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The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?

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The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?

Nathalie Martin*
Joshua Schwartz**

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* Frederick M. Hart Chair in Consumer and Clinical Law. Written for Zeke, who I will always love. Both authors thank Fred Hart, Sam Deloria, Christine Zuni Cruz, John Lavelle, Kevin Washburn, Jean Ann Fox, and Marvin Ginn for their comments on earlier drafts, and thanks the University of New Mexico School of law for its financial support. Both authors thank Ryan Kluthe for his fine research assistance and Bridget Mullins for her excellent editorial assistance.

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I. Introduction

Racecar driver Scott Tucker leads an opulent life, which includes enjoying an \$8 million vacation home in Colorado, to which he travels by a \$13 million Lear Jet.¹ Much of Tucker's vast wealth

1. David Heath, *Payday Lending Bankrolls Auto Racer's Fortune*, IWATCH

has been amassed through internet payday lending businesses, which he operates from his office in Overland Park, Kansas.² He evades state lending laws by partnering with Indian tribes with tribal sovereign immunity, yet the contrast between his lifestyle and the tribes with which he partners could hardly be more stark.³ These partnerships call into question who actually controls these loan businesses and whether they represent a legitimate use of the sovereign immunity tribes have worked so hard to protect.

This Article discusses the most recent incarnation of payday lending regulation-avoidance, which pits tribal sovereign immunity against meaningful consumer protection laws. Under this model, known among internet payday lenders as the “tribal sovereignty” model, existing payday lenders team with Indian tribes in order to gain the benefit of tribal sovereign immunity and avoid state usury laws, small loan regulations, and payday loan laws.⁴ This practice could conceivably weaken both tribal sovereignty and consumer protection in one fell swoop.

For Indian tribes, sovereignty is a fundamentally important concept. Tribal sovereignty is retained from prior to European contact, but is subject to the power of Congress.⁵ Sovereignty is a tribe’s power to self-govern and functions as a barrier to the encroachment of foreign authority on Indian reservations.⁶ Sovereign immunity is a corollary of tribal sovereignty, and protects tribes from enforcement of state law.⁷

Consumer protection is also a matter of deep significance to many Americans, particularly in this historic time of deregulated interest rates, complex consumer credit products, and record debt levels. One context in which consumer regulation has been difficult

NEWS (Sept. 26, 2011, 4:00 PM), <http://www.iwatchnews.org/2011/09/26/6605/payday-lending-bankrolls-auto-racers-fortune> (last visited Apr. 10, 2012) (on file with the Washington and Lee Law Review).

2. *Id.*

3. *Id.*

4. *See infra* notes 143–50 and accompanying text (discussing the typical sovereign model of partnerships between payday lenders and tribes).

5. *See infra* Part IV.A–B (discussing the history and limits of tribal sovereignty).

6. *Id.*

7. *See infra* Part IV.B (discussing the basic principles of sovereign immunity).

to achieve is that of payday loans, high-interest products marketed for short-term use, but more typically used for very long periods of time, during which consumers often pay ten times what they borrowed and have difficulty exiting the loans. Payday lenders are adept at avoiding any regulations states pass, and there is no federal law regulating most of the terms of payday loans. Thus, in the rare instances in which states pass meaningful payday loan regulations, lenders quickly find new ways to avoid those state laws.

This Article explores how tribal sovereign immunity is being used in the context of payday lending to avoid state law and explores the ramifications of this for both consumer-protection regulation and tribes. It discusses payday loans and tribal sovereignty generally, as well as tribal sovereign immunity, then discusses what might be done to address this consumer protection issue. More specifically, we discuss who in society has the power and resolve to dissolve this alliance, identifying tribes themselves, the Supreme Court, Congress, the Federal Trade Commission, and the Consumer Financial Protection Bureau as possibilities.

We summarize the debate about whether payday lending regulation will cause more harm than good by depriving the poor of much-needed capital,⁸ and recount examples of state regulatory efforts that have taken place. We describe the ways that lenders are teaming with tribes to avoid that regulation, and then discuss the long-term implications of these developments, both for consumer protection and for tribal sovereignty.

II. Background on the Economics of Tribal Life

Some journalists with a consumer protection bent have painted tribes as the greedy beneficiaries of these high interest loans, conjuring up images of a gloating tribal member getting rich off the non-tribal poor.⁹ In reality, this is simply not true. First, Native

8. Though we believe meaningful payday loan regulation is sorely needed, this paper does not focus its attention on this issue.

9. See, e.g., Jessica Silver-Greenberg, *Tribes Profit on Payday-Loan Rules*, WALL ST. J., Feb. 10, 2011, at C1 (reporting on the growth of the “sovereign-loan model” and the economic incentives it brings to tribes). *But see* Michael Hudson & David Heath, *Fights Over Tribal Payday Lenders Show Challenges of Financial Reform*, IWATCH NEWS (Feb. 7, 2011, 9:13 AM), <http://www.iwatchnews.org/2011/02/07/2151/fights-over-tribal-payday-lenders->

people also use these loans. In one recent case, a New Mexico woman borrowed \$5,000 under a loan that required she pay back \$42,000.¹⁰ Second, in many of these lender-tribe partnerships, tribal sovereignty is being used in ways that benefit only non-tribal individuals. Thus, characterizations like those in the popular media are almost completely false. These false characterizations could cause short-term and long-term harm to tribes, by painting an inaccurate economic picture, and even by threatening tribal independence and sovereignty itself.

To understand the importance of sovereignty from a tribal perspective, one must also understand the economics for most tribes. Poverty is more prevalent among Native people than any other American demographic.¹¹ Following efforts by the federal government and Euro-American settlers to dislocate and remove the Indian tribes from their territories,¹² many tribes now reside in rural areas with limited development of natural resources.¹³

show-challenges-financial-reform (last visited Apr. 10, 2012) (describing tribes' willingness to profit from payday lending as a result of being "stripped of their economic vitality and forced to relocate to remote wastelands") (on file with the Washington and Lee Law Review); Mark Fogarty, *Payday Lenders 'Using Tribes as Fronts'*, INDIAN COUNTRY TODAY MEDIA NETWORK (Feb. 14, 2011), <http://indiancountrytodaymedianetwork.com/2011/02/14/payday-lenders-'using-tribes-as-fronts'-17421> (last visited Apr. 10, 2012) (objectively reporting on the publication of a report that investigates payday lender arrangements with tribes) (on file with the Washington and Lee Law Review).

10. Native Community Finance, a community development corporation located on the Laguna Pueblo, recently provided a loan to pay off an internet payday loan given by Western Sky Loans. Under the terms of the loan, the consumer would have paid back \$42,000 to borrow \$5,000. The consumer told the executive director of Native American Finance that she thought the loan was O.K. because it was being offered by a tribe. See interview with Marvin Ginn, Exec. Dir., Native Am. Fin. (Oct. 2, 2011).

11. See U.S. COMM'N ON CIVIL RIGHTS, *A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY* 8 (2003), available at <http://www.usccr.gov/pubs/na0703/na0204.pdf> ("[T]he national poverty rate in the United States for the period between 1999 and 2001 was 11.6 percent. For Native Americans nationally, the average annual poverty rate was 24.5 percent.").

12. See Kelly E. Yasaitis, *NAGPRA: A Look Back Through the Litigation*, 25 J. LAND RESOURCES & ENVTL. L. 259, 260-61 (2005) (recounting the treatment of Native Americans in the nineteenth and twentieth Centuries).

13. See Nancy B. Collins & Andrea Hall, *Nuclear Waste in Indian Country: A Paradoxical Trade*, 12 LAW & INEQ. 267, 300 (1994) (describing tribal involvement in nuclear waste as a result of "legal policies that created a system of remote reservations, and restricted resource development").

Unemployment tops 50% in many areas,¹⁴ and access to quality healthcare can be very limited.¹⁵ One significant bright light for tribes in recent history has been economic development. Many people, both Native and non-Native, think this may ameliorate poverty and the social problems that accompany it. Nevertheless, the stereotype of a tribe getting rich off casinos and paying no taxes could hardly be further from the truth.¹⁶ Contrary to the popular conception, most tribes are still poorer than other U.S. communities, despite recent economic development.¹⁷

14. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 11, at 101 (noting that unemployment has reached eighty-five percent on some reservations and that in 2000, unemployment on reservations was more than twice the national rate).

15. See Armen H. Merjian, *Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and Cobell v. Salazar*, 46 GONZ. L. REV. 609, 611–12 (2010). As Professor Merjian states:

Native Americans are, in truth, among the very poorest Americans. As the United States Civil Rights Commission explains, “Native Americans still suffer higher rates of poverty, poor educational achievement, substandard housing, and higher rates of disease and illness. Native Americans continue to rank at or near the bottom of nearly every social, health, and economic indicator.” Fully 23.6% of Native Americans live below the poverty line, and 34% of Native American children live in families with household incomes below the poverty line. Roughly 90,000 Native American families are homeless or under-housed, and nearly half of reservation households are crowded or severely crowded. One in five of those houses lacks adequate plumbing facilities.

Native Americans have a lower life expectancy than any other ethnic group in the United States, and they suffer higher rates of illness for many diseases. “On average, men in Bangladesh can expect to live longer than Native American men in South Dakota.” Elderly Native Americans are 48.7% more likely to suffer from heart failure, 173% more likely to suffer from diabetes, and 44.3% more likely to suffer from asthma than the general population. Meanwhile, one in three Native Americans lacks health insurance coverage.

Id. (citations omitted).

16. See Steven Andrew Light & Kathryn R.L. Rand, *Reconciling the Paradox of Tribal Sovereignty: Three Frameworks for Developing Indian Gaming Law and Policy*, 4 NEV. L.J. 262, 262–64 (2003) (discussing and negating various popular media portrayals of Native Americans as wealthy gaming tribes).

17. See U.S. COMM'N ON CIVIL RIGHTS, *supra* note 11, at 8 (“[T]he national poverty rate in the United States for the period between 1999 and 2001 was 11.6 percent. For Native Americans nationally, the average annual poverty rate was 24.5 percent.”).

Moreover, joint enterprises sometimes provide asymmetrical economic gains for non-Native businesses while significant collateral costs are borne by tribal lands and members. The costs borne by the tribes can be of great consequence relative to the rewards.¹⁸ For example, uranium mining has resulted in far fewer economic benefits than anticipated, and has caused cancer and black lung among Navajos who live and work near the mines.¹⁹ Uranium mining is also ruinous to the surrounding land and groundwater.²⁰ Some tribes have been convinced to take nuclear waste for disposal on their lands, even though the compensation received is significantly undermined by future health and environmental ramifications, and by inherent risk.²¹ The tribal competitive advantage in business often consists of providing an easier or less

18. Casinos are, overall, a significant economic boon to tribes, funding tribal language revitalization programs, tribal cultural institutions, and schools, among other programs. Yet, some argue that involvement with casinos can sometimes chip away at ancient tribal customs. Others find nothing unusual about casinos and find that they do not harm Native culture any more than any other enterprise. See Karin Mika, *Private Dollars on the Reservation: Will Recent Native American Economic Development Amount to Cultural Assimilation?*, 25 N.M. L. REV. 23, 33 (1995) (“Tribes disagree on how much cultural purity will be compromised by ‘nontraditional’ enterprises if outside entities are allowed to develop businesses on reservation lands.”).

19. See Collins & Hall, *supra* note 13, at 294–95 (discussing the negative health and environmental impacts of uranium mining on Native American lands); see also Terri Hansen, *Proposed Alaska Coal Mine Divides Alaska Communities, Elicits Racist Rant*, INDIAN COUNTRY TODAY MEDIA NETWORK (Sept. 19, 2011), <http://indiancountrytodaymedianetwork.com/2011/09/proposed-alaska-coal-mine-divides-alaska-communities-elicits-racist-rant/> (last visited Apr. 10, 2012) (describing the negative impacts of mining on the health and land of Alaskan tribes) (on file with the Washington and Lee Law Review); Carol Berry, *Mining Clashed with Sacred Sites in 2010*, INDIAN COUNTRY TODAY MEDIA NETWORK (Dec. 27, 2010), <http://indiancountrytodaymedianetwork.com/2010/12/mining-clashed-with-sacred-sites-in-2010/> (last visited Apr. 10, 2012) (reporting on the potential environmental, health, and cultural damage caused by uranium and coal mines) (on file with the Washington and Lee Law Review); *A Lump of Coal for ANCs*, INDIAN COUNTRY TODAY MEDIA NETWORK (Dec. 27, 2010), <http://indiancountrytodaymedianetwork.com/2010/12/a-lump-of-coal-for-ancs/> (last visited Apr. 10, 2012) (reporting on proposed legislation to address abuses in preferential government contracts and quoting Senator McCaskill as saying, “[w]e’ve seen that a very small portion of these companies’ profits are reaching native Alaskans”) (on file with the Washington and Lee Law Review).

20. See Collins & Hall, *supra* note 13, at 295 (explaining the environmental impacts of uranium mining).

21. See *id.* at 274–75 (discussing the incentives and consequences to tribes for accepting nuclear waste onto their land).

costly regulatory environment in matters regulated by states.²² Moreover, it goes without saying that tribes are as diverse as any group of people in the country, and there is naturally no consensus among Native people about what constitutes good or bad economic development.²³ Off-reservation business activity can also cause backlash from outsiders.²⁴ It is from this social, historical, and economic climate that the partnership between tribes and payday lenders emerged.

III. Background on Payday Loans

A. Anatomy of a Payday Loan

A payday loan is a loan designed to get a consumer through a short-term cash-flow shortage.²⁵ These loans were originally created in order to help consumers make ends meet between now and payday, thus the descriptive name.²⁶ In reality there are now many varieties of short-term loans of this kind, and the loan terms vary markedly. In one common example, a consumer borrows money at a rate of between \$15 and \$25 per \$100 for a period of fourteen days or fewer.²⁷ In other words, if a consumer got paid four days ago but is already out of cash, she can go borrow, for example, \$400 between

22. This is especially true of tribes that are economically vulnerable. Tribes with more economic resources have more options: They are able to be more discerning and to use the full range of their resources, including capital, to create opportunities.

23. See Matthew L.M. Fletcher, *Indian Tribal Businesses and the Off-Reservation Market*, 12 LEWIS & CLARK L. REV. 1047, 1049–50 (2008) (describing various off-reservation businesses, the controversy behind these businesses, and the possibility of backlash from the outside as a result).

24. See *id.*

25. See Ronald Mann & James Hawkins, *Just Until Payday*, 54 UCLA L. REV. 855, 857 (2007) (explaining the mechanics of a typical payday loan); Karen E. Francis, Note, *Rollover, Rollover: A Behavioral Law and Economics Analysis of the Payday Loan Industry*, 88 TEX. L. REV. 611, 611–12 (2010) (describing a payday loan transaction).

26. See Mann & Hawkins, *supra* note 25, at 857 (“The spirit of the market is captured by a recent Cash America television advertisement advising that ‘some things can’t wait until payday.’”).

