THE ALLIANCE BETWEEN PAYDAY LENDERS AND TRIBES: ARE BOTH TRIBAL SOVEREIGNTY AND CONSUMER PROTECTION AT RISK?

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I. Introduction

Race car driver Scott Tucker leads an opulent life, which includes enjoying a $8 million vacation home in Colorado, to which he travels by $13 million Lear Jet.¹ Much of Tucker’s vast wealth has been amassed through internet payday lending businesses, which he operates from his office in Overland Park, Kansas. 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 starker.² 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. 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. Sovereignty preserves a tribe’s power to self-govern and functions as a barrier to the encroachment of foreign authority on Indian reservations. Tribal sovereign immunity is a corollary of tribal sovereignty, and protects tribes from enforcement of state law.

Consumer protection is 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 to achieve is that of payday loans, a high-interest product designed 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

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² Id.
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 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 regulation will cause more harm than good by depriving the poor of much-needed capital, 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. In reality this is simply not true. First, Native people are also using these loans. In one recent case, a New Mexico woman borrowed $5,000 under a loan that required she pay back $42,000. 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.

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


5 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 Skies. http://www.westernskyloansfinancial.com/ . 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 OK because it was being offered by a tribe. See interview with Marvin Ginn, Executive Director of Native American Finance, October 2, 2011.
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. Following efforts by the federal government and euro-american settlers to dislocate and remove the Indian tribes from their territories, many tribes now reside in rural areas with limited development of natural resources and unemployment rates five times higher than the national average. Unemployment tops 50% in many areas, and access to quality healthcare can be very limited. One significant bright light for tribes in recent history has been economic development. Many people, both Native and non-Native, think this may be an answer at last to poverty and all that accompanies it. Nevertheless, the stereotype of a tribe getting rich off casinos and paying no taxes could hardly be further from the truth. Contrary to the popular conception, most tribes are still poorer than other U.S. communities, despite recent economic development. Moreover, sometimes joint enterprises 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. 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. Uranium mining is

9 Id.
10 See Armen H. Merjian, Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and Cobell v. Salazar, 46 GONZ. L. REV. 609, 612 (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).
also ruinous to the surrounding land and groundwater.\textsuperscript{13} Casinos are, overall, a significant economic boon to tribes, funding tribal language revitalization programs, tribal cultural institutions, and schools, among other programs.\textsuperscript{14} Yet, some argue that involvement with casinos can sometimes chip away at ancient tribal customs.\textsuperscript{15} Some tribes have been convinced to take nuclear waste for disposal on their lands,\textsuperscript{16} even though the compensation received is significantly undermined by future health and environmental ramifications, and by inherent risk.\textsuperscript{17} The tribal competitive advantage in business often consists of providing an easier or less costly regulatory environment in matters regulated by states.\textsuperscript{18} It is from this social, historical, and economic climate that the partnership between tribes and payday lenders emerged.

II. 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.\textsuperscript{19} These loans were allegedly created in order to help consumers make ends meet between now and payday, thus the descriptive name.\textsuperscript{20} 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 14 days or less.\textsuperscript{21} 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 now and her next payday (now 10 days away). To get that $400, she will need to have a checking account, and will write a check, or authorize an automatic debit, for $500 post-dated for her next payday.\textsuperscript{22} When payday comes, she can either let the check or debit clear, or she can go in and pay another $100 to borrow the same $400 for the next two weeks. Interest rates for these loans range from around 400\% per annum to over 1,800\% and the industry is largely unregulated in most of the country.\textsuperscript{23} Payday lending is one of the fastest growing segments of the consumer credit industry. By 2005, there were more payday lending
locations in the U.S. than McDonalds, Burger Kings, Sears, J.C. Penney’s, and Targets combined.  

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. Lender groups, perhaps with some justification, point out that people of lesser means have no place else to go when they really need cash. They claim that restricting access to the only source of capital for people of lesser means will only make people’s problems worse.

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. 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 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. The average loan is rolled over ten times, and some consumers

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24 Francis, supra note 19, at 618-19.
25 Francis, supra note 194, at 612.
26 Id. at 613. See also web pages.
27 Francis, supra note 19, at 613.
28 Consumer groups object to payday lending for reasons other than the high cost. As Jen Ann Fox explained, in response to this comment:

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 only resulted in occasional use, not as big a problem. Those aren’t the same things. The last sentence in that paragraph supports the argument payday lenders make that APR isn’t important. (They are supporting a bill in Congress to drop the APR disclosure requirement for any loan of less than a year duration.) Could you say instead “

29 See Allison Woolston, Note Neither a Borrower Nor a Lender Be, 52 ARIZ. L. REV. 853, 867 (2010). As Ms. Woolston states, “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. Id. (citations omitted). See also Francis, supra note, 19, at 617. In this student note, Ms. Frances, cites a number of studies about rollovers are 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.
pay on the same loan for years at a time.\textsuperscript{30} Moreover, the loans are most frequently used to pay regular, recurring bills like rent and utilities, not emergencies.\textsuperscript{31} This means that once one has borrowed the money, if the person 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 off 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,\textsuperscript{32} Christmas and birthday presents, and even bachelor parties.\textsuperscript{33} 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.\textsuperscript{34}

