasne seemed to be in financial trouble, and Park Place was a potential source of much-needed funds because the Park Place deal contained a $3 million "loan" to the Tribe.[41]

Some sources have speculated that Park Place wanted to sign an exclusive deal with the Tribe to ensure that a New York City casino was *not* opened, thus protecting Park Place's three casinos in Atlantic City from competition and a potential twenty percent loss in profits.[42] To this day, Atlantic City still does not have to worry about competition from the Tribe.

For various reasons, the Park Place deal generated multiple billion-dollar lawsuits.[43] Meanwhile, no casino has materialized from either the Catskill deal or the Park Place deal. In yet another blow to the Tribe's ongoing efforts to open a casino located on the original parcel, the DOI denied the Tribe's application to take land into trust in early 2008.[44] Relying on new standards requiring the gaming trust lands to be within commutable distance of the reservation, the DOI opined that taking the land into trust would not be in the best interest of the Tribe.[45] The Tribe initially filed a lawsuit against the DOI to challenge the decision; however, that suit has since been dismissed without prejudice.[46]

C. *The Lawsuit in Tribal Court*

Litigation over the casino deal with Park Place began almost immediately after the Tribe terminated its contract with the Catskill

40. *Id.* at 13–14.

41. *Id.* at 16.

42. Bagli, *supra* note 1, at B6.

43. *See* discussion *infra* Part II.E.

44. *See* Letter from James E. Cason, Assoc. Deputy Sec'y of the Interior, to Lorraine White, Barbara A. Lazore, and James W. Ransom, Chiefs, St. Regis Mohawk Tribe (Jan. 4, 2008), *available at* http://www.indianz.com/docs/bia/mohawk010408.pdf.

45. *Id.*

46. St. Regis Mohawk Tribe of N.Y. v. Kempthorne, No. 7-cv-01958-RWR (D.D.C. Jan. 10, 2008).

developers. The first lawsuit, which eventually resulted in the large judgment that is the subject of this Article, was filed on April 26, 2000.[47] In that lawsuit, members of the Tribe filed a class action complaint against Park Place, its general counsel Clive Cummis, and the three tribal chiefs (Chiefs Thompson, Smoke, and Ransom) who negotiated and signed the contract with Park Place.[48] The plaintiffs alleged that Park Place: (1) made false and misleading statements that the chiefs relied upon while negotiating the deal, (2) fraudulently induced the three chiefs into the deal by promising that the new casino would be approved in four months, and (3) tortiously interfered with the previous casino contract.[49]

On May 12, 2000, Park Place's attorney filed an application for permission to appear and practice in front of the tribal court and agreeing "under the penalty of perjury" to submit to the jurisdiction of the St. Regis Mohawk Tribal Court.[50] Through such action, the defendants did not seem to question the validity of the tribal court (as they would later do); rather, they appeared to submit to its jurisdiction.[51] Likewise, in defendants' motion to dismiss, they referenced a challenge to the authority of the tribal court by way of a footnote, whereas the motion itself appeared to cite as valid authority the St. Regis Mohawk Tribal Council Rules of Civil Procedure.[52] The tribal court denied the motion to dismiss.[53] Thereafter, the defendants stopped participating in the suit and did not file an answer.[54] The defendants then filed an action in federal court to enjoin the tribal court action, arguing that the court was invalid.[55] The federal court determined it did not have jurisdiction to decide the tribal court's validity.[56]

After more than a year of nonparticipation by the defendants, the tribal court entered a default judgment against them on March 20, 2001.[57]

47. Entry of Default at 2, Arquette v. Park Place Entm't Corp., No. 00-CI-0133GN (St. Regis Mohawk Tribal Court Feb. 1, 2001).

48. *Id.*

49. *See* Default Judgment Order at 6–7, *Arquette*, No. 00-CI-0133GN (St. Regis Mohawk Tribal Court Mar. 20, 2001).

50. VACCO, *supra* note 35, at 32.

51. *Id.*

52. *Id.* at 33.

53. *See* Entry of Default, *supra* note 47, at 3.

54. Default Judgment Order, *supra* note 49, at 4.

55. Park Place Entm't Corp. v. Arquette (*Park Place I*), 113 F. Supp. 2d 322, 323 (N.D.N.Y. 2000). *See* discussion *infra* Part II.E.

56. *Id.* at 324.

57. Default Judgment Order, *supra* note 49.

The court decried the defendants' "willful and wanton disregard of this Court and [its] authority" and their failure to "file an answer or make an appearance before the Court" despite numerous opportunities to do so.[58] The tribal court noted that the defendants had failed to attend four pretrial conferences and that "numerous motions and notices were served upon [them]."[59] According to the court, "Any blaming or finger pointing should be directed at the Defendants who will have no one to blame for a default judgment except themselves."[60] The tribal court ordered defendants to pay the plaintiffs $1.782 billion in actual damages and $5 million in punitive damages.[61] In reaching the amount of damages, the court relied on representations of plaintiffs' experts and government earnings projections.[62]

On July 12, 2007, the tribal court approved an assignment of the class action judgment to the Catskills Litigation Trust (Trust).[63] The Trust consists of members of the Tribe and Empire Resorts, Inc. (the successor-in-interest to the developers in the Catskills deal)—including its former shareholders.[64] Specifically, the original developers and the tribal plaintiffs have agreed to work together to enforce the tribal court judgment and, more importantly, to share any monetary proceeds.[65] Formed in 2004, the Trust is headed by Dennis Vacco, former United States Attorney for the Western District of New York and former Attorney General for the State of New York, and by Joseph Bernstein, retired attorney and real estate developer.[66] The Trust is the plaintiff in the pending federal court action.[67]

In connection with the assignment to the Trust, the tribal court affirmed its 2001 default judgment and added approximately $1 billion in

58. *Id.* at 4.

59. *Id.*

60. *Id.*

61. *Id.* at 15.

62. *See id.* at 8–12, 13–14.

63. Default Judgment Order, Arquette v. Park Place Entm't Corp., No. 00-CI-0133GN (St. Regis Mohawk Tribal Court July 12, 2007).

64. *See* CLT, http://www.catskilltrust.com/about/trust-beneficiaries.html/ (last visited Feb. 26, 2009).

65. Opposition to Motion to Dismiss Complaint at 5–6, Vacco v. Harrah's Operating Co., No. 07-CV-00663 (N.D.N.Y. Sept. 11, 2007); CLT, http://www.catskilltrust. com/about/tribal-and-federal-court-litigation.html/ (last visited Feb. 26, 2009).

66. *See* CLT, http://www.catskilltrust.com/about/trustees.html/ (last visited Feb. 26, 2009).

67. Complaint to Enforce Judgment at 1, *Vacco*, No. 07-CV-00663.

interest, bringing the total amount of the judgment to $2.8 billion.[68] In calculating interest on the judgment, the tribal court applied New York state law to determine the amount of the judgment.[69] The interest continues to accrue to this day.[70]

D. *The Tribal Government Dispute and the Tribal Court's Validity*

Between 1995 and 2007, the Tribe was embroiled in a dispute over the form of its government. This dispute spilled over into the tribal court and called into question the very validity of that court. Due to this question over the tribal court's validity, the defendants contended that the lawsuit and subsequent default judgment were unauthorized and improper. On this basis, while the tribal court action was pending, defendants filed suit in federal court and sought to declare the tribal court invalid.[71] The controversy surrounding the tribal government and tribal court is discussed further below.

1. *Tribal Government History and Controversy*

The St. Regis Mohawk Tribe has traditionally maintained a form of government in which three chiefs, as opposed to one leader, governed.[72] The three chiefs functioned as a combined executive, legislative, and judicial body for much of the Tribe's history. In early 1995, several members of the Tribe sought to adopt a new form of constitutional government and disband the traditional three-chief system.[73] In 1995 the Tribe conducted a referendum to determine if the constitution should be adopted, and 50.935% of the Tribe voted in favor of its adoption.[74]

Controversy arose immediately over the results of the constitutional referendum. The proposed constitution itself stated that referenda must be adopted with 51% of the vote.[75] The referendum, however, was conducted under the authority of a tribal council resolution authorizing the referendum (TCR 95-115), allowing the constitution to be adopted if a

68. Order at 5, Arquette v. Park Place Entm't Corp., No. 00-CI-0133GN (St. Regis Mohawk Tribal Court July 12, 2007).

69. *Id.*

70. *Id.*

71. *Park Place I*, 113 F. Supp. 2d 322, 323 (N.D.N.Y. 2000).