27. See Nathalie Martin, *1,000% Interest—Good While Supplies Last: A Study of Payday Loan Practices and Solutions*, 52 ARIZ. L. REV. 563, 564 (2010) (giving an example of a typical payday loan).

now and her next payday (now ten days away). To get that \$400 at the \$15-per-\$100 rate, she will need to have a checking account and will write a check, or authorize an automatic debit, for \$460 post-dated to her next payday.²⁸ When payday comes, she can either let the check or debit clear, or she can go in and pay another \$60 to borrow the same \$400 for the next two weeks. Interest rates for these loans range from around 400% per annum to over 1,200%, and the industry is largely unregulated in most of the country.²⁹ Payday lending is one of the fastest growing segments of the consumer credit industry.³⁰ As Francis notes, “[b]y 2005, there were more payday-loan stores in the United States than McDonald’s, Burger King, Sears, J.C. Penney, and Target stores combined.”³¹

B. The Debate over Payday Lending Regulation

An active debate rages about whether these loans do more harm than good. Consumer groups claim these loans create a debt trap.³² Lender groups, perhaps with some justification, point out that people of lesser means have no place else to go when they really need cash.³³ They claim that restricting access to the only source of

28. *Id.*

29. *See id.* at 565 (citing Felix Salmon, *Loan Sharking Datapoints of the Day*, REUTERS (Jan. 6, 2010, 7:37 PM), <http://blogs.reuters.com/felix-salmon/2010/01/07/loan-sharking-datapoints-of-the-day/> (last visited Apr. 10, 2012) (on file with the Washington and Lee Law Review).

30. *See* Francis, *supra* note 25, at 618–19 (describing the growth of the payday lending industry).

31. *Id.* at 619.

32. *See* LESLIE PARRISH & URIAH KING, CENTER FOR RESPONSIBLE LENDING, PHANTOM DEMAND: SHORT-TERM DUE DATES GENERATE NEED FOR REPEAT PAYDAY LOANS, ACCOUNTING FOR 76% OF TOTAL VOLUME 15–16 (2009), *available at* <http://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf> (demonstrating how the structure of payday loans creates a debt-trap for borrowers); LAUREN K. SANDERS ET AL., NATIONAL CONSUMER LAW CENTER, STOPPING THE PAYDAY LOAN TRAP: ALTERNATIVES THAT WORK, ONES THAT DON’T 4–6 (2010), *available at* http://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/report-stopping-payday-trap.pdf (describing payday loans and the harms they cause for consumers); Francis, *supra* note 25, at 612 (describing how consumers may get “caught in the ‘debt trap’ of extending the loan for multiple terms”).

33. *See* Francis, *supra* note 25, at 617 (noting that “the payday-lending industry claims to provide a valuable service to consumers who are in need of emergency cash and do not have access to other credit”); *see also* John P.

capital for people of lesser means will only make people's problems worse.³⁴

Some of the most harmful aspects of this problem have nothing to do with interest rates and everything to do with how the loans are marketed and used. We personally might look favorably upon a loan product that allowed people who could not otherwise get credit to borrow money for occasional, unexpected, non-recurring expenses. Though some consumer groups disagree, we believe that this could be a good and useful product even if it cost \$25 for every \$100 borrowed.³⁵ In other words, the high relative cost of loans might not matter so much if loans were truly short term, both in design and marketing, as well as in actual use.

C. The Habits of Payday Lenders and Customers

In reality, these loans are rarely short term or occasional. Empirical data show that the loans are often used habitually.³⁶

Caskey, *Payday Lending: New Research and the Big Question 3* (Fed. Reserve Bank of Philadelphia, Working Paper No. 10-32, 2010), available at <http://www.philadelphiafed.org/research-and-data/publications/working-papers/2010/wp10-32.pdf> (noting that payday lenders serve people of lesser means but not the very poor).

34. See Francis, *supra* note 25, at 613 (describing the arguments made by proponents and critics of payday lending regulations).

35. Consumer groups object to payday lending for reasons other than the high cost. As Jen Ann Fox of the Consumer Federation of America explained, in response to this view:

We object to payday loan structure and design for many reasons other than the cost, i.e. loans made without determination of ability to repay, loans secured by access to bank accounts, balloon payment loans, loans too large to be repaid out of one paycheck even if free, loans based on unfunded checks leading to coercive debt collection tactics, etc. As studies from the Center for Responsible Lending show, even if the loans were used only now and then, this does not mean that high cost is the only issue. If all the factors that go into a payday loan resulted in only occasional use, this would not be a significant problem, but these are not the same things.

Online interview with Ms. Fox (Oct. 18, 2011).

36. Caskey, *supra* note 33, at 4–5. Professor Caskey does a thorough review of recent studies on repeat usage of payday loans, stating that:

Stegman's 2007 article made this same point and provided data indicating that many payday loan customers borrow repeatedly. More recent data reinforce this finding. A study for the California Department of Corporations found, for example, that 19 percent of

According to one source, the average loan is rolled over ten times, and some consumers pay on the same loan for years at a time.³⁷

loan customers took out 15 or more loans over an 18-month period. Only 16 percent took out just one. The study also included focus groups with a small number of customers. Based on the focus groups, the study reported, "When asked if they would recommend payday loans to others, most indicated that they would provide the information about payday lending, but would also provide cautions to the 'addictive', 'repetitive', and 'vicious' cycle that can be a part of the payday lending experience." In Colorado during 2007, payday loan customers with 12 or more loans accounted for 67 percent of all loans; 65 percent of loans were made on the same day that a customer repaid a previous loan. As the Colorado report stated, "During 2007 the 'average' consumer paid about \$573.06 in total finance charges to have borrowed \$353.88 for a period of little more than five and one-half months at each . . . location with which that consumer did business."

Data from Florida indicate that the average number of transactions per consumer from June 2008 through May 2009 was 8.4, and 30 percent of the customers in that year had 12 loans or more. These 30 percent of customers accounted for 61 percent of all payday loans made in that year. In Oklahoma, the average number of transactions per customer was 9.3 from April 2008 through March 2009, 32.5 percent of the customers in that year took out 12 or more loans, accounting for 63.5 percent of loan volume.

Id. (citations omitted).

37. See Allison Woolston, Note, *Neither a Borrower Nor a Lender Be: The Future of Payday Lending in Arizona*, 52 ARIZ. L. REV. 853, 867 (2010) ("This repeated cycle of loan renewal extends the duration of payday loan to an average of almost five months. The typical payday loan customer renews his loan approximately ten times and, in one reported instance sixty-six times."); see also Francis, *supra* note 25, at 617. In this student note, Ms. Francis cites a number of studies about rollovers being repeat loans, stating that:

The average borrower has 10, 11, or 12 payday transactions per year according to three respective reports. A Colorado study found that the average was greater than 9 transactions per year from the same lender, but that did not include transactions that a borrower may have had with other lenders, which the study implied could greatly increase that average. In Illinois, 20% of borrowers have 20 or more payday loans per year. A consumer advocate group found that 66% incur at least 5 payday loans per year and that 31% receive more than 12 per year. The Georgetown study reported that almost 50% of borrowers had at least 7 transactions in the last year and that 22.5% had more than 14 payday loans that year. Though none of the data converged, all of these studies reveal a high rate of rollover transactions per borrower. The striking feature of this data is that the CFSA study, which should be most favorable to the payday-lending industry, shows that almost a majority of all borrowers are rolling over their loans multiple times.

Moreover, the loans are most frequently used to pay regular, recurring bills like rent and utilities, not emergencies.³⁸ This means that once a person has borrowed the money, if he or she cannot pay it back with the fee, he or she now has another monthly or bimonthly bill to pay.

Perhaps not surprisingly, it is hard for a lender to make a profit from occasional, non-recurring customers. Thus, lender marketing typically encourages customers to use the loans for many non-emergency purposes. Advertisements suggest that the loans are a perfect way to fund vacations,³⁹ Christmas and birthday presents, and even bachelor parties.⁴⁰ In other words, while lenders claim that they are here when tragedy hits and that their customers would be harmed if they faced an emergency, many of the loans are used for discretionary purposes at a cost that customers do not understand until it is too late.

Similar to any product, gimmicks abound in payday loan advertising. The idea is to attract new customers but to rely heavily on repeat business.⁴¹ One payday lender uses stripper Bridget the Midget as its mascot in order to demonstrate that the loans are for

Id. (citations omitted).

38. See Caskey, *supra* note 33, at 6 (describing a 2007 California survey which found that “50.2 percent of loan customers said that they took the loan primarily to pay bills, and 22.3 percent said that they mainly used it to buy groceries or other household goods”) (citing APPLIED MGMT. & PLANNING GRP., 2007 DEPARTMENT OF CORPORATIONS PAYDAY LOAN STUDY 47 (2007), available at <http://www.corp.ca.gov/pub/pdf/PDLStudy07C.pdf>). Martin has found that 63% of customers reported using the loans for regular bills in her survey outside store-front lenders’ places of business. Martin, *supra* note 27, at 608–09. Another 4% reported using the loans for discretionary purposes such as gifts or parties, and just 5% for emergencies, 5% for auto expenses, 5% to help family, and 5% for medical expenses. *Id.*

39. See *Using a Payday Loan for Vacation Expenses*, PAYDAY LOAN BLOG (Sept. 29, 2008, 10:19 AM), <http://www.paydayloanaffiliate.com/blog/UsingAPaydayLoanForVacationExpenses.aspx> (last visited Jan. 7, 2012) (advocating the use of a payday loan to fund a vacation) (on file with the Washington and Lee Law Review).

40. See Nathalie Martin, *Funding Your Buddy’s Bachelor Party Through a Payday Loan?*, CREDIT SLIPS (Mar. 25, 2011, 6:32 PM), <http://www.credit-slips.org/creditslips/2011/03/funding-your-buddys-bachelor-party-through-a-payday-loan.html> (last visited Jan. 7, 2012) (linking to a payday loan ad) (on file with the Washington and Lee Law Review).

41. See PARRISH & KING, *supra* note 32, at 2–3 (describing the “churning” of borrows and noting that such churning accounts for three-fourths of all payday loan volume).

“short” term use.⁴² Despite the clever play on words, lenders dun customers to take out new loans almost immediately after they pay back an old one.⁴³ Lenders call customers in their cars on their way home from paying off or paying down the loan.⁴⁴ Lenders waive one two-week fee if you keep your loan out for four two-week cycles in a row.⁴⁵ In fact, if a customer can afford to pay back the whole loan, without resorting to rollovers, lenders offer to increase the amount enough to make sure that this never happens again. In other words, lenders do whatever they legally can to make sure the loans are neither infrequent nor short term.

Whatever problems are created by storefront payday loans, the problems with internet payday loans appear to be far worse. Interest rates are more commonly in the 600%–1,000% range, rather than the 400%–600% range, and the loans are largely unregulated.⁴⁶ Some lenders who operate over the internet consistently claim that they are not bound by any state’s law.⁴⁷ Customers give large amounts of personal data to the lender over the internet before they hear any of the loan terms.⁴⁸ The lenders’

42. Little Payday, *Bridget the Midget Introduces Small Loans at LittlePayday.com!*, YOUTUBE (Sept. 19, 2010), <http://www.youtube.com/watch?v=6euwvEQxm6c> (last visited Jan. 7, 2012) (on file with the Washington and Lee Law Review).

43. See PARRISH & KING, *supra* note 32, at 2 (“Devoting [a] substantial share of paycheck to repaying a payday loan, it appears, leaves most borrowers inadequate funds for their other obligations, compelling them to take a new payday loan almost immediately.”).

44. See Martin, *supra* note 27, at 574 (describing methods used by lenders to encourage repeat borrowing).

45. See Allied Cash Advance Customer Loyalty Card (on file with the Washington and Lee Law Review).

46. See CONSUMER FED’N OF AM., CFA SURVEY OF ONLINE PAYDAY LOAN WEBSITES 5–6 (2011), available at <http://www.consumerfed.org/pdfs/CFAsurveyInternetPaydayLoanWebsites.pdf> (discussing APR disclosures and state regulation of internet payday lenders); JEAN ANN FOX & ANNA PETRINI, INTERNET PAYDAY LENDING: HOW HIGH-PRICED LENDERS USE THE INTERNET TO MIRE BORROWERS IN DEBT AND EVADE STATE CONSUMER PROTECTIONS 22 (2004), available at http://www.consumerfed.org/elements/www.consumerfed.org/file/finance/Internet_Payday_Lending113004.PDF (discussing the costs of internet payday loans).

47. See CONSUMER FED’N OF AM., *supra* note 46, at 5 (describing jurisdictional disclosures made by internet payday lenders).

48. See *id.* at 11–12 (describing the typical privacy policies of internet payday lending websites).

procedures make it extremely difficult to pay off the principal of the loans rather than just the two-week fee.⁴⁹ Recently, the Minnesota Attorney General's office sued five payday lenders for automatically renewing loans and providing no meaningful procedure for paying off loans in full.⁵⁰

D. The Legal and Regulatory Framework of Payday Lending

As set out in this Article, internet payday lenders have a weak history of complying with state laws. A 2004 survey of online lenders demonstrates this point.⁵¹ Payday lenders are subject to state laws that range from draconian—payday lending is a RICO violation in Georgia—to permissive.⁵² The majority of states have laws that specifically authorize payday lending.⁵³ In recent years, state regulators have brought enforcement actions against online lenders that fail to comply with state laws, with the West Virginia Attorney General's office being among the most active.⁵⁴ A 2011 survey of twenty internet payday lenders noted that a growing number of websites post copies of their state licenses and claim to make loans only in states where they are licensed.⁵⁵ The most recent survey by the Consumer Federation of America (CFA) notes that lenders continue to claim choice of law from lax jurisdictions, to

49. See *id.* at 8–9 (describing internet payday loan payment terms and how they result in a debt trap).

50. See *Minnesota Sues Five Internet Payday Lenders*, CONSUMERAFFAIRS.COM (Sept. 7, 2011), <http://www.consumeraffairs.com/news/04/2011/09/minnesota-sues-five-internet-payday-lenders.html> (last visited Jan. 7, 2011) (describing various consumer complaints about internet payday lenders) (on file with the Washington and Lee Law Review).

51. See FOX & PETRINI, *supra* note 46, at 7–12 (discussing the ways in which internet payday lenders evade state laws).

52. See *Legal Status of Payday Lending by State*, PAYDAY CONSUMER LOAN INFORMATION, <http://www.paydayloaninfo.org/legal-status> (last visited Jan. 11, 2012) (summarizing state laws regarding payday lending) (on file with the Washington and Lee Law Review).

53. See *id.* (noting that thirty-three states permit payday lending with safe harbor legislation).

54. See Press Release, Office of the W.Va. Att'y Gen. (Aug. 24, 2012), available at http://www.wvago.gov/pdf/press/2011_onsumersfromDelawareInternetPaydayLender.pdf (announcing the recovery of \$300,000 from a Delaware Internet lender for West Virginians).