Similar to any product, gimmicks abound in payday loan advertising. The idea is to attract new customers but to rely heavily on repeat business. One payday lender uses stripper Bridget the Midget as its mascot in order to demonstrate that the loans are for “short” term use.\textsuperscript{35} Despite the clever play on words, lenders dun customers to take out new loans almost immediately after they pay back an old one. Lenders call customers in their cars on their way home from paying off or paying down the loan. Like credit card companies, lenders send customers checks that can be cashed in the stores. Lenders waive one two-week fee if you keep your loan out for four two-week cycles in a row. In other words, Lenders will do what they can to make sure the customers stay in continuous debt for as long as possible, to keep the profits coming. 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 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 are far worse. Interest rates are more commonly in the 800-1,000\% range, rather than the 400-600\% range, and the loans are 100\% unregulated.\textsuperscript{36} Lenders who operate over the internet consistently claim that they are not bound by any state’s law.\textsuperscript{37} Customers give large

\begin{footnotes}
\item[30] See Woolston, \textit{supra} note 29, at 867 (describing two week loan rolled over 66 times).
\item[31] Martin, \textit{supra} note 21, at 608-09.
\item[33] Blog and tell story.
\item[34] Sebastian paper.
\item[35] YouTube ad for little payday laons.com, \url{http://www.youtube.com/watch?v=6euwvEQxm6c}, last visited on August 3, 2011.
\item[37] CITE
\end{footnotes}
amounts of personal data to the lender over the internet before they hear any of the loan terms. The lenders’ procedures make it extremely difficult to pay off the principal of the loans, rather than just the two-week fee. Recently, the Minnesota attorney general’s office sued five payday lenders for automatically renewing the loans, and providing no meaningful procedure for paying off a loan in full.38

D. The Legal and Regulatory Framework of Payday Lending

As set out above, internet payday lenders have a weak history of complying with state laws. A 2004 survey of online lenders demonstrates this point.39 Payday lenders are subject to state laws that range from draconian – payday lending is a RICO violation in Georgia – to permissive. The majority of states have laws that specifically authorize payday lending.40 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 the most active. A recent 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. The most recent survey by the Consumer Federation of America (the “CFA”) notes that lenders continue to claim choice of law from lax jurisdictions, to locate off-shore, or to claim tribal sovereign immunity to avoid complying with state consumer protections.41

There currently is no federal law regulating the specific terms of these loans, although the Truth in Lending Act, the Electronic Fund Transfer Act, and other general federal laws apply to online lending. Moreover, many laws are passed by states have been quickly skirted by lenders, unless that law includes an interest rate cap. For example, in 2007, New Mexico passed a law that capped fees at $15 per $100 borrower for a period of up to two weeks, required that lenders offer a free installment plan to any customer who could not pay back a loan, prohibited all rollovers,42 limited loans to 25% of a borrower’s gross income,43 and provided for a right of rescission, among other limitations. Critically, the new law also provided that all loans must go into a statewide database44 so these new provisions could be enforced.45 Similar laws were

39 See Fox & Petrini, supra note 36, at ___.
43 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.
45 Id. § 58-15-37(C).
passed in Florida, Oklahoma, Michigan, Illinois, North Dakota, and Indiana, with the same sorry results.\textsuperscript{46} Because a last-minute definition added to the bill made the new law apply only to loans of 14-35 days in duration and those involving a post-dated check, the industry quickly began selling a product that fell outside the definition of the loan in question. In short, the new law accomplished little to nothing.\textsuperscript{47}

The New Mexico law, like some others around the country, capped interest rates at a generous 417%, yet payday lenders regarded this as an insufficient return. In order to reclaim the “tremendous profits”\textsuperscript{48} to which the industry has become accustomed, the industry invented new products such as the payday loan without the post-dated check, and longer installment loans, which earn even higher lender fees.

This is not to say that all states have been ineffective at regulating payday loans, as the recent CFA study shows.\textsuperscript{49} However, the one type of state legislation that \textit{has} worked to eliminate payday loan abuses, namely absolute interest rate caps on all forms of consumer lending, has now met its match. \textsuperscript{50} This new “loophole” attempts to use a tribe’s sovereign immunity to skirt all state laws, including absolute usury caps. Lenders make no secret about why they want to team up with Indian tribes, as this ad for an internet payday loan explains:

\begin{center}
\textsuperscript{46} Veritec Solutions, \textit{New Mexico Payday Loan Transaction System Welcome Package}, http://rld.state.nm.us/FID/PDFs/Veritech_Welcome_Package.pdf, (accessed June 1, 2008). The database is a self-funding project. The sole source of revenue for the database is a $0.50 charge on each payday loan that is entered into the system. There is no charge for customer eligibility checks, Social Security number validation checks, use of the Veritec help desk, transaction updates, or report generation. In order to register and use the database, lenders must be licensed by the New Mexico Financial Institutions Division to provide payday loans in New Mexico, they must have registered their operators with Veritec, and those operators must complete the Veritec training program and be certified by Veritec to use the system. Finally, as noted above, the lenders must complete the upload of their historical data.

\textsuperscript{47} The industry provided this commentary in a similar fight:
\begin{quote}
We have no complaint that after long debate, the Senate and House agreed on a bill to limit borrowers to one payday loan at a time, a cap of $550, a cooling off period and the ability of payday loan providers to electronically debit their customer’s bank account. The implementation of a state-wide data base is of little consequence as well.\textsuperscript{47}
\end{quote}

The Veritec database is still being suggested as a solution to short-term loan abuses all over the country, but this is no solution if the industry can change their lending model and avoid the database. Moreover, the database is little more than a costly chimera if it will not capture the information it is designed to collect.

\textsuperscript{48} n. 18, \textit{supra}.

\textsuperscript{49} \textit{See} Fox & Petrini, \textit{supra} note 36, at 22.

For example, see the laws of Massachusetts, Pennsylvania New York, and Maryland, among others. \textit{See id.} Moreover, in the past, payday lenders used a similar tactic to avoid state usury caps and other small loan laws by conducting business under a tactic known as rent-a-bank or rent-a-charter. The rent-a-charter arrangement permits state banks to export the interest rates of their home states to borrowers in a state with less favorable usury laws. Elizabeth Willoughby, \textit{Bankwest v. Baker: Is it Mayday for Payday Lenders in Rent-a Bank Charter Arrangements?}, 9 N.C. BANKING INST. 269, 274 (2005). One payday lender that had rent-a-bank approval denied to it now uses the tribal sovereignty model. \textit{See} Appendix A, There is an FDIC order against First Bank of Delaware which prohibited third-party arrangements with, among others, ThinkCash. If one goes to www.thinkcash.com, one is directed to Plain Green Loans website, a lender that claims to be a tribally owned site. However, if one then looks at ThinkFinance’s website, one will see Plain Green Loans listed as one of their products. \textit{See} http://thinkfinance.com/products. Also http://thinkfinance.com/blog/, lat visited on October 29, 2011.
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 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.  