72. *Id.* at 322.

73. *Id.*

74. *Id.*

75. *Id.*

majority (more than 50%) voted in its favor.[76] This controversy over the referendum split the Tribe into two factions. Some defended the constitutional government, while others supported the old three-chief government.[77]

Now the tribal court enters into the controversy. With assistance from the DOI, the Tribe began creating a tribal court in 1991.[78] After several years, the tribal court was established pursuant to the passage of Tribal Council Resolution 94-F and the St. Regis Mohawk Tribal Judiciary Act of 1994.[79] This resolution was adopted near the end of 1994.[80] The change in tribal government occurred shortly thereafter, in 1995, and the first tribal court judge was appointed by the constitutional government—not the three-chief government.[81] The tribal court began hearing cases in August of 1995, following passage of the St. Regis Mohawk Civil Judicial Code and the St. Regis Mohawk Tribe Rules of Judicial Procedure.[82]

The convergence of the governmental change and the creation of the tribal court resulted in a multiyear controversy. For example, in *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe*, the former operator of the Tribe's bingo operation filed an action in federal court to enjoin a separate action in the tribal court.[83] The plaintiff also asked the court to find that the tribal court was invalid.[84] Both the federal district court and the Court of Appeals for the Second Circuit upheld the tribal court's ability to entertain the action and concluded that they did not have jurisdiction to rule on the tribal court's validity because it was a "matter[] of tribal law."[85]

Beginning in 1996, the Tribe held several referenda that indicated the members of the Tribe considered the three-chief government to be their legitimate form of government.[86] During that same time, elections were

76. *See* Tarbell v. Dep't of the Interior, 307 F. Supp. 2d 409, 412 (N.D.N.Y. 2004) (holding that the legislative intent of the drafters of TCR 95-115 "was that [a] proposition would pass if approved by a simple majority").

77. *See Park Place I*, 113 F. Supp. 2d at 323.

78. VACCO, *supra* note 35, at 3.

79. *Tarbell*, 307 F. Supp. 2d at 413.

80. *Id.*

81. VACCO, *supra* note 35, at 4–5.

82. *Id.* at 5.

83. Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe, 117 F.3d 61, 64 (2d Cir. 1997).

84. *Id.* at 66.

85. *Id.*

86. *Park Place I*, 113 F. Supp. 2d 322, 323 (N.D.N.Y. 2000).

held for new leadership consistent with the three-chief form of government.[87] The new three-chief leadership revoked the constitution and attempted to dissolve the tribal court formed by the constitutional government.[88] In response, the tribal court invalidated the election of the tribal leadership and pronounced itself valid.[89]

In the midst of this ongoing power struggle, the DOI recognized the constitutional government as the legitimate tribal government.[90] As a result, the three chiefs sued the DOI in federal court.[91] The federal court sided with the three chiefs and concluded that the DOI did not pay deference to the tribal members' desire to have the three-chief government as opposed to the constitutional government.[92] The court opined that the DOI had "acted arbitrarily, capriciously, and contrary to law . . . in refusing to grant official recognition to the clear will of the Tribe's people with regard to their government."[93]

In subsequent litigation, the ousted constitutional government sought a determination in federal court of the validity of the tribal court and government. The judge asked the DOI to submit its assessment.[94] The DOI Associate Solicitor Hogen concluded in his first letter, on June 26, 2002, that: (1) in light of *Ransom I*, the DOI recognized the three-chief government, and (2) although the tribal court was legitimately created by the Judiciary Act of 1994, no judges were appointed by the legitimate three-chief government; thus, the tribal court was not recognized by the DOI.[95] In Hogen's second letter, on July 12, 2002, he reached the same conclusion about the tribal court's validity, this time citing different reasons: (1) the Judiciary Act of 1994 was rescinded by TCR 99-02, and (2) TCR 2000-136 reaffirmed that the tribal court was not recognized or authorized by the Mohawk people.[96]

The validity of both of these resolutions—enacted by the three-chief government—depended on the authority of their enacting government *at*

87. *Id.*
88. Tarbell v. Dep't of the Interior, 307 F. Supp. 2d 409, 413 (N.D.N.Y. 2004).
89. *Id.*
90. *Id.* at 412.
91. Ransom v. Babbit, 69 F. Supp. 2d 141 (D.D.C. 1999).
92. *Id.* at 153.
93. *Id.* at 143.
94. *Tarbell*, 307 F. Supp. 2d at 417.
95. *Id.* at 417–18.
96. *Id.* at 418.

the time. The DOI recognized the constitutional government of the Tribe for the period of time during which the three-chief government passed these two resolutions. It was only in an October 6, 2000 letter by Deputy Assistant Secretary Anderson that the DOI first re-recognized the three-chief government.[97]

Still, the governmental controversy continued. The Tribe held yet a fifth referendum in August of 2007, placing the 1995 constitution before the tribal membership.[98] Again, the tribal membership voted against the constitution by a margin in excess of two to one.[99] Finally, the DOI recognized the three-chief government again in October of 2007.[100] The DOI noted that its two previous decisions invalidating the tribal court had been vacated by the district court and "as a matter of law are now no longer extant."[101] The DOI explicitly chose not to address the issue of the validity of the tribal court because it did not believe that issue was properly before it.[102] It would also appear that, like the federal court, the DOI does not have jurisdiction to interpret tribal law in order to make that determination.[103]

E. *Previous Litigation*

1. *Litigation over the Validity of the Tribal Court*

In *Park Place Entertainment Corp. v. Arquette* (*Park Place I*), Park Place sought a declaratory judgment in the Northern District Court of New York that the tribal court was invalid.[104] Park Place sought to establish that the tribal court was without authority to adjudicate the claims asserted in

97. *Id.* at 417.

98. *See* Memorandum from Franklin Keel, U.S. Dep't of the Interior, East Regional Director, Bureau of Indian Affairs, Determination of the Governmental Body of the St. Regis Mohawk Tribe with whom the Bureau of Indian Affairs Shall Conduct its Government-to-Government Relations 5 (Oct. 31, 2007) (on file with author) (hereinafter Keel Memorandum).

99. *Id.*

100. *Id.* at 8.

101. *Id.*

102. For a reaction to the Bureau of Indian Affairs' approach, see, for example, Gale Courey Toensing, *BIA Decision Supports Mohawks' Claim Against Harrah's*, INDIAN COUNTRY TODAY, Nov. 14, 2007, *available at* http://www.indiancountrytoday.com/archive/ 28143069.html.

103. *See* Keel Memorandum, *supra* note 98, at 7–8.

104. *Park Place I*, 113 F. Supp. 2d 322, 323 (N.D.N.Y. 2000).

the original tribal court litigation.[105] The district court denied the plaintiffs' request.[106] The court declared that because the question presented related to the validity of the tribal court and not its jurisdiction, the plaintiffs had not asserted a federal question.[107] Because no federal question was presented, the district court ruled that it did not have subject matter jurisdiction.[108] Therefore, it denied Park Place's request to declare the tribal court invalid.[109]

On appeal, the Court of Appeals for the Second Circuit remanded the case back to the district court for further development of the issues in light of a letter to the tribal court from Michael J. Anderson, Deputy Assistant Secretary of the DOI.[110] In this letter, Anderson asserted that the DOI was "precluded from recognizing the constitutional government and constitutional court of the St. Regis Mohawk Tribe."[111] The court of appeals asked the district court to reexamine its prior ruling, given the DOI's new opinion about the validity of the tribal court. [112]

The district court never had to conduct a reexamination. Instead, on March 31, 2003, the district court entered a "Judgment Dismissing Action Based Upon Settlement."[113] The parties had come to an apparent settlement agreement.[114] However, the settlement was never fully consummated.