55. FOX & PETRINI, *supra* note 46, at 5–6.

locate off-shore, or to claim tribal sovereign immunity to avoid complying with state consumer protections.⁵⁶

There currently is no federal law regulating the specific terms of these loans, although the Truth in Lending Act,⁵⁷ the Electronic Fund Transfer Act,⁵⁸ and other general federal laws apply to online lending. Moreover, many laws passed by states have been quickly skirted by lenders, unless the law includes an interest rate cap.⁵⁹ For example, in 2007, New Mexico passed a law that capped fees at \$15 per \$100 borrowed for a period of up to two weeks;⁶⁰ required that lenders offer a free installment plan to any customer who could not pay back a loan;⁶¹ prohibited all rollovers;⁶² limited loans to 25% of a borrower's gross income;⁶³ and provided for a right of rescission,⁶⁴ among other limitations.⁶⁵ This new law also provided that all loans must go into a statewide database so these new provisions could be enforced.⁶⁶ Similar laws have been passed in Florida, Oklahoma, Michigan, Illinois, North Dakota, and Indiana,

56. *Id.* at 4.

57. Truth in Lending Act, 15 U.S.C.A. §§ 1601–1667f (2012).

58. Electronic Funds Transfer Act, 15 U.S.C.A. §§ 1693–1693r (2012).

59. See URIAH KING & LESLIE PARRISH, CENTER FOR RESPONSIBLE LENDING, SPRINGING THE DEBT TRAP: RATE CAPS ARE ONLY PROVEN PAYDAY LENDING REFORM 12–18 (2007), available at <http://www.responsiblelending.org/payday-lending/research-analysis/springing-the-debt-trap.pdf> (describing how various regulatory strategies have failed to stop the payday loan debt trap).

60. N.M. STAT. ANN. § 58-15-33(B) (West 2011).

61. *Id.* § 58-15-35(A).

62. *Id.* § 58-15-34(A).

63. *Id.* § 58-15-32(A). According to the Center for Responsible Lending, income limit requirements do not necessarily help consumers avoid becoming trapped in debt. KING & PARRISH, *supra* note 59, at 16. Because this income restriction was based on the consumer's gross income and thus on a dollar figure that the consumer did not actually have available, it did not relate directly to the consumer's ability to repay the loan. Additionally, the income figure was for an entire month but in most cases the term of the loan was for only two weeks, meaning that the consumer only had half of the stated income with which to attempt to repay the loan in any case. None of this makes any difference anyway, because once the law was passed, lenders stopped making loans covered by the new law and moved on to something else.

64. N.M. STAT. ANN. § 58-15-32(C) (West 2011).

65. See *id.* §§ 58-15-32 to 58-15-39 (enumerating all the requirements for payday lending added in 2007).

66. *Id.* § 58-15-37.

but lenders have quickly found ways to skirt the laws.⁶⁷ Because a last-minute definition added to the bill made the new law apply only to loans of fourteen to thirty-five days in duration and those involving a post-dated check, the industry quickly began selling a product that fell outside the definition.⁶⁸ In short, the new law accomplished very little. The New Mexico law, like some others around the country, capped interest rates at a generous 417%, yet payday lenders still found reason to invent new products to skirt the law.⁶⁹

This is not to say that all states have been ineffective at regulating payday loans, as the recent CFA study shows.⁷⁰ State interest rate caps have been very effective at eliminating payday loan abuses,⁷¹ but even this solution may have met its match—tribal sovereign immunity. Lenders make no secret about why they want to team up with Indian tribes, as this advertisement for an internet payday loan explains:

Due to the strict regulations that are hitting the payday loan industry hard, many lenders are now turning to Indian Tribes to help them out. The American Indian Tribes throughout the United States have been granted sovereign immunity which means that they are not held subject to the laws that payday loans are currently going up against. There are 12 states which have banned payday lending but as long as their (sic) is an Indian tribe who runs the operation on this sovereign land, the lenders can continue their business even where payday loans have already been banned. Similar to the Casino boom, payday loans are the new financial strategy that many are using as a loophole through the strict payday loan laws. The revenue is quite high and promising for these tribes who often find themselves struggling. There are approximately 35 online cash advance and payday loan companies that are owned by American Indian

67. See Martin, *supra* note 27, at 588–93 (describing how other states have attempted and failed to successfully regulate and curb payday borrowing).

68. *Id.* at 585–86 (describing how lenders changed their product to fall outside the definition of a payday loan).

69. *Id.* at 585.

70. See NAT'L CONSUMER LAW CTR., SMALL DOLLAR LOAN PRODUCTS SCORECARD—UPDATED 14–20 (2010), available at http://www.consumerfed.org/elements/www.consumerfed.org/file/Updated_Scorecard.pdf (grading states based on whether they impose a 36% APR cap on small dollar loans).

71. See KING & PARRISH, *supra* note 59, at 19 (describing the success of interest rate caps and listing the savings achieved by states that enforce an interest rate cap).

tribes. Consumers have taken out approximately 12,500 loans over the last year in which these tribes made approximately \$420 million. It is no surprise that many lending companies are currently seeking out American Indian Tribes in an effort to save their businesses by escaping US lending laws. Tribal leaders are paid a few thousand dollars a month for allowing a payday lender to incorporate on tribal land. The more lenders that tribes allow to move onto their reservation, the larger the profit that they make.⁷²

This quote also explains that under this version of the tribal affiliation model, tribes get the crumbs while the non-tribal outsiders use their tribal sovereignty to make huge profits. Moreover, as this advertisement makes clear, lenders using the model described in the advertisement are by no means tribes themselves. The next part of this Article analyzes whether these practices entitle some payday lenders to tribal sovereign immunity, and if so, which ones.

IV. Background on Sovereignty and Sovereign Immunity

A. Sovereignty Versus Sovereign Immunity

“There is nothing more important to Indian governments and Indian people than sovereignty.”⁷³ Tribal sovereignty is embodied in hundreds of treaties between Indian nations and the colonial powers,⁷⁴ referenced in the U.S. Constitution, recognized by a vast

72. *The Connection Between Indian Tribes and Payday Lending*, ONLINE CASH ADVANCE, <http://www.online-cash-advance.com/financial-news/the-connection-between-indian-tribes-and-payday-lending#ixzz1Nt1vQu6h> (last visited Jan. 11, 2012) (on file with the Washington and Lee Law Review).

73. *Framework of Tribal Sovereignty*, AMERICAN INDIAN POLICY CENTER, <http://www.americanindianpolicycenter.org/projects/marge1.html> (last visited Jan. 11, 2012) (on file with the Washington and Lee Law Review).

74. See FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 204–24 (Nell Jessup Newton et al. eds., Lexis Nexis 2005) (1941) (tracing the history and extent of powers tribal powers and tribal sovereignty). When two governments enter into a treaty with one another, they are recognizing each other as sovereigns. For example, states generally enter into contracts with each other that are called compacts. Treaties are the basis of the relationship between tribes and the United States. *Id.* When the United States government recognized tribes as sovereigns through treaties, they were following in the footsteps of European nations that had done the same thing. *Id.* at 208.

body of Supreme Court jurisprudence, and affirmed by numerous laws.⁷⁵ It is also referenced in the “Indians not taxed” provision of the Constitution.⁷⁶ The concept is so fundamental that it runs through most legal scholarship on the subject of Indian law.⁷⁷ Tribal sovereignty predates both federal and state governments.⁷⁸ Indian governments have inherent sovereignty which is not derived from any other government but rather from the people themselves.⁷⁹

Despite this clear recognition of tribal sovereignty, Congress and the Supreme Court have been chipping away at this principle little by little, by limiting the regulatory power of tribes and the jurisdiction of tribal courts.⁸⁰ In so doing, Congress and the Supreme Court have systematically stripped tribes of the power to control events taking place on their lands and taken away affirmative governance powers.⁸¹ At the same time, the Supreme Court has expanded tribal *immunity*, or protection from suit.⁸² According to one scholar, this combination of removal of governance powers from tribes and concurrent expansion of immunity could lead to a lack of government accountability, increased uncertainty about the law, and increased animosity toward tribes among the

75. Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 CAL. L. REV. 799, 821–22 (2007).

76. U.S. CONST. amend. XIV, § 2 (“Representatives shall be apportioned among the several states according to their respective numbers . . . excluding Indians not taxed.”).

77. There are three types of sovereigns in the United States, the federal government, state governments, which derive their sovereignty from the federal government, and Indian governments.

78. COHEN, *supra* note 74, at 204.

79. *See id.* at 205 (noting that tribes are distinct entities with powers of self-government derived from original sovereignty rather than a delegation of powers). To have any sovereign nation, you need a distinct, unique group of people, who have a distinct language, a distinct moral and religious structure, and a distinct cultural base. They must have a specific geographic area that they control and regulate. Within that area, they must possess governmental powers, including the power to tax and the power to change their government if they see fit. These governmental powers must be acknowledged by the people who are subject to them, and they must be enforceable by some sort of authority, whether it be military, police, or general citizen control.

80. Katherine J. Florey, *Indian Country’s Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 597–98 (2010) (discussing the erosion of tribal sovereignty).

81. *Id.*

82. *Id.*

general population.⁸³ Thus, while the following discussion describes a broad expansion of tribal sovereign immunity, this expansion takes place in the context of constriction of tribal sovereignty in general.

B. Tribal Sovereign Immunity

Generally speaking, the immunity of a sovereign to suit is a longstanding corollary to the sovereignty of any governmental entity.⁸⁴ Tribal sovereign immunity derives from tribal sovereignty.⁸⁵ Like state and federal sovereign immunity, tribal immunity is an inherent power that prohibits state and private suits against tribes, except in certain circumstances.⁸⁶ Because tribes are governments, it has long been understood that federally recognized Indian tribes are subject to suit only when Congress authorizes the suit or the tribe has waived its immunity.⁸⁷ Tribal sovereign immunity was once thought to be confined to governmental on-reservation activity and thus did not extend to off-reservation conduct.⁸⁸ However, after the *Kiowa*⁸⁹ decision described below, a federal common-law default rule of immunity for all tribal

83. *Id.* at 595.

84. *See id.* at 616–17 (discussing the origins of the sovereign immunity doctrine).

85. COHEN, *supra* note 74, at 635.

86. *Id.* at 636. Tribal sovereign immunity does not bar suits by the federal government, however. *Id.*

87. *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

88. *See id.* at 754–56 (noting that while the Court never drew a distinction, other courts had limited off-reservation immunity).

89. *See Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 760 (1998) (permitting tribal sovereign immunity to extend off-reservation). *Kiowa* involved a Tribal Development Commission that agreed to purchase stock through a promissory note in the name of the tribe. *Id.* at 751. Though the tribe argued the deal was signed on tribal land, the Respondent maintained that the note was executed and delivered in Oklahoma City, or non-tribal land. *Id.* The tribe defaulted on the note and the Respondent sued for the breach of contract. *Id.* The Oklahoma Supreme Court held that Indian tribes are subject to suit in state court for breaches of contract involving off-reservation commercial conduct. *Id.* at 755. The United States Supreme Court reversed. Ultimately, the Supreme Court declined to draw a distinction based on where the tribal activity occurred, granting sovereignty to tribal conduct for purely off-reservation conduct. *Id.* at 760.

activity, on- or off-reservation, was articulated by the U.S. Supreme Court.⁹⁰ By declining to draw a distinction between tribal activities on or off reservation land, and choosing to defer to Congress, the Court held that tribal sovereign immunity applies to virtually all tribally-owned enterprises, whatever the industry and wherever located.⁹¹ Thus, states may attempt to regulate off-reservation tribal activities, but sovereign immunity prevents states from enforcing its substantive laws against tribes through the courts.⁹²

C. The History of Indian Sovereign Immunity: Does It Rest on a “Slender Reed”?

Tribal immunity rests on a far more slender reed than sovereignty itself. Tribes have had sovereignty over their members, territory, and affairs from “time immemorial.”⁹³ Congress has limited this sovereignty, however, by placing tribes under the legislative authority of the United States.⁹⁴ Tribal sovereignty, then, is subject to the will of Congress, which exercises plenary power over Indian affairs.⁹⁵

D. Pre-Kiowa Case Law

Although tribal sovereign immunity is now well established, the U.S. Supreme Court claims that the doctrine developed “almost by

90. *See id.* at 764 (Stevens, J., dissenting) (“[W]e have treated the doctrine of sovereign immunity from judicial jurisdiction as settled law, but in none of our cases have we applied the doctrine to purely off-reservation conduct.”).

91. *See id.* at 760 (majority opinion) (“[W]e decline to revisit our case law and choose to defer to Congress. Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.”).

92. *See id.* at 755 (“There is a difference between the right to demand compliance with state laws and the means available to enforce them.”).

93. *Cherokee Nation v. Georgia*, 30 U.S. 1, 3 (1831).

94. *See COHEN, supra* note 74, at 221–24 (discussing federal statutory limitations on tribal sovereignty).

95. *See Talton v. Mayes*, 163 U.S. 376, 384 (1896) (“[A]lthough possessed of these attributes of local self-government when exercising their tribal functions, all such rights are subject to the supreme legislative authority of the United States.”).

accident.”⁹⁶ The Court never mentioned the sovereign immunity of a tribe until the 1919 case of *Turner v. United States*,⁹⁷ in which it mentioned the doctrine in dicta.⁹⁸ *Turner* arose when members of the Creek Tribe tore down a fence to Creek grazing lands leased to Turner, and Turner sued the tribe for not preventing the destruction.⁹⁹ In *Turner*, the Court held that the obstacle to recovery was “not the immunity of a sovereign to suit, but the lack of a substantive right.”¹⁰⁰ The case was decided not on the basis of the sovereign immunity of the Creek Nation, but rather because the failure of a government or its officers to keep the peace was not actionable.¹⁰¹ Justice Kennedy, writing almost eighty years later, called the *Turner* tribal sovereignty language a “slender reed” for supporting today’s principle of tribal sovereign immunity.¹⁰²

The hint articulated in *Turner* became recognized law twenty-one years later in *United States v. United States Fidelity and Guaranty Co. (U.S. F. & G.)*.¹⁰³ In *U.S. F. & G.*, the Court ruled on a cross-claim filed for mining royalties against two tribal nations.¹⁰⁴ Citing *Turner*, the Court held that tribes are “exempt from suit without Congressional authorization,” that the immunity of the tribes was inherently “theirs as sovereigns,” and that immunity for tribes rested on the same public policy as federal sovereign immunity.¹⁰⁵ *U.S. F. & G.* stands for a generalized notion of tribal sovereign immunity, retained since the pre-European era.

Since *Turner* in 1940, the concept of tribal sovereign immunity has taken much fuller form. In fact, since the *Santa Clara Pueblo*¹⁰⁶ decision in 1978, it has been clear that without an explicit

96. *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 761 (1998).

97. *Turner v. United States*, 248 U.S. 354 (1919).

98. Florey, *supra* note 80, at 619.

99. *Turner v. United States*, 248 U.S. 354, 356–57 (1919). Turner also sued the United States as trustee of Creek funds. *Id.* at 357.

100. *Id.* at 358.

101. *Id.*

102. *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 757 (1998).