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

III. Background on Sovereignty and Sovereign Immunity

A. Sovereignty vs. Sovereign Immunity

There is nothing more important to Indian governments and Indian people than sovereignty. Tribal sovereignty is embodied in hundreds of treaties between Indian nations and the colonial powers, referenced in the U.S. Constitution, recognized by a vast body of Supreme Court jurisprudence, and affirmed by numerous congressional acts. It is also referenced in the “Indians not taxed” provision of the Constitution. The concept is so fundamental that it runs through most legal scholarship on the subject of Indian law. Tribal sovereignty predates both

51 See http://www.online-cash-advance.com/financial-news/the-connection-between-indian-tribes-and-payday-lending#ixzz1Nt1vQu6h
53 COHEN HANDBOOK OF FEDERAL INDIAN LAW 204-24 (Lexis Nexis 2005). 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. 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.
55 U.S. CONSTITUTION.
56 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.
federal and state governments. Indian governments have inherent sovereignty which is not derived from any other government, but rather from the people themselves.

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. 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. At the same time, the Supreme Court has expanded tribal immunity or protection from suit. According to one scholar, this combination of removal of governance powers from tribes while concurrently expanding immunity could lead to a lack of government accountability, increased uncertainly about the law, and increased animosity toward tribes among the general population. 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. Tribal sovereign immunity derives from tribal sovereignty. Like state and federal sovereign immunity, tribal immunity is an inherent power that prohibits state and private suits against tribes except in certain circumstances. 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.

Tribal sovereign immunity was once confined to governmental on-reservation activity and thus did not extend to off-reservation conduct. However, after the Kiowa decision described below, a federal common-law default rule of immunity for all tribal activity, on or off reservation, was essentially recognized. 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

57 See Wheeler, 435 U.S. 313, 323 (1978). Not all of these things are necessary, obviously. The U.S. did not have a distinct language from Britain, for example. See also COHEN HANDBOOK OF FEDERAL INDIAN LAW 204.
58 Id. 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.
60 Id.
61 Id.
62 Id. at 595.
63 See id. at 616-617.
64 COHEN HANDBOOK OF FEDERAL INDIAN LAW 635.
66 Id. at ___.
67 Id. at 764-65 (Stevens, J., dissenting).
located. 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.

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.” Congress has limited this sovereignty, however, placing tribes under the legislative authority of the United States. Tribal sovereignty, then, is subject to the will of Congress, which exercises plenary power over Indian affairs.

C. Pre-Kiowa case law

Although tribal sovereign immunity is now well established, the U.S. Supreme Court claims that the doctrine developed “almost by accident.” The Court never mentioned the sovereign immunity of a tribe until the 1919 case of *Turner v. United States*, in which it mentioned the doctrine in dicta. *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. 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.” 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. 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.


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68 Id. at 755. *Kiowa* involved a Tribal Development Commission that agreed to purchase stock through a promissory note in the name of the Tribe. Though the tribe argued the deal was signed on Trust land, the Respondent maintained that the note was executed and delivered in Oklahoma City, or non-Tribal land. The Tribe defaulted on the note and the Respondent sued for the breach of contract. The Oklahoma Supreme Court held that Indian Tribes are subject to suit in state court for breaches of contract involving off-reservation commercial conduct. The U.S. 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*

70 Cherokee Nation v. State of Ga., 30 U.S. 1, 3, 8 L. Ed. 25 (1831).
71 COHEN HANDBOOK OF FEDERAL INDIAN LAW 635.
72 Talton v. Mayes, 163 U.S. 376, 384 (1896).
73 *Kiowa*, 523 U.S. at 751.
74 Turner v. U.S., 248 U.S. at 358; see also Florey, supra note 74, at 619 (“The Court did not explicitly refer to sovereign immunity until 1919.”).
75 Turner also sued the United States, as trustee. *Turner*, 248 U.S. at 356.
76 *Turner*, 248 U.S. at 356.
77 *Id.* at 358.
78 *Id.*
79 *Kiowa*, 523 U.S. at 757.
the Court held that tribes are “immune 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. U.S.F. & G.i 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 decision in 1978, it has been clear that without an explicit 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. 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 lands. 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. 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. 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.

In Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, the Supreme Court held that sovereign immunity extends to on-reservation commercial activity conducted by the tribe. In Potawatomi, Oklahoma sought the collection of the state tax on cigarettes by the Potawatomi tribal convenience store. 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. The Court suggested alternative remedies, including collecting the sales tax from wholesalers by off-reservation seizure of cigarettes or assessing suppliers, by agreement with the tribe, or through lobbying Congress. 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. Five years later, in Kiowa Tribe v. Manufacturing Technologies, Inc., the Court held exactly that.

D. The Kiowa Holding

81 Id. at 512.
82 Id.
83 Id. (The Court did not articulate the common public policy).
85 Id. at 51.
86 Id.
87 Id. at 58.
88 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.
90 Id. at 507-08.
91 Id. at 512.
92 Id. at 524.
93 Id. at 525.
In *Kiowa Tribe v. Manufacturing Technologies, Inc.* the Court held that tribal sovereign immunity applies to off-reservation commercial activity conducted by a tribe.\(^94\) In *Kiowa*, the tribe defaulted on a note executed off-reservation to Manufacturing Technology,\(^95\) who sued the tribe for the balance owed.\(^96\) The Court agreed with Manufacturing Technology’s argument that State laws can be applied to tribal activities outside of Indian country, but, citing *Potawatomi*, countered that “[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them.”\(^97\) 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.\(^98\) Nor was the Court willing to draw a distinction between commercial and governmental activities of a tribe.\(^99\) 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,”\(^100\) and that tribal sovereign immunity “is a matter of federal law and is not subject to diminution by the States.”\(^101\)

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.”\(^102\) Given the interdependent and mobile American society of the late 20th 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.”\(^103\) 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.”\(^104\) 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.\(^105\) It invited Congress to reconsider the wisdom of recognizing sovereign immunity.