When Harrah's acquired Park Place and assumed all of its litigation liabilities in June of 2005, Harrah's Entertainment, Inc., the parent company of Harrah's, believed the matter had been resolved through settlement. In its 2006 financial statements, Harrah's reported the action as follows:

> In April 2000, the Saint Regis Mohawk Tribe (the "Tribe") granted Caesars the exclusive rights to develop a casino project in the State of

105. *Id.*
106. *Id.* at 324.
107. *Id.* at 323–24.
108. *Id.*
109. *Id.* at 324.
110. Park Place Entm't Corp. v. Arquette (*Park Place II*), No. 00-9365, 2002 U.S. App. LEXIS 845, at *1–2 (2d Cir. Jan. 15, 2002).
111. *Id.* at *2.
112. *Id.*
113. Judgment Dismissing Action Based Upon Settlement, Park Place Entm't Corp. v. Arquette, No. 7:00-CV-0863 (N.D.N.Y. Mar., 31, 2003).
114. *Id.* at 1–2.

> New York. On April 26, 2000, certain individual members of the Tribe purported to commence a class action proceeding in a "Tribal Court" in Hogansburg, New York, against Caesars seeking to nullify Caesars' agreement with the Tribe. On March 20, 2001, the "Tribal Court" purported to render a default judgment against Caesars in the amount of $1.787 billion. Prior to our acquisition of Caesars in June 2005, it was believed that various lawsuits related to the judgment were settled pending execution of final documents and mutual releases. . . . The Company believes this matter to be without merit and will vigorously contest any attempt to enforce the judgment.[115]

It appears that at least one of the plaintiffs refused to sign the settlement documentation,[116] though it was represented to the court that the settlement had been effected.[117]

2. *Previous Developer Litigation in Federal Courts*

Not only was Park Place sued by certain tribal members as described above, but the same factual background gave rise to another case: *Catskill Development, L.L.C. v. Park Place Entertainment Corp.* (*Catskill I*).[118] In this case, the "old" developers involved in the Tribe's initial casino project sued Park Place in federal court, claiming, among other things, tortious interference with contract.[119]

a. *The District Court Actions*. In *Catskill I*, the United States District Court for the Southern District of New York granted Park Place's motions to dismiss the claims of tortious interference with contractual relations, unfair competition, and for violation of the Donnelly Act.[120] The court did not dismiss the claim for tortious interference with prospective

115. Harrah's Entm't, Inc., Annual Report (Form 10-K) at 16 (Mar. 1, 2007), *available at* http://idea.sec.gov/Archives/edgar/data/858339/000119312507044315/d10k.htm.

116. There is a dispute in the current litigation over exactly how many plaintiffs refused to sign or were denied the possibility of reviewing the settlement documentation. *Compare* Memorandum of Law in Support of Defendants' Motion to Dismiss the Complaint at 2, Vacco v. Harrah's Operating Co., No. 07-CV-00663 (N.D.N.Y. Aug. 13, 2007) *with* Opposition to Motion to Dismiss Complaint at 10–17, *Vacco* (N.D.N.Y. Sept. 11, 2007).

117. Defendants' Memorandum of Law, *supra* note 116, at 2.

118. Catskill Dev., L.L.C. v. Park Place Entm't Corp. (*Catskill I*), 144 F. Supp. 2d 215 (S.D.N.Y. 2001).

119. *Id.* at 219–20.

120. *Id.* at 218.

business relations.[121]

After certain discovery was conducted, the district court granted summary judgment to Park Place on that remaining claim.[122] The court determined that the plaintiffs had not established that Park Place acted with either malice or through improper means; rather, the court found that Park Place expressed opinions about the future and mere "puffery" in their persuasive negotiations with the Tribe.[123]

Thereafter, the plaintiffs filed a motion to vacate the court's summary dismissal after learning that Park Place had knowingly withheld important tapes from discovery that purportedly showed Park Place's use of improper means.[124] The tapes included a conversation between Cummis (Park Place's general counsel) and Kaufman (the CEO of President RC, which managed the Tribe's bingo operation at Akwesasne).[125] Kaufman described how he had "squeezed" the Tribe for money at the Akwesasne facility to make them turn to Park Place for a loan; and in the process, Park Place was granted an exclusive contract for a casino in the Catskill region.[126]

The court found that this conversation did not establish improper means because no evidence existed showing that Cummis was a "knowing participant" in Kaufman's actions.[127] Nevertheless, the court vacated its prior decision on the grounds of "substantial justice."[128]

After a limited discovery period, the court reexamined the record and concluded that the plaintiffs still failed to establish Park Place's "knowing participation" in the alleged "money squeeze" at the Akwesasne casino.[129] The plaintiffs thus failed to carry the burden of establishing the "wrongful means" prong of their claim for tortious interference with prospective

121. *Id.*

122. Catskill Dev., L.L.C. v. Park Place Entm't Corp. (*Catskill III*), 217 F. Supp. 2d 423, 425 (S.D.N.Y. 2002).

123. *Id.* at 437.

124. Catskill Dev., L.L.C. v. Park Place Entm't Corp. (*Catskill IV*), 286 F. Supp. 2d 309, 312 (S.D.N.Y. 2003).

125. *Id.*

126. *Id.* at 317–18.

127. *Id.* at 319.

128. *Id.* at 320.

129. Catskill Dev., L.L.C. v. Park Place Entm't Corp. (*Catskill V*), 345 F. Supp. 2d 360, 365 (S.D.N.Y. 2004).

business relations.[130] The prior summary judgment grant was reinstated and plaintiffs' complaint was dismissed in full.[131] That decision was appealed to the Second Circuit, which vacated and remanded the case because of a potential jurisdictional defect.[132] On remand, the district court found that it had jurisdiction and reinstated its order granting the defendants' motion for summary judgment.[133]

b. *Appeal to the Court of Appeals for the Second Circuit.* Two years later, in *Catskill v. Park Place (Catskill V)* the Court of Appeals for the Second Circuit vacated *Catskill III*, which had dismissed all of the plaintiffs' claims, and remanded the case back to district court because of a problem with federal subject matter jurisdiction that had gone unnoticed during the five years of litigation.[134]

The plaintiffs erroneously alleged diversity based on the citizenship test used for corporations and not the proper citizenship test for limited liability companies (LLCs).[135] Only one of the plaintiffs, Monticello LLC, was diverse from the defendant Park Place.[136] The Court of Appeals for the Second Circuit remanded the case back to district court in order for three issues to be properly developed in the record: (1) whether Monticello LLC was diverse from Park Place at the time the action was commenced, thus salvaging federal jurisdiction, (2) whether a third-party beneficiary can recover on a claim of tortious interference with a contract under New York law, and (3) whether Monticello is a third-party beneficiary of the contract signed by Catskill, who can thus recover for tortious interference with the contract at issue.[137]

After the court of appeals remanded the case back to the Southern District Court of New York, the judge considered the above questions posed by the appeal and determined the following: (1) Monticello LLC was diverse from Park Place at the time the action was commenced, so federal jurisdiction exists, (2) third-party beneficiaries can recover on a claim of

130. *Id.*

131. *Id.* at 368.

132. Catskill Litig. Trust v. Park Place Entm't Corp., 169 F. App'x 658, 660–61 (2d Cir. 2006).

133. Debary v. Harrah's Operating Co., 465 F. Supp. 2d 250, 253 (S.D.N.Y. 2006).

134. *Catskill Litig. Trust*, 169 F. App'x at 661.

135. *Id.* at 659.

136. *Id.* at 660–61.