103. *See United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940) (“These Indian Nations are exempt from suit without Congressional authorization.”).

104. *Id.* at 510.

105. *Id.* at 512–13. The Court did not articulate the common public policy.

106. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

Congressional waiver of tribal sovereign immunity, a tribal government can choose not to follow even federal law—at least where the plaintiff is an individual citizen rather than the federal government itself.¹⁰⁷ In *Santa Clara Pueblo v. Martinez*, the Supreme Court interpreted the Indian Civil Rights Act (ICRA), a federal statute that extends portions of the Bill of Rights and the Fourteenth Amendment to tribal people and lands.¹⁰⁸ The Santa Clara Pueblo had a policy of excluding from membership the children of females who married outside the tribe, but including the children of males, which potentially violated ICRA.¹⁰⁹ However, in the absence of “unequivocally expressed” Congressional intent that a tribe is subject to a suit in federal court, the Court found that sovereign immunity barred a suit against the tribe under ICRA.¹¹⁰ Thus, although the law was constructed by Congress to apply to tribes, sovereign immunity was held to be sufficiently robust to prevent federal enforcement of ICRA, at least when the suit was brought by an individual plaintiff.¹¹¹

In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*,¹¹² the Supreme Court held that sovereign immunity extends to on-reservation commercial activity conducted by a tribe.¹¹³ In *Potawatomi*, Oklahoma sought the collection of the state tax on cigarettes by the Potawatomi tribal convenience store.¹¹⁴ Although the Court held that the state of Oklahoma had the authority to tax cigarette sales to non-tribal members, it could not sue the tribe to collect the revenue.¹¹⁵ The Court suggested alternative remedies, including collecting the sales tax from wholesalers by off-reservation seizure of cigarettes or

107. *See id.* at 55–58 (discussing tribal sovereign immunity).

108. *Id.* at 62–72.

109. *Id.* at 51.

110. *Id.* at 58–59.

111. *Id.* at 71–72. *Santa Clara* was upsetting to some scholars and caused consternation toward the Supreme Court at the time. At its essence, however, the decision could hardly have gone any other way. Only a tribe, and certainly not the federal government, can decide who in society is entitled to tribal membership.

112. *Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991).

113. *Id.* at 513.

114. *Id.* at 507–08.

115. *Id.* at 512.

assessing suppliers, by agreement with the tribe, or through lobbying Congress.¹¹⁶ In a concurring opinion, Justice Stevens noted that he was unsure that tribal sovereign immunity would extend to the off-reservation commercial activity of a tribe.¹¹⁷ Five years later, in *Kiowa Tribe v. Manufacturing Technologies, Inc.*, the Court held exactly that.

E. The Kiowa Holding

In *Kiowa Tribe v. Manufacturing Technologies, Inc.*, the Court held that tribal sovereign immunity applies to off-reservation commercial activity conducted by a tribe.¹¹⁸ In *Kiowa*, the tribe defaulted on a note executed off-reservation to Manufacturing Technologies, who sued the tribe for the balance owed.¹¹⁹ The Court agreed with Manufacturing Technologies' argument that state laws can be applied to tribal activities outside of Indian country.¹²⁰ But, citing *Potawatomi*, the Court countered that "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them."¹²¹ The Court refused to limit tribal sovereign immunity to suits stemming from on-reservation transactions, noting that precedent did not support a distinction based on reservation boundaries.¹²² Nor was the Court willing to draw a distinction between commercial and governmental activities of a tribe.¹²³ Rather, the Court held that an "Indian tribe is subject to suit only where Congress has expressly authorized the suit or the tribe has waived immunity,"¹²⁴ and that tribal sovereign immunity "is a matter of federal law and is not subject to diminution by the States."¹²⁵

116. *Id.* at 514.

117. *Id.* at 515 (Stevens, J., concurring).

118. *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

119. *Id.* at 751.

120. *Id.* at 755.

121. *Id.*

122. *Id.* at 754–55.

123. *Id.*

124. *Id.* at 754.

125. *Id.* at 756.

The Court in *Kiowa* articulated a clear and robust doctrine of tribal sovereign immunity but showed some reluctance to do so, stating that there were reasons “to doubt the wisdom of perpetuating the doctrine.”¹²⁶ Given the interdependent and mobile American society of the late twentieth century, and the broad participation of tribes in the wider economy, noted the Court, tribal sovereign immunity “can harm those who are unaware that they are dealing with a tribe who do not know of tribal immunity or who have no choice in the matter, as in the case of tort victims.”¹²⁷ The Court stated that the rationale for a broad tribal immunity—the safeguarding of tribal self-governance and promotion of economic development and self-sufficiency—could be “challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities.”¹²⁸ Although tribal sovereign immunity was a judicially created doctrine, and despite the Court’s reservations about the doctrine’s reach, the Court in *Kiowa* candidly chose to defer to Congress.¹²⁹ In so doing, the Court invited Congress to reconsider the wisdom of recognizing sovereign immunity.¹³⁰

F. *Kiowa’s Progeny*

Nearly one-hundred years since the first passing mention of tribal sovereign immunity, it is clear from *Kiowa* that any tribal enterprise not subject to a specific waiver of immunity by Congress or the tribe is immune from suit on the basis of tribal sovereign immunity.¹³¹ *Kiowa’s* progeny is extensive.¹³² One 2008 study of

126. *Id.* at 758. Note the Court’s retention of the doctrine in *Potawatomi* “on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency.” *Id.* at 757.

127. *Id.* at 758.

128. *Id.* at 757–58.

129. *Id.* at 758–60. The Court noted that Congress was “in a position to weigh and accommodate the competing policy concerns and reliance interests,” and that Congress has authorized suit against tribes in the past, but had not done so in this area. *Id.* at 759.

130. *Id.* at 758.

131. *Id.* at 760.

132. See Jeff M. Kosseff, Note, *Sovereignty for Profits: Courts’ Expansion of Sovereign Immunity to Tribe-Owned Businesses*, 5 FLA. A & M U. L. REV. 131, 138–39 (2009) (discussing the multitude of lower court cases that have followed

Kiowa's effects on reported decisions found seventy-one opinions citing *Kiowa* as a primary reason to extend sovereign immunity to a tribally-owned commercial entity.¹³³ Forty-six of these were casino-related cases, seventeen involved breach of contract claims filed by companies that did business with a tribe, twenty-six involved employment-related suits, and twenty-one were personal injury claims.¹³⁴ Thirty-nine of the seventy-one opinions were federal and twenty-one were state court opinions.¹³⁵

V. Confused Courts: Is the Arm of the Tribe a Misplaced Appendage?

Now that tribal sovereignty extends to commercial enterprises and off-reservation conduct, the question becomes, What constitutes a tribal enterprise? If anything remotely connected to a tribe will qualify, Congress may well move to abrogate immunity in the face of a power that can be easily abused. This seems particularly likely in cases where the entities gaining the financial benefits from immunity are not tribes, but outside, non-tribal interests for whom there may be no policy justification for immunity. Since *Kiowa*, the Supreme Court has yet to address what constitutes a tribal enterprise directly, though it did recognize in a footnote that a corporation can be an “arm of the tribe” for sovereign immunity purposes.¹³⁶ Using this passing phrase as a starting point, courts now attempt to determine if a corporate entity is an arm of the tribe through various multi-factor tests.¹³⁷

Kiowa).

133. *Id.* at 138.

134. *See id.* (“Immunity [has been provided] to a wide variety of tribal entities, including tobacco companies, snow removal contractors, truck stops, hotels, and payday loan companies.”).

135. *Id.*

136. *Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony*, 538 U.S. 701, 705 n.1 (2003).

137. *See Allen v. Gold Country Casino*, 464 F.3d 1044, 1046–47 (9th Cir. 2006) (examining whether a casino was operated as an “arm of the tribe”). For earlier uses of the test, see *Redding Rancheria v. Super. Ct.*, 105 Cal. Rptr. 2d 773, 776–77 (Cal. Ct. App. 2001) (noting that factors to determine if an entity is entitled to immunity include the importance of gaming in promoting tribal self-determination, the close link between the tribe and the casino, and the existence of federal law promoting Indian gambling). As established in *Kiowa*, the

A. Arm of the Tribe Outside Payday Lending

Courts have articulated numerous variations on the test for whether a tribal business enterprise is entitled to the tribe's immunity. Common factors used by courts in the arm-of-the-tribe analysis include:

- (1) whether the enterprise performs a commercial (i.e., proprietary) or traditional governmental function;
- (2) whether it is for-profit or nonprofit and generates its own revenue;
- (3) the enterprise's financial relationship with the tribe, including where the enterprise's revenues go and how they are used;
- (4) whether a suit against the enterprise will jeopardize tribal assets;
- (5) whether the enterprise has insurance to protect the tribal fiscal resources; and
- (6) who controls the enterprise's activities.¹³⁸

Immunity clearly extends to tribally-owned health organizations, housing authorities, museums, and casinos.¹³⁹ As the Ninth Circuit Court of Appeals noted in *Allen v. Gold Casino*, the casino's creation in that case was "dependent upon government approval at numerous levels, in order for it to conduct gaming activities permitted only under the auspices of the Tribe."¹⁴⁰ However, casinos are somewhat unique in the world of tribal economic development, as the Indian Gaming Regulatory Act explicitly provides for the creation and operation of Indian casinos, in order to promote "tribal economic development, self-sufficiency, and strong tribal governments."¹⁴¹ While the U.S. Supreme Court has set out the name of the relevant test, i.e., the arm-of-the-tribe standard, it is still unclear what constitutes an arm of the tribe.

question is not whether the activity may be characterized as a business, which is irrelevant, but whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe. *Gold Country Casino*, 464 F.3d at 1046.

138. Patrice H. Kunesh, *Tribal Self-Determination in the Age of Scarcity*, 54 S.D. L. REV. 398, 399 (2009) (citations omitted).

139. *Id.* at 402. For a collection of cases and their conclusions regarding various entities, see *id.* at 402–03 nn.29, 31.

140. *Gold Country Casino*, 464 F.3d at 1046.

141. *Id.* (quoting 25 U.S.C. § 2702(1)).

*B. The Application of Kiowa to Payday Lending: “[W]e are in a Gray Zone.”*¹⁴²

It is presumptively true from *Kiowa*'s holding that an internet-based payday lender that is formed, funded, and run by a tribe for the benefit of the tribe is entitled to tribal sovereign immunity.¹⁴³ If that scenario exists at all, however, it is rare. Typically, a non-tribal payday lender makes an arrangement with a tribe under which the tribe receives a percentage of the profits, or simply a monthly fee, so that otherwise forbidden practices of the lender are presumably shielded by tribal immunity.¹⁴⁴ This is described in the payday lending industry as the “sovereign model.”¹⁴⁵ Although there is little sunlight on the true financial arrangements between the tribes and payday lenders, under one such agreement, between one and two percent of the payday profits of one “tribal” lender actually went to the tribes.¹⁴⁶ By contrast, the Indian Gaming Regulatory Act,¹⁴⁷ which extensively regulates the Indian gaming industry for the benefit of tribes, mandates that at least 60% of the profits from each gaming enterprise go directly go to the tribe under normal circumstances,¹⁴⁸ with a maximum of 30% going to non-tribal consultants and managers.¹⁴⁹

142. Petition for Review and Stay at 17, *MTE Fin. Servs., Inc., v. Alameda County Super. Ct.*, No. S194110 (Cal. June 20, 2011), 2011 WL 2707079, at *17 (quoting the trial judge from trial transcript).

143. See *supra* notes 118–30 and accompanying text (discussing the holding of *Kiowa*).

144. See *The Connection Between Indian Tribes and Payday Lending*, *supra* note 72 (briefly describing the partnership between tribes and payday lenders).

145. See CAT, *Huge Victory for the Sovereign Model*, Feb. 12, 2012, <http://www.consultants4tribes.com/category/sovereign-model> (last visited Mar. 2, 2012) (collecting this and other blog posts related to the sovereign model) (on file with the Washington and Lee Law Review); PAYDAY LOAN INDUSTRY BLOG, <http://paydayloanindustryblog.com/Payday%20loan%20industry/sovereign-nation-model/> (last visited Jan. 12, 2012) (collecting blog posts related to the sovereign model) (on file with the Washington and Lee Law Review).

146. Real Parties in Interest's Answer to MTE Financial Services, Inc.'s Petition for Review and Request for Stay at 4, No. S194110 (Cal. June 23, 2011), 2011 WL 2907024, at *4 (“Verified discovery responses in this case supplied by another defendant, Processing Solutions, LLC, states that MTE received between 1% and 2% of the total loan revenue.”).

147. Indian Gaming Regulatory Act, 25 U.S.C.A. §§ 2701–2721 (2012).

148. *Id.* § 2710(b)(4).

149. *Id.* § 2711(7).

As the last section articulates, in the absence of guidance from Congress or binding precedent,¹⁵⁰ state and federal courts are developing arm-of-the-tribe tests piecemeal.¹⁵¹ For example, a recent Tenth Circuit Court of Appeals case also sets out a multi-factor test.¹⁵² This inconsistency and lack of authority has led to expensive, inefficient litigation. Although it is unclear whether and under what circumstances the typical tribally-affiliated payday lender will meet these tests, tribes and their affiliated lenders have yet to experience a significant setback at trial. Below we examine three recent cases from state courts. As would be expected after the Supreme Court's holding in *Kiowa*, policy arguments resting on the harm done to a vulnerable population by tribally-affiliated payday lenders whose practices violate state regulations have not succeeded in court. In *Ameriloan v. Superior Court*,¹⁵³ the court acknowledged but then rejected the California Department of Corporations' equitable arguments against applying sovereign immunity in the context of payday lending.¹⁵⁴ There, the California Court of Appeals held that sovereign immunity is not a discretionary doctrine.¹⁵⁵ It is independent of the equities of a given situation.¹⁵⁶ Rather, this is a "pure jurisdictional question."¹⁵⁷

The court stated, however, that it was within the realm of the imagination that a tribal entity could engage in activities that were

150. *Kiowa* clarified that sovereign immunity applies to off-reservation tribal commercial enterprises, but involved a suit against the tribe itself, and did not outline a test to determine when a tribally created entity qualifies as an arm of the tribe.

151. See *supra* Part V.A.

152. Breakthrough Mgmt. Grp., Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173, 1181 (10th Cir. 2010). In this case, the Court applied a test that included these factors for determining whether a tribal economic entity qualifies as "subordinate to the tribe," so as to share in the tribe's sovereign immunity: (1) the method of creation of the entity; (2) its purpose; (3) its structure, ownership, and management, including the amount of control the tribe exercises over the entity; (4) the tribe's intent with respect to the sharing of the sovereign immunity; (5) the financial relationship between the tribe and the entity; and (6) whether the purposes of tribal sovereign immunity are served by granting the entity immunity. *Id.*

153. *Ameriloan v. Super. Ct.*, 86 Cal. Rptr. 3d 572 (Cal. Ct. App. 2008).

154. *Id.* at 581–82.

155. *Id.* at 582.