**E. *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

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94 *Kiowa*, 523 U.S. at 753.
95 *Id.*
96 *Id.*
97 *Id.* at 755.
98 *Id.*
99 *Id.* at 754-55.
100 *Id.* at 754.
101 *Id.* at 756.
102 *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.”
103 *Id.* at 758.
104 *Id.* at 757-58.
105 *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.
Congress or the tribe is immune from suit on the basis of tribal sovereign immunity.\(^{106}\) *Kiowa*’s progeny is extensive. One study of the effects of *Kiowa* on reported decisions found 71 opinions citing *Kiowa* as a primary reason to extend sovereign immunity to a tribally-owned commercial entity.\(^{107}\) 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.\(^{108}\) Thirty-nine of the seventy-one opinions were federal and twenty-one were state court opinions.\(^{109}\)

VI. 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.\(^{110}\) 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.\(^{111}\)

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.\(^{112}\)

\(^{106}\) Id. at 760.


\(^{108}\) 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”).

\(^{109}\) Id.


\(^{111}\) See Allen v. Gold Country Casino, 464 F.3d 1044, 1046 (9th Cir. 2006); see also Marceau v. Blackfeet Hous. Auth., 455 F.3d 974, 978 (9th Cir. 2006), Redding Rancheria v. Super. Ct., 88 Cal.App.4th 384, 388-89, 105 Cal. Rptr. 2d 773 (2001) for earlier uses of the test. As established in *Kiowa*, the 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. *Id.*

Immunity clearly extends to a tribally-owned health organizations,113 housing authorities,114 museums owned by the tribe,115 and to casinos owned by tribes.116 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. 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.”117 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.

B. The Application of Kiowa to Payday Lending: “[W]e are in a Gray Zone.”118

It is presumptively true from the holding in Kiowa 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.119 If that scenario exists at all, however, it is rare.120 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, and otherwise forbidden practices of the lender are presumably shielded by tribal immunity. This is described in the payday lending industry as the “sovereign model.”121 Although there is little sunlight on the true financial arrangements between the tribes commercial construction corporation that did not perform essential governmental functions, that possessed insurance, and where use of corporate form insulated tribal assets). See also Rush Creek Solutions, Inc., v. Ute Mountain Ute Tribe, 107 P.3d 402, 407-08 (Colo. App. 2004) (finding the tribe’s words, actions, and conduct relevant in determining immunity, as was its personnel policy); Padilla v. Pueblo of Acoma, 754 P.2d 845, 849 (N.M. 1988) (holding that tribal commercial construction company engaged in off-reservation conduct could not clothe itself with immunity).

113 Hagen v. Sisseton-Wahpeton Cmty. Coll., 205 F.3d 1040, 1043 (8th Cir. 2000) (tribally established educational institution served as an arm of the tribe and not as a mere business, and thus entitled to tribal sovereign immunity); Pink v. Modoc Indian Health Project, 157 F.3d 1185 (9th Cir.1998), cert. denied, 528 U.S. 877 (1999) (nonprofit health corporation created and controlled by Indian tribes that “served as an arm of the sovereign tribes, acting as more than a mere business” is entitled to tribal immunity)
114 Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth., 207 F.3d 21, 29 (1st Cir. 2000) (noting that tribal housing authority “as an arm of the Tribe, enjoys the full extent of the tribe’s sovereign immunity”).
115 Bassett v. Mashantucket Pequot Tribe, 204 F.3d 343, 358 (2d Cir. 2000) (immunity extends to tribally established museum as agency of tribe)
116 See, e.g., Cook v. Avi Casino Enterprises, Inc., 548 F.3d 718 (9th Cir. 2008) (holding gaming corporation under tribal law was protected by tribe’s immunity from suit); Marceau v. Blackfeet Hous. Auth., 455 F.3d 974, 978 (9th Cir. 2006); see also Trudgeon v. Fantasy Springs Casino, 71 Cal. App. 4th 632, 639, 84 Cal. Rptr. 2d 65, 69 (1999) (finding tribal corporation formed to conduct bingo gaming enterprises on tribal land immune from suit, the court found that subordinate tribal enterprise has “no inherent immunity of [its] own,” and it enjoys immunity “only to the extent of the immunity of the tribe”).
117 See Allen v. Gold Country Casino, 464 F.3d 1044, 1045 (9th Cir. 2006) (quoting 25 U.S.C. 2702(1)).
119 See supra notes 94-101 and accompanying text.
120 As of early October, 2011.
121 See http://www.consultants4tribes.com/category/sovereign-model/ and see http://paydayloanindustryblog.com/Payday%20loan%20industry/sovereign-nation-model/
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.\textsuperscript{122} By contrast, the Indian Gaming Regulatory Act, which extensively regulates the Indian gaming industry for the benefit of tribes, mandates that at least 70\% of the profits from each gaming enterprise go directly to the tribe under normal circumstances, with a maximum of 30\% going to a non-tribal consultants and managers.\textsuperscript{123}