137. *Id.* at 660.

tortious interference with contract under New York law, but (3) Monticello LLC was not a third-party beneficiary to the agreements, and thus, cannot recover under the claim.[138] Given these findings, the district court reinstated its previous judgment in *Catskill III*, in which it had granted the defendants summary judgment and dismissed all of the plaintiffs' claims.[139]

c. *Final Judgment of the Second Circuit Court of Appeals*. In 2008, the court of appeals rendered its final judgment in *Catskill VI*.[140] The court of appeals addressed the merits of the tortious interference with contract and tortious interference with business relations allegations.[141] For the interference with contract claim, the court focused on the validity of the original contracts between the Tribe and the Catskill developers, holding that all the contracts were void because they lacked the necessary approval by the NIGC under the IGRA.[142] For the interference with business relations claim, the court again held that the plaintiffs failed to carry the burden of establishing the "wrongful means" prong of their claim.[143] The court affirmed the district court's judgments and dismissed all of the claims against Park Place.[144] The decision on the validity of the contract, which has potentially chilling consequences on the instant litigation, is being appealed to the U.S. Supreme Court.[145]

F. *Attempts to Enforce the Tribal Judgment in Federal Court:* Vacco v. Harrah's[146]

By 2005 none of the original plaintiffs or defendants in the Catskill litigation described above existed, because in 2004 the plaintiffs assigned their interests in the litigation to the Catskill Litigation Trust, while the defendants first changed their name to Caesar's Entertainment, Inc. and

138. *Debary*, 465 F. Supp. 2d at 262–69.

139. *Id.* at 269–70.

140. Catskill Dev., L.L.C. v. Park Place Entm't Corp. (*Catskill VI*), 547 F.3d 115 (2d Cir. 2008).

141. *Id.* at 119.

142. *Id.* at 132.

143. *Id.* at 137.

144. *Id.*

145. *See* Petition for Writ of Certiorari to the United States Supreme Court, Catskill Dev., L.L.C. v. Harrah's Operating Co., No. 08-984 (Jan. 16, 2009), 2009 WL 255609.

146. Vacco v. Harrah's Operating Co., No. 07-CV-00663 (N.D.N.Y Dec. 4, 2007).

later merged into Harrah's in 2005.[147]

The trustees of the Trust filed suit against Harrah's as successor-in-interest to Park Place, seeking both to enforce the 2001 tribal court judgment ($1.787 billion in actual damages and $5 million in punitive damages) and to obtain interest and costs.[148]

Harrah's moved to dismiss the action, asserting that the Trust was an improper plaintiff because it had obtained the judgment under an agreement that violated New York law and that the matter had been settled in earlier litigation.[149] In December 2007, the district court denied Harrah's motion to dismiss on the ground that the parties had raised factual issues in their brief for the motion to dismiss that were beyond those alleged in the complaint.[150]

The Trust is continuing to pursue enforcement of the tribal court judgment, which, because of accumulated interest of more than $1 billion, is now valued at nearly $3 billion.[151] As of late 2008, the parties were engaged in discovery.

III. ENFORCING TRIBAL JUDGMENTS IN FEDERAL COURT

Eight years after the original judgment was entered, Harrah's still faces a $3 billion judgment in tribal court. The key question now is whether the federal court will recognize and enforce the judgment, allowing the plaintiffs to recover the $3 billion.[152] This Part will describe

147. Debary v. Harrah's Operating Co., 465 F. Supp. 2d 250, 259 (S.D.N.Y. 2006).

148. *See* Complaint to Enforce Judgment at 6, Vacco v. Harrah's Operating Co., No. 07-CV-00663 (N.D.N.Y. June 22, 2007).

149. Defendants' Memorandum of Law, *supra* note 116, at 10–22.

150. Decision and Order, *Vacco*, No. 07-CV-00663 (N.D.N.Y. Dec. 4, 2007).

151. Arnold M. Knightly, *New York Tribe Seeks $3 Billion from Harrah's Entertainment*, LAS VEGAS REV.-J., July 19, 2007, at 1D.

152. This Article assumes that the district court has jurisdiction over the action. Plaintiffs have alleged both diversity and subject matter jurisdiction. Complaint at 2, Vacco v. Harrah's Operating Co., No. 07-CV-00663 (N.D.N.Y. June 22, 2007). The parties appear completely diverse—the trustee plaintiffs are domiciled in New York and Florida. *Id.* at 1. The defendants are domiciled in Nevada but have what appear to be substantial contacts with New York, including entering into the contract at issue and bringing suits in New York courts in related matters—establishing personal jurisdiction in New York as well. *Id.* at 2–3. The complaint also alleges federal subject matter jurisdiction. *Id.* at 2. Whether the district court will uphold the plaintiffs' assertions of federal question jurisdiction is beyond the scope of this Article.

the process the court will likely use in making that determination.

Before a judgment can be enforced, it must first be "recognized."[153] In effect, recognition precludes litigation in one jurisdiction because the matter has already been litigated in another, usually foreign, court. The goal of recognition is to get the court's assistance in enforcing the judgment.[154] A court in the United States cannot enforce a judgment until it has been recognized.[155]

In this situation, the recognition of the tribal court judgment is necessary because the defendants have refused to pay the judgment and do not have any assets within the jurisdiction of the tribal court. For all intents and purposes, the judgment is unenforceable within the St. Regis Mohawk Tribal Court's jurisdiction.

The district court needs to resolve two issues before deciding whether to enforce the judgment. First, it must decide whether to grant full faith and credit or instead apply the principles of comity.[156] Second, it must make an *Erie* choice-of-law determination on whether state or federal law controls.[157]

The question of whether the district court will recognize and enforce the judgment is complicated by the unique status of Indian tribes in United States jurisprudence. John Marshall famously described tribes as "domestic dependent nations" in 1831, and courts have been struggling with this description ever since.[158] That struggle is brought to life in the question of whether the court will enforce the judgment. The court faces according the judgment full faith and credit, which means determining that a tribe is akin to a state or, more appropriately, a territory.[159] Or the court may instead employ the principles of comity, treating the tribe as if it were a foreign sovereign.[160] Unfortunately, tribes do not fit easily into either category.

153. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 481 cmt. b (1987).
154. *See id.* § 481(2).
155. *See id.*
156. *See id.* § 481 reporters' notes 1, 4.
157. *See id.* § 481 cmt. a; *see also* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
158. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).
159. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 481 reporters' note 4.
160. *See id.* § 481 reporters' note 1.

These two rubrics involve very different levels of scrutiny of the tribal court judgment. Under a full faith and credit determination, recognition of the judgment, and therefore enforcement, is required.[161] Under principles of comity, a court may exercise its discretion and decide whether the judgment should be enforced.[162] Clearly, enforcement of the judgment will likely depend on which of these two rubrics is applicable.

A. *Full Faith and Credit*

Article IV, Section One of the United States Constitution mandates full faith and credit for the "public acts, records, and judicial proceedings" of other states.[163] Congress enacted the Full Faith and Credit Act, codified at 28 U.S.C. § 1738, to implement this Clause.[164] The statute requires full faith and credit for the judicial decisions of every "state, territory, or possession."[165] The Full Faith and Credit Act effectively presumes that the due process safeguards required by the Constitution were upheld in reaching the judgment. Originally enacted in 1790, the statute is silent as to Indian tribes.[166] As such, it is unclear whether tribes, given their status as "domestic dependent nations," fall under the category of "territory" as contemplated by the statute.[167]

No definitive answer exists in the case law. Courts in Idaho and New Mexico have specifically determined that tribes are territories under the meaning of the statute, but no other state courts have done so.[168] Furthermore, Congress has enacted specific legislation requiring states to give full faith and credit to certain tribal court decisions, which could be interpreted as precluding any intent to cover the entire body of tribal court judgments.

For example, the Indian Child Welfare Act requires state and federal courts to extend full faith and credit to tribal court child placement

161. *See id.* § 481 reporters' note 4 ("Judgments rendered in one State of the United States are guaranteed enforcement in all other States of the United States by the Full Faith and Credit clause of the United States Constitution, Article IV, Section 1.").

162. *See id.* § 481 reporters' note 1.