156. *Id.*

157. *Id.*

so distant from tribal interests that the entity could no longer be legitimately seen as an extension of the tribe and would therefore fail the arm-of-the-tribe test and not be entitled to immunity.¹⁵⁸ Tribally chartered corporations that are “completely independent of the tribe,” noted the court, are not covered by the doctrine of sovereign immunity.¹⁵⁹ *Ameriloan* also left open the possibility that a distinction in sovereign immunity might be drawn between Indian gaming entities and payday loan companies, on the basis that the Indian gaming industry has been recognized by Congress as important to the welfare of Indian tribes, while payday lending has not.¹⁶⁰

Rather than rule against the lender, the court in *Ameriloan* remanded the case to the trial court for a determination of whether payday lending entities are sufficiently related to the tribe to benefit from sovereign immunity.¹⁶¹ In order to analyze whether payday lending entities are in fact arms of the tribe, the *Ameriloan* court instructed the lower court to consider two factors: (1) “whether the tribe and the entities are closely linked in governing structure and characteristics” and (2) “whether federal policies intended to promote Indian tribal autonomy are furthered by extension of immunity to the business entity.”¹⁶² The *Ameriloan* court authorized limited discovery, “directed solely to matters affecting the trial court’s subject matter jurisdiction,”¹⁶³ meaning discovery tailored to the two broad factors mentioned above.

Cash Advance and Preferred Cash Loans v. State,¹⁶⁴ a Colorado Supreme Court case, upheld the Colorado Court of Appeals decision that sovereign immunity from suit shielded two tribally affiliated internet payday lenders when they operated as arms of the tribe,

158. *Id.* at 585 (quoting *Trudgeon v. Fantasy Springs Casino*, 84 Cal. Rptr. 2d 65, 69 (Cal. Ct. App. 1999)).

159. *Id.* (quoting *Agua Caliente Band of Cahuilla Indians v. Super. Ct.*, 52 Cal. Rptr. 3d 659, 665 (Cal. 2006)).

160. *Id.* at 586 n.10.

161. *Id.* at 585.

162. *Id.* at 586 (citing *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006); *Redding Rancheria v. Super. Ct.*, 105 Cal. Rptr. 2d 773, 776 (Cal. Ct. App. 2001); *Trudgeon v. Fantasy Springs Casino*, 84 Cal. Rptr. 2d 65, 68 (Cal. Ct. App. 1999)).

163. *Id.*

164. *Cash Advance & Preferred Cash Loans v. State*, 242 P.3d 1099 (Colo. 2010) (en banc).

but it significantly altered the lower court's arm-of-the-tribe test.¹⁶⁵ The lenders, affiliated with the Miami Nation and the Santee Sioux Nation, were targeted by the Colorado Attorney General for allegedly violating the state's payday lending laws.¹⁶⁶ The Court of Appeals reviewed five different arm-of-the-tribe tests from other jurisdictions,¹⁶⁷ focusing on an eleven-factor test culled from the dissent of a Washington Supreme Court case.¹⁶⁸ The Colorado Supreme Court, citing *Kiowa*, rejected the eleven-factor test, stating that at least two of the factors considered "the entity's purpose [and] would function as a state-imposed limitation on tribal sovereign immunity, in contravention of [*Kiowa*]." ¹⁶⁹

The Colorado Supreme Court replaced the eleven-part test with a three-factor test that "focuses on the relationship between the tribal entities and the tribes: . . . (1) whether the tribes created the entities pursuant to tribal law; (2) whether the tribes own and operate the entities; and (3) whether the entities' immunity protects the tribes' sovereignty."¹⁷⁰ Contrary to the Court of Appeals, which factored in the purpose of the entity, the Colorado Supreme Court explicitly grounded its approach in the inherent nature of tribal sovereignty.¹⁷¹ *Cash Advance* also clarified that the burden of proof rests not with the tribe, but rather with the state, which must prove that sovereign immunity does *not* apply.¹⁷²

165. See *id.* at 1110 (adopting three factors from the federal courts of appeal and noting that the Colorado Court of Appeal's eleven factor test was "contrary to federal in some respects").

166. *Id.* at 1103.

167. State *ex rel.* Suthers v. Cash Advance & Preferred Cash Loans, 205 P.3d 389, 403–05 (Colo. App. 2008).

168. *Id.* at 405–06. The Washington Supreme Court case from which the eleven-factor test was taken by the lower court is *Wright v. Colville Tribal Enterprise Corp.*, 147 P.3d 1275 (Wash. 2006).

169. *Cash Advance & Preferred Cash Loans*, 242 P.3d at 1111. The two factors that were explicitly rejected were: "(2) whether the purposes of Cash Advance and Preferred Cash are similar to the Tribes' purposes;" and "(9) the announced purposes of Cash Advance and Preferred Cash." *Id.* at 1105. Another notable factor that was jettisoned was "(10) whether Cash Advance and Preferred Cash manage or exploit tribal resources." *Id.*

170. *Id.* at 1110.

171. See *id.* at 1110 n.11. ("We prefer an approach that recognizes, without diminishing, the inherent nature of tribal sovereignty.").

172. *Id.* at 1113. The Colorado Supreme Court affirmed that sovereign immunity is a matter of subject matter jurisdiction rather than an affirmative defense, and thus that, as a result, the state must prove by a preponderance of

The Colorado Supreme Court remanded to the state trial court, which held that the lending entities were, in fact, arms of the tribe and thus entitled to sovereign immunity.¹⁷³ The court noted that a tribal entity does not lose its immunity simply by contracting with non-Indian operators of the business.¹⁷⁴ It found that the Congressional intent of promoting tribal economic development was furthered by allowing Indian Nations the freedom “to enter into commercial areas where they have no expertise, but can acquire the necessary expertise through non-Indian operators.”¹⁷⁵

The court held that the inquiry into tribal immunity is focused on the status of the entities in the present.¹⁷⁶ In other words, whether a particular entity meets the arm-of-the-tribe test is answered with the facts as they are when the court considers the matter, not when the complaint was filed or any other time in the past.¹⁷⁷

The court found that the three factors of the arm-of-the-tribe test were met with regard to the two tribal entities at issue. It found that the entities in question, Miami Nations Enterprises, Inc. (MNE) and SFS, Inc. (SFS)¹⁷⁸ were formed pursuant to tribal law as evidenced by documents put before the court.¹⁷⁹ The court further held that the businesses were owned and operated by the tribes,¹⁸⁰ and were thus in such relation to the tribe that granting immunity would protect the sovereignty of the tribe.¹⁸¹

evidence that the tribes are not entitled to sovereign immunity. *Id.*

173. Amended Order, *State of Colorado v. Cash Advance*, Case No. 05CV1143, *on remand*, *Cash Advance & Preferred Cash Loans v. State*, 242 P.3d 1099 (Colo. 2010) (en banc) (on file with Washington and Lee Law Review).

174. *Id.* at 11.

175. *Id.* (citing *Cabazon Band of Mission Indians v. Riverside Cnty.*, 783 F.2d 900, 901 (9th Cir. 1986), *aff'd sub. nom. California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) (noting with approval that the tribal business was “operated by non-Indian professional operators, who receive a percentage of the profits”).

176. *Id.* at 12. The court uses the phrase “trapped in the present.” *Id.*

177. *Id.*

178. Doing business as, respectively, “Cash Advance” and “Preferred Cash Loans.” *Id.* at 5.

179. *Id.* at 13–14.

180. *Id.* at 15. Documents placed before the court indicated that the tribe chooses MNE’s board of directors, that two of the three directors must be members, and that the Business Committee hired the CEO. *Id.*

181. *Id.* at 16. Here, the court points to economic benefits to the tribe from

The court looked in detail at Colorado's assertion that the tribal entities were shams.¹⁸² It accepted the following as proven: that the payday loan businesses existed before the tribal entities took them over; that Scott Tucker, an experienced outside payday lender, owned and operated those prior businesses; that Tucker's loan entities formerly did business under the current names of the entities; that the tribes were likely recruited in the mistaken belief that the businesses could be shielded by the sovereign immunity of the tribes; and that during the initial period of affiliation, Tucker was the true owner of the business.¹⁸³ Nevertheless, because both tribes replaced Tucker's entities with wholly-owned tribal corporations in 2008, the tribes were found to be the true owners at the time of the court's consideration, and thus immune.¹⁸⁴

In dicta, the court speculated that even if it were true that Tucker "functionally" owned the business in the present, it is still "not at all certain the tribal entities would thereby lose their immunity."¹⁸⁵ It is the tribal entity that is immune, "not their particular businesses, and . . . tribal immunity does not depend in any fashion on the type of business a tribal entity engages in, with whom, or for what ulterior purpose."¹⁸⁶ However, the court noted that it is only the tribal entities and their officers while acting within the scope of tribal business that are immune from suit.¹⁸⁷ Thus, Colorado could subpoena Tucker and his non-tribal officers as well as non-tribal entities to discover whether they were and still are the lenders.¹⁸⁸ The court found that the state could not subpoena

the businesses.

182. *Id.* at 18–23.

183. *Id.* at 20–21 (noting that ownership could be inferred from the fact that Mr. Tucker put up all of the capital for the businesses, providing \$3 million to one entity and \$5 million to another). Both agreements called for 1% of the gross to go to the tribes, with a monthly minimum of \$20,000. It should be noted that Judge Hoffman originally issued an order based on a misunderstanding that the tribes received 99% of the profits from Tucker. Judge Hoffman acknowledged the error in his amended order. He noted that the State's sham argument was "closer as a factual matter" under the actual arrangements, but remained unproven. Further, the court said that "even if they were [sham owners,] that characterization would not displace tribal immunity." *Id.* at 1–2 n.1.

184. *Id.* at 21.

185. *Id.*

186. *Id.*

187. *Id.* at 22.

188. *Id.*

the tribal entities. Colorado cannot do that, said the court, “any more than it could subpoena France if it thought Tucker was the real owner and operator of Air France.”¹⁸⁹

Moreover, when the burden of proof rests on the party challenging the immunity of a tribally-affiliated payday lender, the specific details of what constitutes allowable discovery become extraordinarily important. In *Specially Appearing Defendant MTE Financial Services, Inc. v. Alameda County Superior Court*, briefed in June 2011, tribally-affiliated lender MTE challenged the scope of discovery allowed by the trial court.¹⁹⁰ MTE and payday loan borrowers Baillie and Rosas (Baillie) agreed that discovery was appropriate on the issue of subject matter jurisdiction¹⁹¹ but disagreed on what such discovery would entail.¹⁹² More precisely, they disagreed about whether discovery should allow Baillie to “follow the money trail.”¹⁹³ Baillie asserted that a “thorough explanation” of all the entities involved in the operation of the payday entities, and the relationships between these entities, is critical to the arm-of-the-tribe inquiry.¹⁹⁴ To Baillie, the fact that the tribe might receive just 1% to 2% of the monies generated by the business implied that the tribe was merely rented.¹⁹⁵ If so, argued Baillie, the lending entity could not possibly meet the arm-of-the-tribe test.¹⁹⁶

Conversely, the lenders argued that allowing Baillie to “follow the money” would constitute unjustifiable intrusive discovery and

189. *Id.*

190. See Petition for Review and Stay at 5, *MTE Fin. Servs., Inc., v. Super. Ct.*, No. S194110 (Cal. June 20, 2011), 2011 WL 2707079, at *5 (seeking review “to settle an important question related to whether Indian tribal sovereign immunity is dependent upon the type of ‘tribal business venture’”).

191. *Ameriloan* is binding precedent on this point. See *supra* notes 154–64 and accompanying text (discussing the *Ameriloan* holding).

192. See Real Parties in Interest’s Answer to MTE Financial Services, Inc.’s Petition for Review and Request for Stay, *supra* note 146, at *3–4.

193. Compare *id.* at *4 (arguing that arm-of-the-tribe analysis necessitates an investigation of the money trail in this case), with Petition for Review and Stay, *supra* note 190, at 18 (arguing against the trial court’s order allowing Plaintiffs to “follow the money”).

194. Real Parties in Interest’s Answer to MTE Financial Services, Inc.’s Petition for Review and Request for Stay, *supra* note 192, at *4.

195. *Id.* at *12.

196. *Id.* at *12–13.

would pry into the internal affairs of the tribe.¹⁹⁷ The tribe willingly provided MTE's organizational documents and documents indicating that MTE is a chartered corporation organized under the laws of the Modoc Tribe of Oklahoma by Tribal Resolution, wholly owned by the Modoc Tribe, to facilitate goals relating to the economy, government, and sovereignty of the tribe.¹⁹⁸ The articles of incorporation expressly provide for MTE to share in the sovereign immunity of the tribe.¹⁹⁹

The briefs in *MTE* illustrate the two poles of the arm-of-the-tribe debate as it relates to tribally-affiliated lenders. Tribes will likely maintain that whether an entity functions as an arm of the tribe is a foundational inquiry, and not to be inferred from the functional arrangements, whatever they are. If tribal sovereignty is inherent and not subject to diminution by the states, so the argument goes, a state court lacks the power to hold that a tribal entity formed according to tribal law, by tribal resolution, for the stated purposes of tribal development, with clear intent on the part of the sovereign tribe to convey its sovereign immunity to the entity, is not an arm of the tribe, simply because the deal the tribe negotiated does not retain enough of the profits to satisfy the court. On the other hand, it is common sense that if an entity provides a miniscule percentage of its revenue to the tribe, and the tribe is barely involved, the entity cannot be said to stand in the place of the tribe. Moreover, if a tribe retains only a minimal percentage of the profits from the enterprise, it would appear that the enterprise may not be truly "controlled" by the tribe.

C. If Today's Lenders Are Not Tribes, What About Tomorrow's?

We suspect that many of the current connections between tribes and internet payday lenders are tenuous, and further, that tribes generally receive minimal compensation relative to their non-tribal partners. It is unclear whether these payday lending operations are managed by tribes in any substantial sense. In some cases we know that lenders claim to be tribally-owned when in reality, there is no

197. Petition for Review and Stay, *supra* note 190, at *18.

198. *Id.* at *4–5.

199. *Id.* at *9.

connection to a tribe.²⁰⁰ Obviously, tribal sovereign immunity is not implicated at all in such cases. Moreover, the most recent arm-of-the-tribe test from a payday case²⁰¹—a permissive formulation relative to past tests—requires that the enterprise be owned and operated by the tribe. Thus, any payday lending entity that entails strictly passive involvement on the part of the tribe would fail this test.

It is less clear how future internet payday lenders will be operated, as tribes may themselves begin to operate these lenders and thus fulfill the arm-of-the-tribe test. Ironically, the more tightly states regulate the payday industry, the more valuable tribal sovereign immunity becomes, and the more likely that tribes will take control of these operations, retaining more of the profits. In other words, more tribes could choose to simply form, fund, and run operations of their own, solely for the benefit of their members, thus meeting *Kiowa* directly. Since even the most improbably one-sided state court rulings from the perspective of consumer protection are unlikely to provide a stable solution to this problem, we turn below to other potential resolutions.