As the last section articulates, in the absence of guidance from Congress or binding precedent,\textsuperscript{124} state and federal courts are developing “arm of the tribe” tests piecemeal. For example, a recent Tenth Circuit Court of Appeals case also sets out a multi-factor test. In \textit{Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort},\textsuperscript{125} the Court applied the following test 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; and (5) the financial relationship between the tribe and the entity. This inconsistency and lack of authority has led to expensive, inefficient litigation. Although it is yet 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 \textit{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 \textit{Ameriloan v. Superior Court}, the court acknowledged but then rejected the California Department of Corporation’s equitable arguments against applying sovereign immunity in the context of payday lending.\textsuperscript{126} There, the California Court of Appeals held that sovereign immunity is not a discretionary doctrine. It is independent of the equities of a given situation. Rather, this is a “pure jurisdictional question.”\textsuperscript{127}

The court stated, however, that it was within the realm of the imagination that a tribal entity could engage in activities that were 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.\textsuperscript{128} Tribally chartered corporations that are “completely independent of the tribe,” noted the court, are not covered by the doctrine of sovereign immunity.\textsuperscript{129} Naturally, no one would think that a state-chartered corporation was subject to immunity if the corporation as not owned by the state. Similarly, a tribally-chartered corporation

\textsuperscript{122} Real Parties in Interest’s Answer to MTE Financial Services, Inc.’s Petition for Review and Request for Stay at 4, No. S194110, 2011 WL 2907024, at *4 (Cal. June 23, 2011). (“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.”).
\textsuperscript{123} \textit{IGRA 25 U.S.C. § 2711(7)}.
\textsuperscript{124} \textit{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.
\textsuperscript{125} 629 F.3d 1173 (10th Cir. 2010).
\textsuperscript{126} Ameriloan \textit{v.} Superior Court, 169 Cal. App. 4th 81, 86 Cal. Rptr. 3d 572 (Cal.App. 2 Dist., 2008).
\textsuperscript{127} \textit{Id.} at 95, 86 Cal. Rptr. 3d at 582-2.
\textsuperscript{128} \textit{Id.} at 97, 86 Cal. Rptr. 3d at 585, (citing \textit{Trudgeon}, 71 Cal. App. 4th 632, 640).
\textsuperscript{129} \textit{Id.} (citing \textit{Agua Caliente Band of Cahuilla Indians v. Superior Court}, 40 Cal. 4th 239, 247-8 (2006).
is subject to immunity only if it is actually tribally owned. *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.130

Rather than rule against the lender, the Court in *Ameriloan* remanded the case to the trial court for a determination of whether the payday lending entities are sufficiently related to the tribe to benefit from sovereign immunity.131 In order to analyze whether the 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.132 The *Ameriloan* court authorized limited discovery, “directed solely to matters affecting the trial court’s subject matter jurisdiction,”133 meaning discovery tailored to the two broad factors mentioned above.

*Cash Advance and Preferred Cash Loans v. State*, a Colorado Supreme Court case, upheld the Colorado Court of Appeals ruling that sovereign immunity from suit shields two tribally affiliated internet payday lenders if they operated as “arms of the tribe,” but significantly altered the lower court’s arm of the tribe test.134 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.135 The Court of Appeals reviewed five different arm of the tribe tests from other jurisdictions,136 choosing an eleven factor test culled from the dissent of a Washington Supreme Court case.137 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]*.”138

The Colorado Supreme Court replaced the 11-part test with a three-factor test that “focuses on the relationship between the tribal entities and the tribe: (1) whether the tribes created the entities pursuant to tribal law; (2) whether the tribes own and operate the entities; (3) whether the entities’ immunity protects the tribes’ sovereignty.”139 Contrary to the Court of Appeals, which factored in the purpose of the entity, the Colorado Supreme Court explicitly

130 Id. at 98, 86 Cal. Rptr. 3d at 586.
131 Id. at 98, 86 Cal. Rptr. 3d at 585.
132 Id at 585-586. The *Ameriloan* court cited three casino cases for these factors: *Trudgeon*, 71 Cal. App. 4th at 638; *Redding Rancheria*, 88 Cal. App. 4th at 389; *Allen*, 464 F.3d 1044, 1046.
133 Id. at 98, 86 Cal. Rptr. 3d 586.
135 Id. at 1103
137 Id. at 405-06. The Washington Supreme Court case from which the 11 factor test was taken by the lower court is *Wright v. Colville Tribal Enterprise Corp.*, 159 Wash.2d 108, 147 P.3d 1275 (2006).
138 *Cash Adv. and Preferred Cash Loans*, 242 P.3d 1099 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 1110-11; *Id.* at 1105. Another notable factor that was jettisoned is (10) whether Cash Advance and Preferred Cash manage or exploit tribal resources. *Id.* at 1105.
139 Id. at 1110.
grounded their approach in the inherent nature of tribal sovereignty.\footnote{140} Cash Advance also clarified that the burden of proof rests with not with the tribe, but rather with the state, which must prove that sovereign immunity does \textit{not} apply.\footnote{141}

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 becomes extraordinarily important. In \textit{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.\footnote{142} MTE and payday loan borrowers Baillie and Rosas (hereafter, “Baillie”) agreed that discovery was appropriate on the matter of subject matter jurisdiction,\footnote{143} but disagreed on what such discovery would entail. More precisely, they disagreed about whether discovery should allow Baillie to follow the money trail.\footnote{144} 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. 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.\footnote{145} If so, argued Baillie, the lending entity could not possibly meet the arm of the tribe test.\footnote{146}

Conversely, lenders argued that allowing Baillie to “follow the money” would constitute unjustifiable intrusive discovery and would pry into the internal affairs of the tribe.\footnote{147} The tribe willingly provided MTE’s organizational documents and provided 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.\footnote{148} The articles of incorporation expressly provide for MTE to share in the sovereign immunity of the tribe.\footnote{149}