163. U.S. CONST. art. IV, § 1.

164. Full Faith and Credit Act, 28 U.S.C. § 1738 (2000).

165. *Id.*

166. *See id.*

167. *See id.*; Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

168. *See* Sheppard v. Sheppard, 655 P.2d 895, 902 (Idaho 1982); Jim v. CIT Fin. Servs. Corp., 533 P.2d 751, 752 (N.M. 1975).

orders.[169] The Violence Against Women Act requires all courts, including tribal courts, to give full faith and credit to all orders granted under the Act.[170] In addition, the Full Faith and Credit for Child Support Orders Act applies to all courts, including tribal courts.[171] Further, the Indian Land Consolidation Act extends full faith and credit to certain actions involving Indians lands.[172] Finally, the Parental Kidnapping Prevention Act has been held to apply to tribal courts.[173]

The Supreme Court has not conclusively addressed this issue. However, the Ninth Circuit has analyzed the statute and has expressly rejected granting full faith and credit to tribal court judgments.[174] In *Wilson v. Marchington*, the plaintiff argued that her tribal court judgment was entitled to full faith and credit.[175] For full faith and credit to apply, the judgment had to fall under the Full Faith and Credit Act.[176] The issue, according to the court, was whether tribes were "territories or possessions" within the meaning of that Act.[177] The court decided that because Congress later expressly extended full faith and credit to specific types of tribal judgments,[178] Congress did not intend for full faith and credit to extend to all tribal court judgments generally.[179]

In this instance, because the judgment at issue does not fall within one of the specific and very limited areas that require full faith and credit for tribal court judgments, it seems unlikely that the district court will employ that analysis.

B. *Comity*

The court is more likely to employ the principles of comity in deciding whether to enforce the tribal court judgment.[180] The principles of

169. *See* 25 U.S.C. § 1911(d) (2000).

170. *See* 18 U.S.C. § 2265(a) (2000).

171. *See* 28 U.S.C. § 1738B.

172. *See* 25 U.S.C. § 2207.

173. 28 U.S.C. § 1738A; *see In re* Larch, 872 F.2d 66, 68 (4th Cir. 1989) (concluding that the Cherokee Tribe was a "state" under the Parental Kidnapping Prevention Act and owed full faith and credit to state court orders).

174. *See* Wilson v. Marchington, 127 F.3d 805, 807–09 (9th Cir. 1997).

175. Wilson v. Marchington, 127 F.3d 805, 807 (9th Cir. 1997).

176. *Id.* at 807–08.

177. *Id.* at 808.

178. *See supra* notes 169–73.

179. *Wilson*, 127 F.3d at 808–09.

180. *Id.* at 809 ("In the absence of a Congressional extension of full faith and

comity were established more than one hundred years ago in *Hilton v. Guyot* and apply to the recognition of foreign judgments—generally judgments of courts in other countries.[181] Unlike under the Full Faith and Credit Clause, courts are not obligated to enforce foreign judgments under the principles of comity.[182] Instead, the court examines the facts and circumstances surrounding the proceeding to see if the judgment is entitled to enforcement.[183] This process ensures that only judgments that have afforded United States citizens basic due process may be enforced.[184] The rationale behind comity is that although foreign courts may have different rules and procedures, their judgments may be enforced so long as certain fundamental rights are protected.[185] Under the principles of *Hilton*, comity is "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other."[186]

1. *Applying Comity Principles to Tribal Judgments*

The United States Supreme Court has not addressed the application of comity to tribal court judgments. However, in the same case in which it rejected full faith and credit for tribal court judgments, the Ninth Circuit held that federal comity principles should apply to them.[187] According to the court, "as a general principle, federal courts should recognize and enforce tribal judgments."[188] In *Wilson*, the Ninth Circuit sought to announce a federal rule applicable to the enforcement of a tribal court judgment.[189]

In the case, an enrolled member of the Blackfeet Tribe sued a nonmember and his employer for damages resulting from an automobile

credit, the recognition and enforcement of tribal judgments in federal court must inevitably rest on the principles of comity.").

181. Hilton v. Guyot, 159 U.S. 113, 163–64 (1895). The *Hilton* Court defined comity as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Id.* at 164.

182. *Id.* at 228.

183. *See id.* at 166 (quoting WHEATON'S INTERNATIONAL LAW § 147 (Richard Henry Dana ed., 8th ed. 1866)).

184. *See id.* at 202–03.

185. *See id.*

186. *Id.* at 163–64.

187. Wilson v. Marchington, 127 F.3d 805, 809 (9th Cir. 1997).

188. *Id.* at 810.

189. *Id.*

accident that occurred on the Blackfeet Indian Reservation in Montana.[190] The Tribe member received a money judgment from the trial court.[191] The plaintiff then sued in federal court to enforce the judgment, presumably because the defendants did not have any assets within the reach of the Blackfeet Tribal Court.[192] The plaintiff argued that the judgment was entitled to recognition under principles of full faith and credit or comity.[193] The trial court agreed with the plaintiff; however, the appellate court did not.[194]

Having examined and rejected full faith and credit for the judgment, the Ninth Circuit turned to principles of comity using *Hilton*'s framework.[195] The Ninth Circuit concluded that: "[a]lthough the status of Indian tribes as 'dependent domestic nations' presents some unique circumstances, comity still affords the best general analytical framework for recognizing tribal judgments."[196] The Ninth Circuit went on to state that "[f]ederal 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 law.
>
> In addition, a federal court may, in its discretion, decline to recognize and enforce a tribal judgment on equitable grounds, including the following circumstances:
>
> (1) the judgment was obtained by fraud;
>
> (2) the judgment conflicts with another final judgment that is entitled to recognition;
>
> (3) the judgment is inconsistent with the parties' contractual choice of forum; or
>
> (4) recognition of the judgment, or the cause of action upon which it is based, is against the public policy of the United States or the

190. *Id.* at 807.
191. *Id.*
192. *See id.*
193. *Id.*
194. *Id.* at 807–08, 815.
195. *Id.* at 809.
196. *Id.* at 810.

forum state in which recognition of the judgment is sought.[197]

Pursuant to the foregoing Ninth Circuit analysis, there are two mandatory grounds for refusing to uphold the tribal court judgment: lack of due process and lack of jurisdiction.[198] Four discretionary grounds exist for refusing to uphold a tribal court judgment: (1) fraud in obtaining the judgment, (2) conflict with another final judgment, (3) violation of a forum selection clause, and (4) public policy.[199] The Ninth Circuit's application of comity appears to track closely to the generally accepted analysis as expressed in the *Restatement (Third) of Foreign Relations Law of the United States*.[200]

The Ninth Circuit made subject matter jurisdiction of the tribal court a further mandatory element for enforcement. Under the *Restatement* approach, lack of subject matter jurisdiction is a discretionary ground for nonenforcement.[201] The Ninth Circuit's departure from the *Restatement*, however, is consistent with federal Indian law, which places tribal jurisdiction at the center of almost every dispute.

As the court noted, "subject matter jurisdiction is a threshold inquiry in virtually every federal examination of a tribal judgment."[202] According to the court, "[t]he principles of comity require that a tribal court have competent jurisdiction before its judgment will be recognized by the United States courts."[203] The court thus concluded that the unique place of tribal courts requires an additional mandatory element. The court went on to analyze the tribal court's subject matter jurisdiction under *Strate v. A-1 Contractors*, concluding that the tribal judgment was unenforceable and unrecognizable because the Blackfeet court did not have jurisdiction over the cause of action.[204]

Based on the rule announced by the Ninth Circuit, the district court in New York may decide to enforce the St. Regis Mohawk judgment only if it

197. *Id.* (adopting the *Restatement* view).

198. *Id.*

199. *Id.*

200. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2)(a)–(f) (1987).

201. *Id.* § 482(2)(a).

202. Wilson v. Marchington, 127 F.3d 805, 811 (9th Cir. 1997) (citing Strate v. A-1 Contractors, 117 S. Ct. 1404, 1411 (1997); Montana v. United States, 450 U.S. 544, 565–66 (1981)).

203. *Id.* at 815.