VI. Potential Solutions to the Problem

Although access to emergency cash for people in need is arguably beneficial, the record on unregulated payday lending indicates that the business model is frequently exploitative of a vulnerable and often poor population. Yet many, if not most, tribes are still in need of fundamental economic development to provide basic social services to their members. Tribal options are often limited by circumstances thrust upon tribes by history. For some

200. See WESTERN SKY FINANCIAL, <http://www.westernsky.com> (last visited Jan. 12, 2012) (on file with the Washington and Lee Law Review).

Western Sky Financial is owned wholly by an individual Tribal Member of the Cheyenne River Sioux Tribe and is not owned or operated by the Cheyenne River Sioux Tribe or any of its political subdivisions. WESTERN SKY FINANCIAL is a Native American business operating within the exterior boundaries of the Cheyenne River Sioux Reservation, a sovereign nation located within the United States of America.

201. See *supra* notes 154–64 and accompanying text (discussing *Ameriloan v. Super. Ct.*, 86 Cal. Rptr. 3d 572 (Cal. Ct. App. 2008)).

tribes, payday lending may be an important means of generating income and opportunity. The tribal sovereignty model that allows payday lenders to operate without regard to state lending regulations is most pernicious when tribes do not get the lion's share of the profits. Since this seems to be the typical case, we view the tribal sovereignty model (as it is currently put into practice) more as a problem for vulnerable consumers than as a potential solution to tribal disadvantage.

Nevertheless, unless states can prove that an entity is not operated and controlled by a tribe, state and circuit courts will lack the power to significantly limit use of the tribal sovereign immunity avenue.²⁰² Below we explore several other potential solutions to the tribal sovereignty model: (1) decisions by tribes themselves to regulate or prohibit payday lending; (2) Supreme Court doctrinal revision or clarification; (3) congressional action; and (4) agency action by either the Consumer Financial Protection Bureau or the Federal Trade Commission.

A. Tribal Regulation or Restraint: Tribes May Choose to Regulate Payday Lending or Refrain from Unregulated Payday Lending.

Tribes can decide for themselves how to address payday lending. The decision by a tribe to participate in unregulated payday lending, regulate payday lending, or simply forbid payday lending by its members and corporations, is a contextualized inquiry that each tribe must make independently. This decision will depend upon each tribe's unique culture, laws, tradition, customs, beliefs, and economic circumstances. However, there are important reasons why a tribe might choose to refrain from engaging in unregulated payday lending, especially when a substantial portion of the economic benefit is to be siphoned off by outsiders. Tribes can look to state payday lending laws for examples of effective regulation, or fashion their own forms of regulation. Tribes may wish to form coalitions with other tribes in order to strategize about effective laws and policies.

202. See *supra* note 172 and accompanying text (discussing the notion that tribal immunity is a question of jurisdiction and noting the burden of proof rests on the party challenging immunity).

Conversely, a tribe that engages in unregulated payday lending stakes out a de facto position that it opposes regulation designed to protect vulnerable consumers. Because the lending entity stands in the place of the tribe,²⁰³ it is as if the tribe itself is engaging in the exploitation of the underprivileged for the sake of profit. Such action could tarnish sovereignty. Exploitative payday lending can do significant harm to an already vulnerable person or family, and thus there is an ethical dimension to tribal participation. As scholar Sam Deloria aptly notes, “sovereignty can be used in a way that erodes itself.”²⁰⁴

Use of tribal sovereign immunity to engage in unregulated payday lending in contravention of state law might engender a backlash, such as that experienced by tribes in 1976–1977, in response to non-Indian views that tribes were favored by the federal government.²⁰⁵ As Deloria further concludes, in the context of state-tribal collaboration:

[R]ecent history shows that the diminutions of tribal sovereignty have come from the courts’ responses to tribal unilateral assertions of sovereignty or from efforts by individuals to avoid sovereignty, in lawsuits that might well have not been brought if the situations had been addressed—and managed—by an intergovernmental agreement.²⁰⁶

Tribal sovereign immunity, although not conferred, is not absolute. Use of sovereign immunity to evade consumer protection laws may be exactly the type of activity referred to in *Kiowa* as having the potential to undermine the congressional rationale for a robust sovereign immunity doctrine presumed by the Supreme Court.²⁰⁷ Although the doctrine of tribal sovereign immunity (as

203. See *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006) (explaining that when an entity acts as an arm of the tribe, its “activities are properly deemed to be those of the tribe,” and providing examples of entities found to be acting as an arm of the tribe).

204. Sam Deloria, Tassie Hanna & Chuck Trimble, *The Commission on State-Tribal Relations: Enduring Lessons in the Modern State-Tribal Relationship* 38 (August 2, 2011) (unpublished manuscript) (on file with the Washington and Lee Law Review).

205. *Id.* at 18–19.

206. *Id.* at 38.

207. See *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 757–58 (1998). The fact that this might be seen as undermining the presumed congressional rationale is not an argument for a court’s allowing suit against a tribal entity

opposed to sovereignty generally) has thus far expanded consistently, the doctrine of tribal territorial sovereignty has, in the past, seen a retreat after an expansionary period.²⁰⁸ The use of tribal sovereign immunity to escape state regulation as the value in a business partnership might attract the attention of Congress or the Supreme Court. Once the issue is taken up, congressional intervention or binding federal precedent might not be narrowly tailored, and tribal sovereign immunity could be hampered beyond payday lending. Although tribes make independent decisions with regard to the exercise of sovereign immunity, the negative consequences of a Supreme Court ruling or congressional intervention in this area would affect them all.

Because of harmful and steady constriction in other realms of tribal sovereignty, restriction in the area of tribal sovereign immunity has the potential to significantly diminish the ability of tribes to make and be controlled by their own laws.²⁰⁹ We do not question the right of tribes to utilize sovereign immunity to engage in payday lending. Rather, we gently question the wisdom. Although unregulated payday lending might be profitable, and a sovereign's responsibility to its people is unquestionably paramount, both ethical and practical considerations could cause tribes to autonomously reject this opportunity. Because the actions of any single tribe could have ramifications for all others, collective action on the part of tribes, if possible, may be important. Thus, tribes may want to form coalitions and otherwise organize with other tribes in order to address payday lending.

B. The Supreme Court Could Clarify or Revise Tribal Sovereign Immunity

engaged in payday lending. The statement in *Kiowa* was dicta, but the holding is firm: a tribal entity—commercial or not, and regardless of whether the activity takes place outside of the reservation—shares in the tribe's sovereign immunity. *Id.* at 760. The analysis focuses on the relationship between the tribe and the entity, and cannot judge the type of activity in which the entity is engaged.

208. Deloria et al., *supra* note 204, at 15–20; Florey, *supra* note 80, at 603–13.

209. See Florey, *supra* note 80, at 640 (explaining that tribal immunity is one of the few robust protections remaining for tribal sovereignty).

The Supreme Court could clarify the arm-of-the-tribe test, or otherwise modify or even eliminate tribal sovereign immunity. While the Supreme Court already had an opportunity to clarify the arm-of-the-tribe test in *Kiowa*, and while the unambiguous holding in *Kiowa* allows little room for modification by the Court without overturning established precedent, the Court can still overrule *Kiowa* now, particularly in the face of abuses of power. Doing so would fly in the face of the Supreme Court's expressed deference to Congress in this area, but this does not mean that it will not be done.

Commentators have suggested that the Court shows "no inclination to step in" and limit tribal sovereign immunity,²¹⁰ yet recent cases cast doubt on whether the Court truly intends to remain uninvolved, deferring indefinitely to Congress. In *Madison County, New York v. Oneida Indian Nation of New York*,²¹¹ the Court granted certiorari on the question of "whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing."²¹² Currently before the Court is a Petition for a Writ of Certiorari begging specifically that the Supreme Court abrogate the doctrine of tribal sovereign immunity altogether.²¹³ These cases show that although the law might seem well settled by *Kiowa*, each time the issue of tribal sovereignty is raised in the courts, the risk of radical change is presented. Payday lending cases fit squarely into the reasons the *Kiowa* dissent and the majority dicta expressed reservations with the tribal sovereign immunity doctrine as a whole.²¹⁴ Thus, tribally-

210. See *id.* at 625 (recounting that Congress declined to restrict sovereign immunity, and that the Supreme Court has also not made any efforts to do so); see also Andrea M. Seielstad, *The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law*, 37 TULSA L. REV. 661, 665–666 (2002) (discussing the development of federal policy with respect to tribal immunity and the Court's deference to the legislative and executive branches in this policy area).

211. See *Madison Cnty., New York v. Oneida Indian Nation*, 131 S. Ct. 704, 704 (2011) (remanding to the Court of Appeals for the Second Circuit the question of whether the Oneida nation had waived its sovereign immunity).

212. *Id.* at 704.

213. Petition for Writ of Certiorari at ii, *Reed v. Gutierrez*, (No. 10-1390), 2011 WL 1821576 (2011), available at http://www.narf.org/sct/reedvgutierrez/petition_for_cert.pdf.

214. See *supra* notes 112–15 and accompanying text. The dissent points out that tribal sovereign immunity doctrine is "unjust" as applied to off-reservation commercial conduct and that sovereigns should "be held accountable for their

affiliated payday lending presents increased risk to all tribes who depend on tribal sovereign immunity as a tool for economic development and a buttress to tribal sovereignty.

C. Congressional Action

At the time of the decision in *Kiowa*, Congress was actively debating legislation that would have imposed very general limitations on tribal sovereign immunity.²¹⁵ It would not be unprecedented for Congress to reconsider and reconstruct the contours of tribal sovereign immunity in general. Payday lending, and the “tribal sovereignty” model in particular, have recently attracted negative attention²¹⁶—attention that could inspire Congress to revisit the issue of tribal sovereign immunity.

Congress has plenary power over Indian affairs,²¹⁷ and therefore congressional action would be the most definitive of the potential solutions to the loophole. Unless held unconstitutional, any congressional action would be binding and definitive unless superseded by subsequent legislation. Congressional action has the benefit of providing certainty and could stem the growth of wasteful lawsuits in this area. Congressional intervention would bring considerable risk to tribal interests that tribal sovereign immunity would be impacted well beyond the specific issue of internet payday lending.

Congressional action would likely be welcomed by a potentially powerful, if highly unusual, coalition of consumer protection advocates, brick-and-mortar payday lenders,²¹⁸ states’ rights

unlawful, injurious conduct.” *Kiowa*, 523 U.S. at 765–66.

215. Seielstad, *supra* note 210, at 711.

216. See, e.g., *CBS Evening News: How “Payday” Lenders Pull Off Crippling Rates* (CBS television broadcast Sept. 26, 2011), available at <http://www.cbsnews.com/stories/2011/09/26/eveningnews/main20111913.shtml>.

217. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 44 (1831).

218. Brick and mortar payday lenders, who, as a whole, tenaciously fought regulation, now view tribally-affiliated lenders who are able to avoid regulation as a significant threat. Cf. Wayne Greene, *Regulators in Dispute Over Internet Payday Loans by Tribes*, TULSA WORLD (Oct. 25, 2011), http://www.tulsa-world.com/news/article.aspx?subjectid=336&articleid=20111025_16_A1_Intern472461&r=2667 (last visited Feb. 5, 2012) (explaining the difficulties of regulating tribal lenders and the impact of tribal businesses on non-tribal lenders) (on file with the Washington and Lee Law Review).

advocates, and those who take a narrow view of Native American rights. Some commentators note that when Congress took up the issue of tribal immunity around the time of the *Kiowa* decision, the contemplated action would have “effectively eliminate[d] tribal sovereign immunity.”²¹⁹

Given the potentially broad base of support for the limitation of tribal sovereign immunity, and the type of drastic action once contemplated by Congress, it is very possible that congressional action would carve into tribal immunity more generally than would be required in order to simply regulate payday lending. Congressional action could clearly establish the contours of the tribal sovereignty model, or eliminate it entirely. If Congress acted more broadly, it could significantly damage tribal autonomy.

Hopefully, if Congress does decide to regulate internet payday lending, and other products such as similarly-priced internet installment loans, Congress will do so narrowly, without abrogating more tribal immunity than necessary.

D. Agency Action

1. The Federal Trade Commission Could Act

The Federal Trade Commission’s (FTC) Bureau of Consumer Protection, one of several Bureaus within the FTC, enforces federal laws related to consumer affairs and rules promulgated by the FTC.²²⁰ Its functions include investigations, enforcement actions, and consumer and business education.²²¹ Some of the issues that have caught the FTC’s attention include telemarketing fraud, shady practices by nursing homes, and identity theft.²²² The FTC also

219. Seielstad, *supra* note 210, at 711.

220. See Federal Trade Commission, *About the Bureau of Consumer Protection* (Jun. 16, 2009), <http://www.ftc.gov/bcp/about.shtm> (last visited Feb. 5, 2012) (on file with the Washington and Lee Law Review).

221. *Id.*

222. See, e.g., Federal Trade Commission, *About the Bureau of Consumer Protection, Division of Marketing Practices* (Oct. 23, 2007), <http://www.ftc.gov/bcp/bcphp.shtm> (last visited Feb. 5, 2012) (explaining enforcement efforts against telemarketing fraud) (on file with the Washington and Lee Law Review); Federal Trade Commission, *About the Bureau of Consumer Protection, Division of Privacy and Identity Protection* (Oct. 23, 2007), <http://www.ftc.gov/bcp/bcpiip.shtm> (last visited Feb. 5, 2012) (outlining some of the

oversees online advertising, behavioral targeting, and all issues dealing with online privacy concerns.²²³

The FTC lacks authority over banks but does have authority over payday lenders.²²⁴ While accused at times of being toothless or doing too little on behalf of consumers generally, recent payday lending practices have caught the commissioners' attention.²²⁵ The FTC recently sued several lenders, doing business as Lakota Cash and Big Sky Cash, who allegedly send documents to their borrowers' employers that mimic a garnishment by the federal government.²²⁶ Federal agencies can garnish without a court order.²²⁷

The FTC has not addressed the fundamental practices of payday lending, however, such as charging triple-digit interest rates

Commission's approach to combating identity theft) (on file with the Washington and Lee Law Review); Federal Trade Commission, *About the Bureau of Consumer Protection, Who Cares: Sources of Information About Healthcare Products and Services, Assisted Living and Nursing Homes*, <http://www.ftc.gov/bcp/edu/microsites/whocares/nursinghomes.shtm> (last visited Feb. 5, 2012) (offering resources to assess services provided by nursing homes) (on file with the Washington and Lee Law Review).

223. Areas of principal concern for the FTC are: advertising and marketing, financial products and practices, telemarketing fraud, privacy and identity protection. *See, e.g., supra* note 221 and accompanying text; *see also* Michael D. Scott, *The FTC, The Unfairness Doctrine, and Data Security Breach Litigation: Has the Commission Gone Too Far?*, 60 ADMIN. L. REV. 127, 133 (2008).