The briefs in \textit{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

\begin{enumerate} \item \textit{Id.} at n.11. (“We prefer an approach that recognizes, without diminishing, the inherent nature of tribal sovereignty.”)
\item \textit{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 evidence that the tribes are not entitled to sovereign immunity. \textit{Id.}
\item \textit{Ameriloan} is binding precedent on this point. See supra note 133 and accompanying text.
\item Real Parties in Interest’s Answer to MTE Financial Services, Inc.’s Petition for Review and Request for Stay, at 4.; Petition for Review and Stay at 17, Specially Appearing Defendant MTE Financial Services, Inc., v. Alameda County Superior Court, at 18.
\item Real Parties in Interest’s Answer to MTE Financial Services, Inc.’s Petition for Review and Request for Stay, at 12.
\item \textit{Id.}, at 12-13.
\item Petition for Review and Stay, Specially Appearing Defendant MTE Financial Services, Inc., v. Alameda County Superior Court, at 17.
\item \textit{Id.} at 5.
\item \textit{Id.}
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 the money 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 is not 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.\(^{150}\) 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 tribally-owned when in reality, there is no connection to a tribe.\(^{151}\) Obviously, tribal sovereign immunity is not implicated at all in such cases. Moreover, the most recent arm of the tribe test from a payday case\(^ {152}\) – 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 tighter states regulate the payday industry, the more valuable tribal sovereign immunity becomes, and the more likely that Tribes will take more 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.

V. 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.\(^ {153}\) 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 them by history, and for some Tribes,

\(^{150}\) See supra note 38 and accompanying text. See also http://www.online-cash-advance.com/financial-news/the-connection-between-indian-tribes-and-payday-lending#ixzz1Nt1vQu6h

\(^{151}\) See: http://www.westernsky.com/ (“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.”)

\(^{152}\) See supra notes 134-140 and accompanying text.

\(^{153}\) Martin, supra note 21, at __.
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 to vulnerable consumers than 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. 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.

NEED MORE ON REGULATION OPTIONS.

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 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 Philip S. Deloria aptly notes, “sovereignty can be used in a way that erodes itself.”

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 the 1976-1977, in response to non-Indian views that tribes were favored by the Federal Government. As Philip S. Deloria further concludes, in the context of state-tribal collaboration:

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154 See supra notes 94-101 and accompanying text.
155 See Allen, 464 F.3d at 1046. (When an entity acts as an arm of the tribe its activities are “properly deemed to be those of the tribe.”).
157 Id. at 18-19.
Recent 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.\footnote{Id. at 38.}

Tribal sovereign immunity, although not conferred, is not absolute. \footnote{The fact that this might seen as undermining the presumed Congressional rationale is not an argument for a court’s allowing suit against a tribal entity engaged in payday lending. The statement in \textit{Kiowa} was dicta. 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. The analysis focuses on the relationship between the tribe and the entity, and cannot judge type of activity of the entity.} Use of sovereign immunity to evade consumer protection laws may be exactly the type of activity referred to in \textit{Kiowa} as having the potential to undermine the Congressional rationale for a robust sovereign immunity doctrine presumed by the Supreme Court.\footnote{Deloria, Hanna, and Trimble. \textit{supra} note 156 at 15-20; Florey, \textit{supra} note 59, at 603-13.} Although the doctrine of tribal sovereign immunity (as 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.\footnote{Florey, \textit{supra} note 59, at 640.} 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.\footnote{Id. at 38.} In this section, 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.

\textbf{B. The Supreme Court Could Clarify or Revise Doctrine}

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 \textit{Kiowa}, and while the unambiguous holding in \textit{Kiowa} allows little room for modification by the Court without overturning established precedent, the Court can still overrule \textit{Kiowa} now, particularly in the face of abuses of power. Doing so would fly in

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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, 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, 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.” 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. 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 tribal sovereign immunity doctrine as a whole. Thus, tribally-affiliated payday lending presents increased risk to all Tribes who depend on tribal sovereign immunity as a tool for economic development, and as 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. Thus, it would not be unprecedented for Congress to re-contemplate and reconstruct the contours of tribal sovereign immunity in general. Payday lending, and the ‘tribal sovereignty’ model in particular, have recently attracted negative attention – attention that could inspire Congress to revisit the issue of tribal sovereign immunity.

Congress has plenary power over Indian affairs, 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 trial sovereign immunity would be impacted well beyond internet payday lending.

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162 Id. at 625; See also Andrea M. Seielstad, The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law, 37 TULSA L. REV. 661, 665-66.
164 Id. at 704.
166 See supra notes 102-104 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 unlawful, injurious conduct.” Kiowa, 523 U.S. at 765-66.
167 Seielstad, supra note 162, at 711.
169 Cherokee Nation, 30 U.S. at 44.
Congressional action would likely be welcomed by a potentially powerful, if highly unusual, coalition of consumer protection advocates, brick and mortar payday lenders, states’ rights advocates, and those who take a narrow view of Native 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.”

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, as well as other products such as similarly-priced internet installment loans, Congress will do so narrowly. Hopefully, Congress will not abrogate any more tribal sovereignty than is necessary, but will state explicitly that this narrowly tailored law applies directly to tribes and explicitly abrogates sovereign immunity for this narrow purpose only.

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. Its functions include investigations, enforcement actions, and consumer and business education. Some of the issues that have caught the FTC’s attention include telemarketing fraud, shady practices by nursing homes, and identity theft. The FTC also oversees online advertising, behavioral targeting, and all issues dealing with on-line privacy concerns.

The FTC lacks authority over banks but does have authority over payday lenders. 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. 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. Federal agencies can garnish without a court order.