204. *Id.* at 814–15 (citing *Strate*, 117 S. Ct. at 1415–16).

determines that the tribal court had jurisdiction in the first instance and the defendants were afforded due process.

C. *The* Erie *Conundrum*

The district court in New York may find it necessary to conduct an *Erie* analysis of whether federal or state law applies.[205] While the *Wilson* court reached its own conclusions regarding tribal judgments, the district court in New York is not bound by that analysis because it is not within the Ninth Circuit, but rather is within the appellate purview of the Second Circuit.

Under the United States Supreme Court's *Erie* doctrine jurisprudence, the first step is identifying the source of the law that governs the issue at hand.[206] The source of that law may be the United States Constitution, a federal statute, or a common law rule.[207] If the source of the law is the Constitution or a statute, the *Erie* doctrine's second step involves determining whether the law is valid, and whether it is pertinent to the situation.[208] Any rule based in the Constitution is valid and its Necessary and Proper Clause provides a low validity hurdle for any law made by Congress.[209]

Things are a little more complicated with judge-made common law. In those cases, the outcome-determinative test of *Hanna v. Plumer* is applied.[210] Under *Hanna*, the court must examine the law under the twin aims of *Erie*: "'discouragement of forum shopping and avoidance of inequitable administration of the laws.'"[211] The issue is whether the application of state or federal law would be outcome determinative to the enforcement of the judgment; in other words, the court evaluates whether application of the federal rule or law would result in a different decision

205. *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (discussing when to apply state law in federal court).

206. Stephanie Moser Goins, Comment, *Beware the Ides of* Marchington*: The* Erie *Doctrine's Effect on Recognition and Enforcement of Tribal Court Judgments in Federal and State Courts*, 32 AM. INDIAN L. REV. 189, 198 (2007).

207. *Id.*

208. *Id.* (citing Hanna v. Plumer, 380 U.S. 460, 471–74 (1965)).

209. *Id.* at 198–99 (explaining that laws of Congress will be valid "so long as the rule remains at least arguably procedural and within the Constitutional limits of [Congress's] jurisdictional power by not abridging, enlarging, or modifying a substantive right, the rule will be considered valid by the courts.").

210. *Id.* at 199 (citing *Hanna*, 380 U.S. at 468 n.9).

211. *Id.* (quoting *Hanna*, 380 U.S. at 467–68).

than would application of state law.[212] If it would not, then the federal rule is used.[213] However, to the extent that use of the federal law encourages forum shopping or inequitable administration of the laws, the state law will be used—assuming no countervailing federal interest trumps *Erie*'s aims.[214]

In *Wilson*, the Ninth Circuit held that the issue of enforcing tribal judgments is a matter of federal law.[215] Relying on *Banco Nacional de Cuba v. Sabbatino*, the Ninth Circuit rejected the assertion that the recognition of tribal judgments required the application of state, rather than federal, law.[216] The court indicated that "Indian law is uniquely federal in nature, having been drawn from the Constitution, treaties, legislation, and an 'intricate web of judicially made Indian law.'"[217] The court also noted the "quintessentially federal character of Native American law" in reaching that conclusion.[218] Subject matter jurisdiction should be addressed in the first instance by the federal district court.[219] The addition of subject matter jurisdiction to the comity equation is consistent with existing federal Indian law with its focus so squarely on tribal court jurisdiction.

As a result, the Ninth Circuit did not conduct an *Erie* analysis. Rather, it simply made these foregoing statements and applied federal law. Yet, whether state or federal law applies may not be so clear cut. Generally, federal courts apply state comity law when determining whether to enforce a judgment.[220] The Second Circuit has held that a federal court should apply state law in determining whether to enforce a foreign country judgment, but it has not yet ruled on whether state or federal law should apply in deciding whether to enforce a tribal judgment.[221] Whether the

212. *Id.* at 199 (citing Walker v. Armco Steel Corp., 446 U.S. 740, 749–50 (1980)).

213. *Id.*

214. *Id.* (citing Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 428, 432 (1996)).

215. Wilson v. Marchington, 127 F.3d 805, 813 (9th Cir. 1997) (citing Chilkat Indian Vill. v. Johnson, 870 F.2d 1469, 1473 (9th Cir. 1989)).

216. *Id*. (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964)).

217. *Id.* (quoting Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978)).

218. *Id.*

219. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985).

220. *See generally Wilson*, 127 F.3d at 805.

221. *In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India, 809 F.2d

district court in New York will adopt the rule in *Wilson* or conduct an *Erie* analysis is uncertain.

D. *New York Law*

Given the uncertain results of an *Erie* analysis, a review of New York comity law is necessary.[222] New York has adopted the Uniform Foreign Money-Judgments Recognition Act.[223] Under that statute, a foreign country judgment that is final, conclusive, and enforceable where rendered must be recognized.[224] It will be enforced as "conclusive between the parties to the extent that it grants or denies recovery of a sum of money."[225]

The New York statute, though, expressly applies to judgments from foreign countries.[226] The word "country" is a specific addition to the New York implementation of the uniform law.[227] Tribes are clearly not foreign countries. Therefore, to apply state law, the district court will have to decide whether to apply this New York statute as written or, like the *Wilson* court, modify it to suit the special place of tribes in United States jurisprudence.

Like federal common law, the New York statute provides two mandatory grounds for refusing to enforce the judgment: (1) "the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law," and (2) "[t]he foreign court did not have personal jurisdiction over

195, 204–05 (2d Cir. 1987).

222. Because full faith and credit and comity have different legal underpinnings, a court, by necessity, would have to conduct an *Erie* analysis after deciding which standard to apply. However, should the court conduct that analysis first, the result would likely be the same. Under New York law, principles of comity would apply. New York has expressly granted full faith and credit only to the judgments of the Peacemaker Courts of the Seneca Nation. *See* Jimeson v. Pierce, 79 N.Y.S. 3, 5–6 (App. Div. 1902) (discussing the applicable Indian law, passed in 1892, and amendments, passed in 1893, giving full faith and credit to the Peacemaker Courts of the Seneca Nation). Therefore, because New York has addressed only Seneca Nation judgments, it seems reasonable to conclude that it did not intend to grant full faith and credit to St. Regis Mohawk judgments.

223. *See* N.Y. C.P.L.R. §§ 5301–5309 (McKinney 1997).

224. *Id.* § 5302, 5303.

225. *Id*. § 5303.

226. *Id.* § 5302.

227. *Compare id.* ("This article applies to any foreign country judgment . . . ."), *with* UNIF. FOREIGN MONEY JUDGMENTS RECOGNITION ACT § 2, 93 U.L.A. 66 (1966) ("This Act applies to any foreign judgment . . . .").

the defendant."[228]

New York law also recognizes certain discretionary grounds for refusing to enforce the judgment. A judgment from a foreign court

> need not be recognized if:
>
> 1. the foreign court did not have jurisdiction over the subject matter;
>
> 2. the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;
>
> 3. the judgment was obtained by fraud;
>
> 4. the cause of action on which the judgment is based is repugnant to the public policy of this state;
>
> 5. the judgment conflicts with another final and conclusive judgment;
>
> 6. the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or
>
> 7. in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.[229]

New York law only includes personal jurisdiction and not subject matter jurisdiction as a mandatory ground for declining to recognize a foreign judgment. As discussed below, subject matter jurisdiction is likely to be the focus of the district court analysis due to its importance under federal law. New York law also includes two additional discretionary grounds: (1) lack of notice, and (2) inconvenient forum when jurisdiction is based only on personal service.[230]

IV. APPLYING THE LAW TO *VACCO V. HARRAH'S*

With the caveat that discovery is still ongoing in *Vacco v. Harrah's*, this Part will evaluate the grounds for enforcing the St. Regis Mohawk Tribal Court judgment under federal law. As described above, the differences between federal and state law are minimal. Further, as a practical matter, the areas where they differ are not likely to be significant

228. N.Y. C.P.L.R. § 5304.
229. *Id.*
230. *Id.*

in the district court's analysis.