224. Federal Trade Commission Act, 15 U.S.C.A. §§ 41–58 (2012).

225. *See FTC Action Halts Allegedly Illegal Tactics of Payday Lending Operation That Attempted to Garnish Consumers' Paychecks*, Federal Trade Commission (Sept. 12, 2011), <http://www.ftc.gov/opa/2011/09/payday.shtm> (last visited Jan. 25, 2012) (recounting recent FTC suits against payday lenders who illegally attempted to garnish borrowers' wages) (on file with the Washington and Lee Law Review).

226. *Id.*

227. *See id.* The FTC alleges that these lenders illegally revealed consumers' unproven debts to their employers and deprived consumers of their right to dispute the debts or make payment arrangements. *Id.* The complaint further alleges that lenders misrepresented to employers that the defendants are legally authorized to garnish an employee's wages, without first obtaining a court order; falsely represented to employers that the defendants have notified consumers about the pending garnishment and have given them an opportunity to dispute the debt; unfairly disclosed the existence and the amounts of consumers' supposed debts to employers and co-workers without the consumers' knowledge or consent; violated the FTC's Credit Practices Rule by requiring consumers taking out payday loans to consent to have wages taken directly out of their paychecks in the event of a default; and violated the Electronic Funds Transfer Act and Regulation E by requiring authorization for electronic payments from their bank account as a condition of obtaining payday loans. *Id.*

for so-called short-term loans that are in reality far from short-term. This task, if it is to be taken on, is most likely to be tackled by the new Consumer Financial Protection Bureau (CFPB).²²⁸

2. Consumer Financial Protection Bureau Could Act

a. The General Powers of the CFPB

Leaving aside the issue of whether Congress might act to limit sovereign immunity, Congress already has spoken on the issue of regulating payday loans in general.²²⁹ On July 21, 2010, the Dodd–Frank Act went into effect, which in turn created the CFPB.²³⁰ While the CFPB cannot set interest rate caps, it clearly has the authority to regulate payday loans in other ways. It also appears that the CFPB has the power to jettison the tribal-affiliation loophole.²³¹

228. This assumes that federal agencies have the power to regulate tribes, an issue about which there is current disagreement. For example, in a case dealing with the Occupational Safety and Health Act (OSHA), administered by the Occupational Safety and Health Administration, see *Donovan v. Navajo Forest Products Industries*, 692 F.2d 709 (10th Cir. 1982) (holding that OSHA was not applicable to the Navajo in derogation of the treaty-granted exclusivity) and *Department of Labor v. Occupational Safety and Health Review Comm'n*, 935 F.2d 182 (9th Cir.1991) (holding the opposite with regards to a sawmill owned by the Confederated Tribes of Warm Springs).

229. This section of the Article borrows extensively from Nathalie Martin, *Regulating Payday Loans: Why This Should Make the CFPB'S Short List*, 2 HARV. BUS. L. REV. ONLINE 44 (2011).

230. See Dodd–Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010).

231. This is not altogether clear. Under the Constitution, Congress is granted power over Indian affairs. Congress is, of course, the legislative branch, whereas the CFPB—and all agencies—are created by Congress but fall under the executive branch. At times, the courts have claimed that even Congress must be explicit in its intention to abrogate tribal sovereign immunity. See *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978). At other times, it seems that the presumption is that congressional Acts of general applicability are applicable to Native Americans. See *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985). With regard to regulatory agencies: the EPA, for instance, has been authorized by Congress through specific amendments to treat tribes as states with regard to most environmental statutes. In short, the question is what Congress has said in the Dodd–Frank Act itself, and how explicitly Congress said it. See Dodd–Frank Act, § 1024 (a)(1). If the CFPB's regulations are strongly pro-consumer (and after all, the purpose of the agency is to protect consumers), preemption of state laws should become less of an issue

Generally speaking, the CFPB is charged with policing activities relating to financial products and services for unfair, deceptive, and abusive acts or practices,²³² and routinely examining non-depository entities for compliance with federal consumer financial laws.²³³ The agency has general authority to monitor financial products and services for risks to consumers,²³⁴ and as part of this monitoring function, it may require lenders to file reports and participate in interviews and surveys, and also may gather information from consumers.²³⁵ More importantly, the Act specifically prohibits all unfair, deceptive, or abusive acts or practices by covered persons and their service providers.²³⁶ The CFPB is thus given broad power to make rules and take enforcement action with respect to any “unfair, deceptive, or abusive act or practice . . . in connection with any transaction with a

because the federal laws will be more rather than less protective than state laws. See Jared Elost, *Dynamic Federalism and Consumer Financial Protection: How the Dodd–Frank Act Changes the Preemption Debate*, 89 N.C. L. REV. 1273, 1273, 1286–87. Moreover, if a state law is more protective, the CFPB regulation will not preempt it. *Id.*

232. See 12 U.S.C. § 5511(b)(2); see also H.R. 4173 § 1021(b)(2).

233. 12 U.S.C.A. § 5512(a) (2012); H.R. 4173 § 1022(a). The CFPB has become the administrator for all “federal consumer financial laws,” which include nearly every existing federal consumer financial statute, as well as new consumer financial protection mandates prescribed by the Act. 12 U.S.C.A. § 5481(14) (2012); see also H.R. 4173 § 1002(14). Thus, the CFPB has the exclusive authority to promulgate regulations, issue orders, and provide guidance to administer the federal consumer financial laws.

234. 12 U.S.C.A. § 5512(c)(1) (2012); see also H.R. 4173 § 1022(c)(2)(A).

235. 12 U.S.C.A. § 5512(c)(4)(B)(i) (2012); 12 U.S.C.A. § 5516(b), (c) (2012); 12 U.S.C.A. § 5531 (2012); see also H.R. 4173 §§ 1022(c)(4)(B)(1), 1026(b), (c), 1031.

236. 12 U.S.C.A. § 5536 (2012); H.R. 4173 § 1036; see also 12 U.S.C.A. § 5481(6) (2012); H.R. 4173 § 1002(6) (defining a “covered person” as “(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person.”). A “service provider” is a person that provides a material service to a covered person in connection with the offering or provision of a consumer financial product or service. 12 U.S.C.A. § 5481(26) (2012); H.R. 4173 § 1002(26). Service providers also may be subject to CFPB supervision. 12 U.S.C.A. § 5514(e) (2012); H.R. 4173 § 1024(e). Under the Act, “person” “means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.” 12 U.S.C.A. § 5481(19) (2012); H.R. 4173 § 1002(19).

consumer for a consumer financial product or service, or the offering of a consumer financial product or service.”²³⁷

An act or practice is considered “unfair” if it is likely to cause substantial injury to consumers that cannot be reasonably avoided by consumers, whenever this substantial injury is not outweighed by countervailing benefits to consumers or to competition.²³⁸ An act or practice can be deemed abusive in two different ways. First, it can be found to be abusive if it materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service.²³⁹ Second, an act can be found to be abusive if it takes unreasonable advantage of one of three things:

1. a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service; or
2. the inability of the consumer to protect the interests of the consumer in selecting or using consumer financial products or services, and
3. the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.²⁴⁰

“Abusive” is defined broadly to include situations in which the consumer lacks understanding of a consumer financial product, particularly where a covered person’s acts or omissions contribute to this lack of understanding.²⁴¹ This definition might even apply to disallow complicated disclosure terms, the provision of terms that are not translated to the native language of a consumer, or even an agreement that the consumer fully understands, but that the CFPB

237. 12 U.S.C.A. § 5531(a) (2012); H.R. 4173 § 1031(a).

238. 12 U.S.C.A. § 5531(c)(1) (2012); H.R. 4173 § 1031(c)(1). Because this is a consumer protection statute, even the benefit to competition must benefit consumers.

239. 12 U.S.C.A. § 5531(d)(1) (2012); H.R. 4173 § 1031(d)(1).

240. See 12 U.S.C.A. § 5531(d)(2) (2012); H.R. 4173 § 1031(d)(2). The CFPA does not define the term “deceptive,” so the meaning of “deceptive” may be construed under § 5 of the FTC Act and the regulations and other guidance of the FTC. 15 U.S.C.A. § 45(a)(4)(A) (2012). The Senate report states that the existing law prohibits unfair and deceptive practices, suggesting that the term is used with the same meaning here. S. Rep. No. 111-176 (2010).

241. Michael B. Mierzewski, Beth S. DeSimone, Jeremy W. Hochberg & Brian P. Larkin, *The Dodd-Frank Act Establishes the Bureau of Consumer Financial Protection as the Primary Regulator of Consumer Financial Products and Services*, 127 BANKING L. J. 722, 730 (2010).

feels is not reasonably in the consumer's interest.²⁴² Depending on how the CFPB interprets the definition of "abusive," payday lending could be forbidden entirely.²⁴³

b. The CFPB and Payday Lending in General

As set out in the prior section, the CFPB can ban outright any product that is either unfair or abusive. The CFPB can also regulate all products that have the potential to be abusive or unfair.²⁴⁴ Payday loans arguably fall within both categories.²⁴⁵ Because these loans are most frequently used by people of lesser means²⁴⁶ for non-emergencies,²⁴⁷ the loans can cause substantial injury that is not

242. *Id.*

243. *Id.* Covered persons and their service providers are also required to maintain and share information about their practices with the CFPB. 12 U.S.C.A. § 5536(a)(2) (2012); H.R. 4173 § 1036(a)(2). Furthermore, "[a]ny person" who knowingly or recklessly provides "substantial assistance" to covered persons and service providers who violate these prohibitions will be equally liable for the violation. *See* 12 U.S.C.A. § 5536(a)(3) (2012); H.R. 4173 § 1036(a)(3). Disclosures must be provided not just at the time of the initial loan, but over the term of the relationship, and these disclosures must allow consumers "to understand the costs, benefits, and risks associated with the product or service." 12 U.S.C.A. § 5532(a) (2012); H.R. 4173 § 1032(a). Form disclosures must contain "plain language comprehensible to consumers," have "a clear format and design," explain necessary information "succinctly," and "be validated through consumer testing." 12 U.S.C.A. § 5532(b)(2)–(3) (2012); H.R. 4173 § 1032(b)(2)–(3). Large fines can be assessed for non-compliance with these requirements. *See* 12 U.S.C.A. § 5565(c) (2012); H.R. 4173 § 1055(c).

244. *See, e.g.*, 12 U.S.C.A. § 5511 (2012) (outlining the purposes and objectives of the CFPB).

245. A practice or product is unfair if it is likely to cause substantial injury to consumers that cannot be reasonably avoided, whenever this substantial injury is not outweighed by countervailing benefits to consumers or competition. 12 U.S.C.A. § 5531(c) (2012). While consumers could arguably avoid substantial injury from payday loans by using them less frequently and not rolling them over, the CFPB could still target payday lenders for unfair or abusive practices because such lenders rely on tactics that hinder these potential protective measures by consumers and instead make sure consumers use their products continuously.

246. Francis, *supra* note 25, at 613; *see also* John P. Caskey, *supra* note 33, at 3 (noting that payday lenders serve people of lesser means but not the very poor).

247. *See* Martin, *supra* note 27, at 608–09 (showing that few payday borrowers said they used the loans for emergency expenses; most used the loans for regular bills).

outweighed by a countervailing benefit. Enforcing this part of the Act requires the CFPB to ask specifically whether the loan's cost is worth what the consumer pays for it over the full life of the loan.²⁴⁸ Lending practices suggest that lenders do take unreasonable advantage of consumers' lack of knowledge of the loan terms.²⁴⁹ Lenders also encourage borrowing whenever possible and discourage paying off the loans.²⁵⁰

Customers also have various behavioral biases, including optimism bias and framing.²⁵¹ There is also much more at stake for

248. See 12 U.S.C.A. § 5531 (2012). A product is abusive if it "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service" or "takes unreasonable advantage" of one of the following: (1) "a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service"; (2) "the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service"; or (3) "the reasonable reliance by the consumer on a covered person to act in the interests of the consumer." *Id.* § 5531(d). Only one of these three conditions is required to find an act or product abusive, and in this instance at least two of the three conditions are satisfied.

249. There is tremendous subterfuge of the actual terms of payday loans, as is true in so many consumer-lending contexts today. Yet subterfuge in payday lending causes more individual harm than subterfuge in other contexts. It is difficult to calculate the actual costs of these products over time, up front, given that the loans are short term and interest-only, but usually renewed and rolled into a new loan.

250. This is particularly a problem with internet payday loans, in which the lender often just takes out the interest on the loan automatically, creating no easy way to pay off the whole loan. See CONSUMER FED'N OF AM., CFA SURVEY OF ONLINE PAYDAY LOAN WEBSITES 9 (reporting on a 2011 study and stating that online loans are often structured to automatically withdraw only the finance charge and continue the loan for another pay cycle). Nor is this a new problem. A 2004 study by the Consumer Federation of America explains how this is done, which was then described on a government web site:

Although loans are due on the borrower's next payday, many surveyed sites automatically renew the loan, withdrawing the finance charge from the borrower's bank account and extending the loan for another pay cycle. Sixty-five [of 100] of the surveyed sites permit loan renewals with no reduction in principal. At some lenders, consumers have to take additional steps to actually repay the loan. After several renewals, some lenders require borrowers to reduce the loan principal with each renewal.

Robert Longley, Consumers Warned of Online Payday Loan Sites, ABOUT.GOV U.S. GOVERNMENT INFO, <http://usgovinfo.about.com/od/consumerawareness/a/paydayloans.htm> (last visited Mar. 16, 2012) (on file with the Washington and Lee Law Review).

251. Regarding the influence of framing, because consumers are used to hearing interest rates stated in terms of twenty to twenty-five percent, they

them in taking out these loans, which ultimately represent a huge percentage of their overall cash flow. The costs are high by any standard, but by the average payday loan customer's standard, they are excessive beyond imagination.²⁵²

Another step the CFPB can take is to conclusively prohibit the use of wage assignments and demand drafts for payday loans, closing one arguable loophole in the Electronic Funds Transfer Act.²⁵³

c. The CFPB and Tribes

The CFPB applies to Native Americans as consumers. It was formed to protect all Americans from abusive lending practices.²⁵⁴ The U.S. Treasury's web site contains a detailed memo regarding how the CFPB applies to Native Americans and why the issue is important.²⁵⁵ Though this memo does not carry the force of law, it is an indication of the CFPB's intent. As the Treasury memo explains, Native Americans are more likely to use alternative financial services than other Americans.²⁵⁶

believe that twenty percent over two weeks also equals twenty percent per annum.

252. Additionally, consumers cannot protect their interests because the true terms of the loans are often hidden from consumers at the point of sale. Finally, consumers cannot protect their interests because all of the products are offered under the same or similar unfavorable terms. The market is simply not working. Considering all of the above, it is hard to picture a product more likely to fit within these definitions of unfair and abusive than a payday loan.

253. See, e.g., Electronic Funds Transfer Act, 12 U.S.C. § 1693(a).

254. Some commentators suspect that the CFPB will focus on store-front payday lenders while continuing to ignore tribally-affiliated internet lenders. See Natasha Mayer, *The Free-Market Bandits*, THE DAILY CALLER (Feb. 23, 2011, 2:58 PM), <http://dailycaller.com/2011/02/22/the-free-market-bandits/> (last visited Feb. 5, 2012) (on file with the Washington and Lee Law Review).