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170 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.
171 Seeielstad, supra note 162, at 711.
172 Areas of principal concern for this bureau are: advertising and marketing, financial products and practices, telemarketing fraud, privacy and identity protection, etc. Under the FTC Act, the Commission can bring actions in federal court through its own attorneys. The FTC, The Unfairness Doctrine, and Data Security Breach, 60 ADMIN. L. REV. 127 (2008).
175 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. The complaint further alleges that
The FTC has not taken on the fundamental practices of payday lending, however, such as charging triple digit interest rates for loans that are called short term loans but 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. This assumes that federal agencies have the power to regulate tribes, an issue about which there is current disagreement.\textsuperscript{176}

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. On July 21, 2010, Congress’ Dodd Frank Act went into effect, which in turn created the Consumer Financial Protection Bureau (the “CFPB”). 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.\textsuperscript{177}

Generally speaking, the CFPB is charged with policing activities relating to financial products and services for unfair, deceptive, and abusive acts or practices,\textsuperscript{178} and routinely examining non-depository entities for compliance with federal consumer financial laws.\textsuperscript{179} Even 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.

\textsuperscript{176}With regards to the Occupational Safety and Health Act (OSHA), administered by the Occupational Safety and Health Administration, for example, 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 see 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).

\textsuperscript{177}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). At other times, it seems that the presumption is that Congressional Acts of general applicability are applicable to Native Americans (see Tuscarora & Coeur D’Alene). 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 questions 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 because the federal laws will be more rather than less protective that state laws. Jared Elosta, 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.

\textsuperscript{178}Dodd-Frank Act § 1021(b)(2).

\textsuperscript{179}Id. § 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.
though it cannot set interest rate caps, the CFPB has extensive power to curb abusive lending. The agency has general authority to monitor financial products and services for risks to consumers, and as part of this monitoring function, may require lenders to file reports and participate in interviews and surveys, and also may gather information from consumers. More importantly, the Act specifically prohibits all unfair, deceptive, or abusive acts or practices by covered persons and their service providers. 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 consumer for a consumer financial product or service, or the offering of a consumer financial product or service.”

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. 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. Second, an act can be found to be abusive if it takes unreasonable advantage of one of these 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.

This definition of “abusive” is very broad and certainly includes situations in which the consumer lacks understanding of a consumer financial product, particularly where a covered person’s acts or omissions contributed to this lack of understanding. According to some

prescribed by the Act. Id. § 1002(14). Thus, the CFPB has the exclusive authority to promulgate regulations, issue orders, and provide guidance to administer the federal consumer financial laws.

Id. § 1022 (c)(2)(A).

Id. §§ 1022 (c)(4)(B)(i), 1026 (b) & (c), 1031.

Id. § 1036. See also id. § 1002(6) (a “covered person” means “(A) any person that engages in offering or providing a consumer financial product or service; and (B) any affiliate of a person described [in (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. Id. § 1002(26). Service providers also may be subject to CFPB supervision. See, e.g., id. § 1024(e). Under the Act, “person” means “an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity.” Id. § 1002(19).

Id. § 1031 (a).

Id. § 1031(c)(1). Obviously since this is a consumer protection statute, even the benefit to competition must benefit consumers.

Id. § 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. The Senate Report states that the existing law prohibits unfair and deceptive practices, suggesting the term is used with the same meaning here. S Rep. No. 111-176 (2010).
commentators, 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 feels is not reasonably in the consumer's interest.  

Depending on how the CFPB interprets this definition of abusive, payday lending could be forbidden entirely.

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. Payday loans arguably fit both definitions. Because these loans are most frequently used by people of lesser means for non-emergencies, the loans can cause substantial injury that is not outweighed by a countervailing benefit. Enforcing this part of the Act requires the CFPB to ask specifically whether the cost of the loan is worth what the consumer pays for it over the full life of the loan. 

Lending practices suggest that lenders do take unreasonable advantage of consumers’ lack of knowledge of the loan terms. Lenders also encourage borrowing whenever possible and discourage paying off the loans.

Customers also have various behavioral biases, including optimism bias and framing. Additionally, payday loan customers are less sophisticated than many other consumers and presumably have less financial knowledge overall. Also, there is much more at stake for them in taking out these loans, which ultimately represent a huge percentage of their


187 Id. Covered persons and their service providers are also required to maintain and share information about their practices with the CFPB. Dodd-Frank Act §1036(a)(2). “[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. Id. §1036(a)(3). Disclosures must be provided not just at the time of the initial loan, but over the life of the relationship. These disclosures must allow consumers to understand the costs, benefits, and risks associated ith the product or service,” Id. § 1032(a). and form disclosures must contain plain language comprehensible to consumers,” have “a clear format and design,” explain information “succinctly.” and be “validated through consumer testing.” Id. § 032(b). Finally, large fines can be assessed for non-compliance. Id. § 1055(c).

188 Again, 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 to competition. While one could quibble about whether consumers could avoid substantial injury from payday loans by using them less frequently and not rolling them over, lenders do what they can to make sure consumers use the products continuously.

189 A product is abusive if it takes unreasonable advantage of one of the following: 1. a lack of understanding of the material risks, costs, or conditions of the product or service; 2. the inability of the consumer to protect his or her interests in selecting or using consumer financial products or services, or 3. reasonable reliance on a covered person to act in the interests of the consumer. You need just one of these for a product to be deemed abusive, and here at least two of three are present.

190 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.

191 Regarding the latter, because consumers are used to hearing interest rates stated in terms of 20-25%and believe that 20% over two weeks equals 20% per annum.
overall cash flow. The costs are high by any standard, but by the average payday loan customer’s standard, they are excessive beyond imagination.192

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

c. The CFPB and Tribes

The CFPB applies to Native Americans as consumers. It was formed to protect all Americans from abusive lending practices.193 The U.S. Treasury’s web site contains a detailed memo about how the CFPB applies to Native Americans and why the issue is important.194 Though this memo does not carry the force of law, it is an indication of the CFPB’s intent, As this Treasury memo explains, Native Americans are more likely to use alternative financial services than other Americans.195

Moreover, as established in Donovan v. Coeur d’Alene Tribal Farm,196 at least in the 11th Circuit, some Federal regulations apply to Native American tribes, notwithstanding sovereign immunity. In Coeur d’Alene, the Coeur D’Alene Tribe argued that it was not subject to OSHA

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192 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.