A. *Subject Matter Jurisdiction of the Tribal Court*

Whether subject matter jurisdiction is a mandatory or discretionary factor in determining the enforceability of the 'foreign' judgment under principles of comity, the St. Regis Mohawk Tribal Court's subject matter jurisdiction over the suit will figure prominently in the district court's analysis. Even if the district court was to analyze comity under New York law, an analysis under federal law of the tribal court's jurisdiction will be a threshold issue.[231] Federal courts have exclusive subject matter jurisdiction to review tribal court jurisdiction.[232] To be sure, Harrah's has raised lack of subject matter jurisdiction as a defense in the instant action.[233]

The general rule is that tribes do not possess jurisdiction over causes of action involving non-Indians who come within their borders.[234] Under *Montana v. United States*, there are two exceptions that allow tribes to exercise civil jurisdiction over cases involving non-Indians on reservations.[235] "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[236] A tribe may also "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[237] With only one exception, the United States Supreme Court has never upheld the extension of tribal civil authority over litigation involving nonmembers on non-Indian land.[238]

231. Wilson v. Marchington, 127 F.3d 805, 811 (citing Strate v. A-1 Contractors, 117 S. Ct. 1404, 1411 (1997); Montana v. United States, 450 U.S. 544, 565–66 (1981)).

232. *See* Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 857 (1985).

233. *See* Answer at ¶ 35, Vacco v. Harrah's Operating Co., No. 07-CV-00663 (N.D.N.Y. June 22, 2007).

234. Montana v. United States, 450 U. S. 544, 565 (1981).

235. *Id.*

236. *Id.*

237. *Id.* at 566.

238. *See* Nevada v. Hicks, 533 U.S. 353, 360 (2001) (citing Brendale v. Confederated Tribes & Bands of Yakima Nation, 492 U.S. 408, 443–44, 458–59 (1989) (Blackmun, J., concurring in part and dissenting in part)) ("[The] tribe can impose zoning regulation on that 3.1% of land within reservation area closed to public entry

The subject of *Arquette v. Park Place Entm't Corp*. is an agreement between the tribe and a developer.[239] At issue in the agreement was a casino that would have presumably benefited all of the enrolled tribal members. As such, it arguably involves important property rights of the Tribe and might fall under the first *Montana* exception.[240] The litigation also involves defendants who entered into a consensual relationship with the Tribe. Further, the district court has previously indicated certain support for the tribal court's jurisdiction.[241] According to District Judge McAvoy, who is presiding over the instant action as well, "[i]t appears that the underlying dispute is of the type where jurisdiction in a Tribal Court would generally be proper."[242]

The Second Circuit also confirmed the issue of the tribal interest in the underlying litigation. According to the court, "under any possible conception of the scope of tribal or reservation affairs, this case falls within it."[243] Based on the foregoing, the district court could determine that the tribal court's exercise of jurisdiction over the cause of action does not violate federal law.

In addition, a challenge to the jurisdiction of a tribal court is subject to an exhaustion requirement.[244] In other words, to challenge tribal court jurisdiction, a party must first exhaust tribal court remedies.[245] But there is an exception if exhaustion is futile.[246]

In *Basil Cook Enterprises*, the Second Circuit upheld a challenge to the St. Regis Mohawk Tribal Court's jurisdiction.[247] That case arose from a dispute over the management of the Tribe's bingo establishment at Akwesasne.[248] The Tribe filed a complaint in the tribal court, seeking "monetary damages based on fraud, theft, and conversion as well as breach

that was not owned by the tribe.").

239. *See generally* Default Judgment Order, Arquette v. Park Place Entm't Corp., No. 00-CI-0133GN (St. Regis Mohawk Tribal Court Feb. 1, 2001)

240. *Montana*, 450 U.S. at 565.

241. *Park Place I*, 113 F. Supp. 2d 322, 323–24 (N.D.N.Y. 2000).

242. *Id.* at 324 n.1.

243. Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe, 117 F.3d 61, 66 (2d Cir. 1997).

244. Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 856–57 (1985).

245. *Id.*

246. *Id.* at 856 n.21.

247. *Basil Cook Enters.*, 117 F.3d at 63.

248. *Id.*

of fiduciary duties."[249] Basil Cook Enterprises sought injunctive relief and a declaratory judgment in the federal court, requesting a halt to the tribal court proceedings.[250] The federal court refused to grant such relief on the grounds that tribal remedies had not been exhausted.[251] The Second Circuit affirmed the lower court ruling.[252]

In the situation here, it is possible the court will determine that Harrah's has not exhausted its tribal court remedies because it did not file an appeal in tribal court. In response, Harrah's can argue that exhaustion would have been futile, based upon the uncertain validity of the tribal court.

B. *Personal Jurisdiction*

To determine whether the tribal court may exercise personal jurisdiction over the defendants, the district court will likely look to New York law. Generally, personal jurisdiction under comity is determined by the law of the state where the judgment is being enforced.[253] Under New York standards pertaining to in personam jurisdiction, there is no simple test to determine the propriety of jurisdiction.[254] However, "'"proof of one transaction in New York is sufficient to confer jurisdiction over a nonresident as long as the activities of the defendant in question were purposeful and there is a substantial relationship between the transaction and the claim asserted."'"[255]

In *Arquette v. Park Place Entertainment Corp.*, the defendants entered into a contract regarding a Tribe-owned casino with the Tribe's three chiefs.[256] On that basis, the tribal court concluded it had personal jurisdiction over the defendants.[257] Though the factual underpinnings of how that contract was negotiated and the terms of the contract will have to

249. *Id.* at 64.

250. *Id.*

251. *Id.*

252. *Id.* at 63.

253. *See* CIBC Mellon Trust Co. v. Mora Hotel Corp. N.V., 743 N.Y.S.2d 408, 418 (App. Div. 2002) ("[W]e should scrutinize the [foreign court's jurisdiction] analysis to determine if the jurisdictional determination accords with our principles.").

254. *See id.* at 419 (analyzing the six-tier approach of the New York law).

255. *Id.* at 421 (quoting Canadian Imperial Bank of Commerce v. Saxony Carpet Co., 899 F. Supp. 1248, 1253 (S.D.N.Y. 1995)) (citation omitted in original).

256. Default Judgment Order at 2, Arquette v. Park Place Enm't Corp., No. 00-CI-0133GN (St. Regis Mohawk Tribal Court Mar. 20, 2001).

257. *Id.* at 2–3.

be developed in the district court, entering into a contract with the tribal chiefs to operate a Tribe-owned casino may be sufficient to support the tribal court's exercise of personal jurisdiction over the defendants.

A challenge to personal jurisdiction can be waived when it is not raised at a foreign tribunal.[258] Here, Harrah's claims that it made a special appearance solely to challenge the "validity and jurisdiction of the purported tribal court."[259] However, counsel for Harrah's applied for and received permission to practice in the St. Regis Mohawk Tribal Court. In that application, counsel agreed "'under penalty of perjury; to submit to the jurisdiction of the Saint Regis Mohawk Tribal Court.'"[260] In addition, Harrah's filed a motion to dismiss in the action, noting only in a footnote that they did not concede jurisdiction of the tribal court.[261]

C. *Due Process Considerations*

Under either federal or New York law, the district court must deny recognition and enforcement of the tribal court judgment if it determines that the proceedings lacked due process protections. The court will examine whether the tribal court provided the defendants with an opportunity to a hearing that comports with the basic principles of due process.[262] If the tribal court did not possess adequate procedures to ensure fairness, the district court must deny recognition of the judgment. In particular, if a defendant did not receive notice or an opportunity to participate in the proceedings, the judgment cannot be enforced.[263]

The issues surrounding the validity of the tribal court would likely surface in this part of the court's analysis. Defendants have repeatedly raised the issue of the tribal court's validity during the instant action. Specifically, Harrah's claims that, at the time of the judgment, the St. Regis Mohawk Tribal Court "did not exist and was not recognized" by the Tribe, the BIA, or the DOI.[264] On one hand, the district court has previously held

258. *See* Budget Blinds, Inc. v. White, 536 F.3d 244, 268–69 (3d Cir. 2008) (Cowen, J., concurring in part and dissenting in part).