255. See U.S. Dep't of the Treasury, *The Dodd-Frank Wall Street Reform and Consumer Protection Act Benefits Native Americans* (Jan. 26, 2011), <http://www.treasury.gov/initiatives/wsr/Pages/Native-Americans.aspx> (last visited Feb. 5, 2012) (on file with the Washington and Lee Law Review).

256. The Treasury memorandum further explains the applicability of the CFPB's regulations to Native families:

For Native American families using alternative financial services: The Wall Street Reform and Consumer Protection Act establishes, for the first time, robust federal supervision and oversight over larger alternative financial service companies such as

Moreover, as established in *Donovan v. Coeur d'Alene Tribal Farm*,²⁵⁷ and other cases,²⁵⁸ federal regulations apply to Native American tribes and may be enforced by the federal government. In *Coeur d'Alene*, the Coeur D'Alene Tribe argued that it was not subject to Occupational Safety and Health Act (OSHA) requirements as a result of tribal immunity.²⁵⁹ The Tribe operated a farm that produced grain and lentils for sale on the open market, and employed both tribal and non-tribal members.²⁶⁰ After an inspection, the Tribe was cited for twenty-one violations of OSHA.²⁶¹ The farm did not dispute the facts but argued that OSHA did not apply to them because of tribal immunity.²⁶²

check cashers and payday lenders, including on reservations. The CFPB will be able to combat abusive practices that harm consumers, helping families avoid hidden fees and keep more money in their pocketbooks.

Id. As for minorities in general, an analysis of the 2007 Survey of Consumer Finances by the Center for American Progress found that “[t]hirty-eight percent of families who has borrowed a payday loan within the last year were nonwhite while just twenty-two percent of families who did not take out such a loan were nonwhite.” Amanda Logan and Christian E. Weller, *Who Borrows From Payday Lenders?: An Analysis of Newly Available Data*, CENTER FOR AMERICAN PROGRESS (March 2009), available at http://www.americanprogress.org/issues/2009/03/pdf/payday_lending.pdf. As for Native Americans specifically, a survey of attendees at a National American Indian Housing Council meeting found that at least half of respondents believed that the following alternative financial services were a problem in their communities: loans against tax refunds (sixty-eight percent), payday loans (sixty-seven percent), pawn shops (fifty-eight percent), and car title loans (fifty percent).

257. *Donovan v. Coeur d'Alene Tribal Farm*, 751 F.2d 1113 (9th Cir. 1985) (holding that the OSHA applied to commercial activities carried on by an Indian tribal farm).

258. See *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians*, 166 F.3d 1126, 1127, 1129–30 (11th Cir. 1999) (applying the Americans with Disabilities Act to a tribal restaurant and holding that although private suit was barred by sovereign immunity, the Attorney General of the United States could bring actions against the tribe); *San Manuel Indian Bingo & Casino*, 475 F.3d 1306 (D.C. Cir. 2007) (construing the National Labor Relations Act as applying to tribe); *Smart v. State Farm Ins. Co.*, 868 F.2d 929 (7th Cir. 1989) (applying Employee Retirement Income Security Act to group insurance policy issued to Indian-owned hospital); *Phillips Petroleum Co. v. EPA*, 803 F.2d 545, 547 (10th Cir. 1986) (finding that the Safe Drinking Water Act may be imposed in Indian country).

259. *Donovan*, 751 F.2d at 1115.

260. *Id.* at 1114.

261. *Id.*

262. *Id.* at 1114–15.

Holding that generally applicable federal law applies equally to tribes and everyone else, the Ninth Circuit Court of Appeals established three exceptions to the rule.²⁶³ The court held that a “federal statute of general applicability that is silent on the issue of applicability to Indian tribes” will not apply to tribes if: “(1) the law touches ‘exclusive rights of self-governance in purely intramural matters’; (2) the application of the law to the tribe would ‘abrogate rights guaranteed by Indian treaties’; or (3) there is proof ‘by legislative history or some other means that Congress intended [the law] *not* to apply to Indians on their reservations.’”²⁶⁴ In any of these three situations, Congress must expressly state that a law applies to native people before the court will apply that law to native communities or individuals.²⁶⁵

i. Interference with Tribal Self-Government

The first prong of the *Coeur d’Alene* test asks whether the applicability of the federal law in question would interfere with rights of tribal self-government.²⁶⁶ If so, the federal law cannot be applied to tribes unless there is a “clear” expression of congressional intent that the law should apply to tribes.²⁶⁷ In *Coeur d’Alene*, applying OSHA, the court found that interpreting this exception as broadly as the tribe argued would exempt all tribal businesses from federal regulation. The court stated:

[I]f the right to conduct commercial enterprises free of federal regulation is an aspect of tribal self-government, so too, it would seem, is the right to run a tribal enterprise free of the potentially ruinous burden of federal taxes. Yet our cases make clear that federal taxes apply to reservation activities even without a “clear” expression of congressional intent.²⁶⁸

The court went on to say, “we believe that the tribal self-government exception is designed to except purely intramural matters such as conditions of tribal membership, inheritance rules, and domestic

263. *Id.* at 1115–16.

264. *Id.* at 1116 (emphasis added).

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* (citations omitted).

relations from the general rule that otherwise applicable federal statutes apply to Indian tribes” engaging in regulated open market commerce.²⁶⁹

ii. The “Treaty Rights” Exception

The tribe next argued that OSHA cannot apply to a tribe’s activities absent a clear expression of congressional intent because application of the Act would infringe on treaty rights.²⁷⁰ Because the court found no treaty at all between the Coeur d’Alene tribe and the United States, it found that the second exception did not apply either.²⁷¹

iii. The “Other Indications” Exception

As set out above, if neither of the first two exceptions apply, there is a third, catch-all exception for situations in which Congress expressed explicit intent that the law *not* apply to tribes.²⁷² This exception asks whether the legislative history surrounding the law in question (in *Coeur d’Alene* it was OSHA) indicates any congressional desire to exclude tribal enterprises from the scope of its coverage.²⁷³ This exception requires that there be express intent to exclude tribes.

In applying *Coeur d’Alene* to the CFPB’s regulations, there is no question that the Dodd–Frank Act that created the CFPB is a law of general applicability. This means the CFPB’s regulations apply as long as none of the three exceptions set out in *Coeur d’Alene* apply.²⁷⁴ None of these exceptions appear to apply to internet payday lending. As in *Coeur d’Alene*, the business in question here is in regular commerce, and there is nothing about regulating payday lending that bears upon tribal membership, inheritance

269. *Id.* The tribe also argued that the inspector’s presence interfered with the tribe’s immunity, but the Court disagreed. *See id.* at 1116–17.

270. *Id.* at 1117.

271. *Id.* at 1117–18.

272. *Id.* at 1116.

273. *Id.* at 1118.

274. *Id.* at 1115–16.

rules, and domestic relations, or any other internal governance matter.²⁷⁵ Moreover, unlike *Coeur d'Alene*, there is no intrusion onto tribal land at all, as the CFPB will likely be regulating internet lending, not store-front lending.²⁷⁶ As to prong two, like *Coeur d'Alene*, at least in the cases identified thus far, there is no treaty between the United States and the tribes involved in internet payday lending. Finally, there is no express intent here for the CFPB to exclude tribes or native people. To the contrary, as the Treasury memorandum indicates, there was express intent for the exact opposite, namely, for the CFPB to apply equally to tribes and everyone else.²⁷⁷

In summary, federal laws of general application apply to tribes and can be enforced by the federal government unless one of the *Coeur d'Alene* factors applies.²⁷⁸ Thus, if nothing else, the CFPB is in a position to outlaw or limit internet payday lending in general, regardless of who is doing the lending. Given the difficulties created by the sovereign immunity model, as well as off-shore lending models, the role of the CFPB is critical.

The CFPB's investigative powers could also be very useful to the offices of state attorneys general in thwarting the overarching participation of non-immune, non-tribal financiers (such as Mr. Tucker) in this market, who should be targeted. State attorneys general will have access to CFPB investigations of tribes pursuant to memoranda of understanding required by Dodd-Frank to pursue the non-tribal financiers of tribal lending entities under state law as aiders, abettors, conspirators, or control persons.

Tribal immunity does not make tribal lending in contravention of state law legal, but it does make tribes immune from prosecution. It will likely be more effective for attorneys general to not join the tribes as defendants in order to pursue non-tribal defendants in illegal lending schemes. Using the CFPB's investigative and enforcement actions, no change in law or interpretation is required

275. *Id.* at 1116 (explaining that the tribal self-government exception is intended to apply to matters such as those listed in the text above).

276. As the court noted, the regulators would not need to enter reservation land, but even if they did, this would not be not interference under *Coeur d'Alene*. *See id.* at 1116–17.

277. *See* U.S. Dep't of the Treasury, *supra* note 256.

278. *See* WILLIAM C. CANBY, JR., *AMERICAN INDIAN LAW IN A NUTSHELL* 282–86 (4th ed. 2004).

for this attorney general action to take place. The CFPB, however, would need to take an immediate and active role in investigating online payday lending.

VII. Conclusion: Who Loses When Sovereignty Is Sold?

Sovereignty is the linchpin of tribal self-determination.²⁷⁹ Scholars are already concerned that broadening sovereign immunity to off-reservation business enterprises will cause the Supreme Court and Congress to limit that immunity, particularly where the immunity extends to non-Indians.²⁸⁰ Indeed, the Supreme Court may already be reevaluating its stance toward tribal immunity,²⁸¹ a step in the wrong direction for tribes.²⁸² There has been marked and insidious erosion in tribal sovereignty as it relates to tribal territory since *Kiowa*. This development is so pronounced that it might outweigh the significant benefits tribal economic development has brought to tribes.²⁸³ Tribal payday lending could further erode this sovereignty.

Courts, litigants, and scholars continue to challenge the fairness of corporate immunity for casinos and other businesses that compete in the economic mainstream.²⁸⁴ Thus far, the Supreme Court has somewhat begrudgingly continued to recognize broad tribal immunity in the commercial context, though the precise parameters of sovereign immunity in the business context remain undefined. Tribes need not allow these parameters to lie in the

279. See S. Chloe Thompson, *Exercising and Protecting Tribal Sovereignty in Day-to-Day Business Operations: What the Key Players Need to Know*, 49 WASHBURN L.J. 661, 661 (2010).

280. See *id.* at 661–662; Kunesh, *supra* note 138, at 398; Charles Trimble, *Sovereignty for Rent with Payday Loan Businesses*, INDIANZ.COM (Mar. 14, 2011), <http://64.38.12.138/News/2011/000756.asp> (last visited Feb. 5, 2012) (on file with the Washington and Lee Law Review).

281. See Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority Over Nonmembers*, 109 YALE L.J. 1, 7 (1999); David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 Cal. L. Rev. 1573, 1574 (1996); Sarah Krakoff, *The Virtues and Vices of Sovereignty*, 38 CONN. L. REV. 797, 797 (2006); Kunesh, *supra* note 138, at 398.

282. Getches, *supra* note 281, at 1574.

283. Thompson, *supra* note 279, at 661.

284. *Id.* at 664–65.

hands of random courts, the Supreme Court, or Congress. Rather, they can take things into their own hands and regulate or forbid payday lending by their members and corporate entities.

Tension about the extent of tribal sovereign immunity is evident in recent Supreme Court jurisprudence. For example in *Kiowa*, Justice Stevens's dissent expressed serious doubts about the legal premise and fairness of tribal immunity from suit for off-reservation commercial activities.²⁸⁵ Justice Stevens claimed that sovereign immunity in the context of commercial activity is unjust, adding that “[g]overnments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct.”²⁸⁶

Some tribal members recognize the risk in selling sovereignty too cheaply. As Charles Trimble, a member of the Oglala Sioux tribe, stated on his popular Native American blog:

[Payday lending] is fodder for those forces that still argue that tribes are not up to the standards of discipline and law for sovereignty and self-governance. Instead they are seen by many as havens of corruption and lawlessness, and fronts for sleazy businesses. These are the things that could feed a backlash; and as I have written before, even if our sovereignty is secure, those forces could make it more difficult to exercise it for the good of our people.

For example, anti-tribal forces could push Congress to just extend the Indian Gaming Regulatory Act's requirement for state-tribal compacts for other non-gaming businesses. Or ultra-conservative budget cutters could use the excuse of not wanting to promote state law circumvention by subsidizing the payday lenders through the tribes.²⁸⁷

He added that “[t]here is great dignity in sovereignty and great discipline is needed for its preservation.”²⁸⁸ Similarly, Professor Patrice Kunesh suggests that tribes remain mindful that “improvident use of tribal sovereign immunity may impede actualization of full tribal self-determination and obstruct ultimate tribal vindication of important legal rights.”²⁸⁹ With immunity

285. See *Kiowa*, 523 U.S. at 760–66 (Stevens, J., dissenting).

286. *Id.* at 766.

287. Trimble, *supra* note 280.

288. *Id.*

289. See Kunesh, *supra* note 138, at 416; see also Kevin K. Washburn, *Tribal*

comes great power, which, if overused, can backfire.²⁹⁰ Given the power of Congress, the Supreme Court, the FTC, and the CFPB, tribes may find good reasons to steer clear of these partnerships entirely, or to closely regulate them.

Self-Determination at the Crossroads, 38 CONN. L. REV. 777, 791 (2006) (“Militant and inflexible assertions of tribal sovereignty may be emotionally satisfying, and they may, frankly, be more consistent with fundamental notions of truth and justice. But strong expressions of ‘sovereignty’ seem to come up hollow in so many Supreme Court cases.”).

290. Another commentator, who represents tribes in various business enterprises, adds further suggestions and cautions. Recognizing that sovereignty is more likely challenged when tribes have different laws than the rest of society, she suggests that when enacting laws, tribes consider enacting laws similar to those found in the rest of society. *See* Thompson, *supra* note 279, at 679–80. Doing so will result in less conflict of laws analyses as well as fewer overall immunity challenges and thus less risk of further chipping away at immunity. *Id.* at 680. Next she recommends that when enacting laws, tribes try to enact laws that are facially fair and reasonable because this too will reduce the likelihood that sovereign immunity claims will arise. *Id.* at 681–82. Finally, and more relevant here, she recommends that tribes concerned with protecting immunity think very hard about when such immunity should apply to non-tribal members. Stating that applying immunity to non-members “increases the likelihood of challenges to the Tribe’s authority,” she suggests serious thought about when to take such actions. *Id.* at 682. Professor Kunesh advises that any sovereign immunity be used with “fairness, responsiveness and transparency.” Kunesh, *supra* note 138, at 416. Noting how fact-specific sovereign immunity can be, she adds that “in this complex legal and policy-orientated matrix, every variable matters. The status of the parties and their political and legal relationship to the tribe, such as tribal member, nonmember, reservation resident or itinerant patron, business partner or financier must be considered.” *Id.* at 418.