193 One blogger insists that the CFPB will continue to pick on store-front lenders, but will leave these tribally-affiliated internet lenders alone. See The Daily Caller, Free Market Bandits, http://dailycaller.com/2011/02/22/the-free-market-bandits/, last visited on August 17, 2011.


195 As this memo further states when explaining 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 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.

As to 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 had borrowed a payday loan within the last year were nonwhite while just 22 percent of families who did not take out such a loan were nonwhite.” [Center for American Progress, “Who Borrows from Payday Lenders,” (March 2009)] As to native people 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 (68%), payday loans (67%), pawn shops (58%), and car title loans (50%).

196 751 F.2d 1113 (9th Cir. 1985).
requirements as a result of tribal immunity. The Tribe operated a farm that produced grain and lentils for sale on the open market, and employed both tribal and non-tribal members. After an inspection, the Tribe was cited for 21 violations of OSHA. The Farm did not dispute the facts but argued that OSHA did not apply to them because of tribal immunity.

Holding that federal law applies equally to tribes and everyone else, the Ninth Circuit Court of Appeals established three exceptions to the rule. 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. 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.

i. Interference with Tribal Self-Government

The first prong asks whether the applicability of the federal law in question would interfere with rights of tribal self-government and therefore requires a "clear" expression of congressional intent to apply the Act to tribal enterprises. In the OSHA case, the Court found that interpreting this exception as broadly as the tribe argued would except all tribal businesses from federal regulation. The Court stated in Coeur d’Alene that:

if 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. (citations omitted).

The Court elaborated, stating that “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 relations from the general rule that otherwise applicable federal statutes apply to Indian tribes” not just engaging in regulate open market commerce.197

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 treaty rights. The court found that while, as a general matter, Congress does not intend to abrogate rights guaranteed by Indian treaties when it passes general laws, unless it makes specific reference to Indians, "there is no treaty between the Coeur d'Alene Tribe and the United States government.”

iii. The "Other Indications" Exception

197 The Tribe also argued that the inspector’s presence interfered with the Tribe’s immunity, but the Court disagreed.
As set out above, the third exception requires that there be proof "by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservations."\(^{198}\) This prong addresses whether the legislative history surrounding the law in question (in *Coeur d’Alene it was OSHA*), indicate any congressional desire to exclude tribal enterprises from the scope of its coverage. The “other indications exceptions” 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.\(^{199}\) This means the CFPB’s regulations apply as long as none of the three exceptions set out in *Coeur d’Alene* apply. 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 rules, and domestic relations, or any other internal governance matter. 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.\(^{200}\) As to prong two, as in *Coeur d’Alene*, at least in the cases identified thus far, there is no treaty here between the U.S. 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 memo indicates, there was express intent for the exact opposite, namely for the CFPB to apply equally to tribes and everyone else. Thus, it appears that if nothing else, the CFPB is in position to outlaw or limit internet payday lending in general, regardless of who is doing the lending.\(^{201}\)

**VI. Conclusion: Who Loses When Sovereignty is Sold?**

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\(^{198}\) Again, the question is whether the CFPB necessarily get the powers of the Dodd-Frank. *See supra* note 193.

\(^{199}\) The regulators will not need to enter reservation land but even if they did, this is not interference under *Coeur d’Alene*.

\(^{200}\) So what can the CFPB do, short of setting interest rates? At the very least, the CFPB can insist on removal of the subterfuge and insist that all loans be recorded in a national database accessible by the CFPB. It can then carefully study the industry by closely monitoring lender activity through required lender databases, and by gathering information directly from consumers. The CFPB can rewrite disclosures in a way that parrots those now found on credit card statements, and use customer studies to see if these disclosures are working. It can also require strict underwriting based upon a borrower’s ability to pay back the loan.

As to remedies, it can set and enforce steep penalties for non-compliance that include an absolute inability to enforce any loan that does not comply strictly with the CFPB regulations. It can ban all waivers of trials by consumers, including mandatory arbitration clauses, as well as waivers of class actions. Finally, the CFPB can limit or deny payday lenders access to the banking system, given that banks are used to process the loans. Depending on what the data show, the CFPB might consider outlawing these loans outright, as an unfair, abusive, and/or deceptive practice.

The question of course is whether regulating these products, used mostly by the working poor, will be a priority for the CFPB. Interim Direct of the CFPB Elizabeth Warren included payday lending regulation in her short list of four immediate priorities for bureau enforcement, which included transparency in mortgage markets, disclosures for credit cards and payday loans, financial education, and supervision, enforcement, and fair lending for non-banks.
Sovereignty is the linchpin of tribal self-determination. Scholars are already concerned that broadening sovereign immunity to off-reservation business enterprises will cause the Supreme Court and Congress to limit the immunity, particularly where the immunity extends to non-Indians. Indeed, the U.S. Supreme Court may already be reevaluating its stance toward tribal immunity, a step in the wrong direction for Tribes. 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.

Courts, litigants, and scholars continue to challenge the fairness of corporate immunity at casinos and other businesses that compete in the economic mainstream. Thus far, the U.S. 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 up in the air. Tribes need not allow these parameters to lie in the hands of random courts, and the U.S. 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, the Stevens dissent expressed serious doubts about the legal premise and fairness of tribal immunity from suit for off-reservation commercial activities, when he claims that sovereign immunity in the context of the labor law case is unjust, adding that “Governments, like individuals, should pay their debts and should be held accountable for their unlawful, injurious conduct.”

In light of this situation, 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.” With immunity comes great power, which, if overused, can backfire. Given the power of Congress,
the U.S. Supreme Court, the FTC, and the CFPB, Tribes may find good reasons to steer clear of these partnerships entirely, or to closely regulate them.

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 112, 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.