259. Answer at 3, Vacco v. Harrah's Operating Co., No. 07-CV-00663 (N.D.N.Y. Dec. 17, 2007).

260. VACCO, *supra* note 35, at 32.

261. Answer, *supra* note 259, at 3.

262. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 (1987).

263. *Id.*

264. Answer, *supra* note 259, at 5.

that it did not have jurisdiction to determine the tribal court's validity.[265] On the other, the validity of the tribal court was in question throughout the time of the proceedings.

D. *The Discretionary Factors*

Two of the four discretionary grounds for refusing to enforce the judgment are likely inapplicable. To date, there has been no evidence that the judgment was procured by fraud. Second, no evidence exists that the contract contains a conflicting forum selection clause. Therefore, it seems unlikely that the district court would refuse to enforce the judgment on these two grounds.

1. *Public Policy*

Defendants have not raised any issues of public policy to date, but these issues may play an important role in the district court's decision of whether to grant comity to the tribal court judgment. Although it seems unlikely that the enforcement of a money judgment against a large company would be considered against public policy, the factual history of the tribal court judgment raises certain concerns for federal court enforcement of the judgment, especially when the financial stakes are this high. The fact that the DOI had not given final approval for taking the Catskills land into trust, combined with the DOI's letter in early 2008 denying the Mohawk tribe's trust application, may certainly result in another examination of the tribal court's calculation of damages.

2. *Conflicting Final Judgments*

Defendants have claimed that the action is barred by the settlement and dismissal of the two previous actions relating to the same subject matter.[266] The rule is that a judgment may not be enforced if it conflicts with another final judgment.[267]

a. *The Park Place Litigation*. The *Park Place* action was purportedly settled and voluntary dismissal orders were issued.[268] In its

265. Basil Cook Enters., Inc. v. St. Regis Mohawk Tribal Court, 117 F.3d 61, 66 (2d Cir. 1997).

266. *See* Answer, *supra* note 259, at 4–5.

267. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1987).

268. Defendants' Memorandum of Law, *supra* note 116, at 6–7.

motion to dismiss, Harrah's argues that the settlement agreement is enforceable under New York law—not that the federal court action is precluded by the voluntary dismissal—thereby potentially conceding that the voluntary dismissal does not amount to a final judgment.[269] This argument may have more merit as a collateral attack. The court may indeed evaluate the facts and circumstances to see if the settlement agreement should be enforced. In ruling on Harrah's motion to dismiss with respect to whether the settlement agreement was binding, the federal court determined that consideration of materials outside of the pleadings would be required and declined to decide the issue.[270]

b. *The Catskill Litigation*. Unlike the *Park Place* litigation, the *Catskill* litigation may have resulted in a final judgment declaring the *Catskill* contracts void.[271] As such, Harrah's may advance an argument that the Second Circuit's final decision in *Catskill VI* constitutes a conflicting final judgment that should bar the district court's enforcement of the tribal court judgment.[272]

The law is not entirely clear on whether the later court of appeals judgment will trump enforcement of the tribal court judgment. Under the *Restatement*, when there are two competing foreign judgments, a discretionary last-in-time rule applies; in other words, the last foreign court judgment should apply, but a court may, in its discretion, accept the earlier judgment or neither judgment.[273] When one foreign judgment competes with a judgment from a United States court, the rule appears to be reversed; thus, if the final judgment from the United States court comes first, it precludes application of a pending or later foreign judgment.[274] It is unclear what courts should do when a prior foreign judgment competes with a United States court decision issued later.

269. *See id.* at 22.

270. Decision and Order, *supra* note 150, at 4.

271. *Catskill VI*, 547 F.3d 115, 130–32 (2d Cir. 2008). The finality of this decision depends on whether the Trust can successfully petition the United States Supreme Court to grant certiorari and hear its case.

272. Neither the answer, nor the motion to dismiss submitted by Harrah's raised the *Catskill VI* litigation conflict as an issue to be determined by the district court. *See* Answer, *supra* note 259; Defendant's Memorandum of Law, *supra* note 116.

273. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 cmt. g (1987).

274. *In re* Bruetman, 259 B.R. 649, 669–72 (Bankr. N.D. Ill. 2001); Holmes v. Mangel, 72 B.R. 516, 521 (Bankr. S.D. Fl. 1987).

In the present situation, the issue is complicated by the fact that the district court may consider the *Catskill VI* decision to be res judicata, at least as it is applied to the initial *Catskill* plaintiffs who have joined the Trust.[275] The district court may also find that because the tribal court judgment was issued before the *Catskill* line of cases rendered any decision, there is no conflicting final judgment.

E. *Collateral Attack*

The judgment may also be subject to collateral attack that is beyond the scope of the comity analysis. For example, in its motion to dismiss, Harrah's suggests that Vacco, as trustee of the Catskills Litigation Trust, does not have standing to sue.[276] Harrah's asserts that the Trust entered into an agreement with the St. Regis Mohawk Tribe and the parties to the *Arquette* lawsuits, agreeing to the assignment of fifty percent of any of the litigation proceeds to the Trust.[277] Harrah's claims that the assignment is invalid under New York's law on champertous relationships.[278] On the other hand, plaintiffs have argued that an action is not champertous when the assignee is not a stranger to the underlying dispute.[279]

As with the other issues raised in Harrah's motion to dismiss, the federal court declined to decide this issue.[280] The Second Circuit did, however, hold that the Trust was created for a "legitimate business purpose" and that it was not created to manufacture federal jurisdiction.[281]

V. CONCLUSION

The answer to the three-billion-dollar question is, of yet, unclear. It is difficult to predict whether the district court will enforce the judgment against Harrah's. The district court is not precluded from affording full faith and credit. Even applying the principles of comity to the judgment is not determinative. Although the district court may be within its discretion

275. *See, e.g.*, Linkco, Inc. v. Nichimen Corp., 164 F. Supp. 2d 203, 212 (D. Mass. 2001) (granting motion to dismiss in light of res judicata implications).

276. Defendants' Memorandum of Law, *supra* note 116, at 10–13.

277. *Id.* at 11.

278. *Id.* (citing N.Y. JUD. CT. ACTS LAW § 489(1)). A champertous relationship occurs when an individual who is not a party to the litigation bargains to prosecute that action for a share of the proceeds. *See* BLACK'S LAW DICTIONARY 246 (8th ed. 2004) (defining "champerty").

279. Coopers & Lybrand v. Levitt, 384 N.Y.S. 2d 804, 807 (App. Div. 1976).

280. Decision & Order, *supra* note 150, at 4.

281. *Catskill VI*, 547 F.3d 115, 124 (2d Cir. 2008).

to permit enforcement, the potential due process and public policy concerns discussed above may provide sufficient grounds for refusing to enforce the tribal court judgment. In any case, the United States Supreme Court has rarely, if ever, expanded the jurisdiction of tribal courts. Indeed, the recent trend of Supreme Court decisions seems to indicate that the Court appears determined to limit, rather than expand, the role of tribal courts.[282] As such, even if the district court were to enforce the judgment, Harrah's may face a more sympathetic response from the currently configured United States Supreme Court.

Nonetheless, ignoring the Tribal Court has already had expensive consequences for Harrah's. Defending this litigation has cost Harrah's a great deal of money, and it will undoubtedly cost much more, even if the district court refuses to enforce the judgment. As such, the litigation will be watched carefully as it continues to unfold.

282. *See, e.g.*, Plains Commerce Bank v. Long Family Land & Cattle Co., 128 S. Ct. 2709, 2727 (2008) (holding that the tribal court did not have jurisdiction over a non-Indian bank that sold fee simple land located on a reservation to non-Indians); Nevada v. Hicks, 533 U.S. 353, 374 (2001) (holding that the tribal court did not have jurisdiction to adjudicate claims for tortious conduct on a reservation during the execution of a search warrant for an off-reservation crime).