

USURY ON THE RESERVATION:
REGULATION OF TRIBAL-AFFILIATED PAYDAY LENDERS

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Introduction

Over the last decade, federal and state governments have devised regulation for the payday lending industry, which is comprised of financial companies that offer short-term loans to especially risky borrowers, sometimes at shockingly high interest rates. In order to avoid rules that promote fair lending—but undermine profits—some online payday lenders have claimed affiliation with Native American tribes, invoking tribal sovereign immunity.

In litigation across the country, courts have recognized payday lenders' tribal immunity arguments, stymieing the efforts of state agencies seeking to protect their citizens from excessive interest rates and fees. Even when tribal immunity defenses are defeated in court, states often expend significant time and resources overcoming them. This conflict between payday lenders and regulators raises a number of important questions. What is the extent of tribal immunity and national sovereignty? What are the requirements for a business located on tribal land to claim tribal affiliation? What is the proper source of payday lending regulation: the state or the federal government? If the federal government is the appropriate regulator, can existing financial regulatory agencies effectively address the problem?

This note seeks to answer these questions and proposes a solution to preclude payday lenders from circumventing regulatory oversight. Part I discusses the payday lending industry and the emergence of online payday lenders, recent regulation and payday lenders' claim to tribal affiliation. Part II considers the historical development and the current state of the tribal sovereign immunity doctrine. Part III discusses the authority of federal and state entities to regulate the payday lending industry and the experiences of agencies that have confronted online tribal-affiliated payday lenders. Part IV suggests federal legislation to directly address payday lenders' tribal affiliation claims. Congress, by virtue of its plenary power over Native American affairs could adopt several plausible approaches, but its best option would be to authoritatively define the criteria for tribal sovereign immunity for tribe-affiliated businesses.

I. Latter Day Usury: The Problem of Payday Lending

Throughout history, societies have regulated usury, which is “the lending of money at exorbitant interest rates.”¹ At least as far back as the ancient Israelites, usury was condemned.² Ancient Hindus, early Muslims and medieval Christians, despite their differences in other critical respects, all denounced usury.³ Although the days are gone when towering intellectual figures, such as Dante and Shakespeare, devised imaginatively sadistic punishments for usurers, society still struggles with entities that lend money at excessive interest rates.⁴ Payday lenders are some of the most visible practitioners of lending at very high interest rates. In addition to traditional payday lenders that loan money out of physical stores, in recent years online payday lending has emerged as one of the most intractable consumer protection issues confronting regulators.

A. Conventional Payday Lending

Payday loans are small-dollar, short-term, unsecured loans that borrowers promise to repay out of their next paycheck or regular income payment.⁵ Payday loans are usually priced at a fixed fee, which represents the finance charge for the loan.⁶ For borrowers, the attraction of payday lending is that a loan can be procured quickly

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¹ Definition of *Usury*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/usury> (last visited Apr. 1, 2012).

² See *Ezekiel* 18:17 (New International Version).

³ See Wayne A.M. Visser & Alastair McIntosh, *A Short Review of the Historical Critique of Usury*, 8 ACCOUNTING, BUS. & FIN. HISTORY 175, 175–89 (1998).

⁴ See WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* act 4, sc. 1, II. 229–30 (Jay L. Halio ed., Clarendon Press 1993) (1600); Visser & McIntosh, *supra* note 3, at 181.

⁵ See *An Update on Emerging Issues in Banking: Payday Lending*, FED. DEPOSIT INSURANCE CORP. (Jan. 29, 2003), <http://www.fdic.gov/bank/analytical/fyi/2003/012903fyi.html>.

⁶ *Id.*

and easily, often with little regard to a poor credit history.⁷ The hallmark of a payday loan is its interest rate.⁸ Because of its short maturity, a payday loan can have an extraordinarily high effective annual percentage rate that can exceed 1,000 percent.⁹

Although payday lending is relatively new, the industry has expanded rapidly during the last two decades.¹⁰ This industry's growth is fueled by its profitability.¹¹ In 2008, payday lenders in the United States achieved \$7 billion in revenues from \$42 billion in loans.¹²

But while payday lending is an incredible boon to payday lenders, the practice has not been as good for borrowers. All too often, payday borrowers fail to repay their interest in a timely fashion and, as penalties and finance charges build, borrowers become caught in a cycle of debt.¹³ According to the Center for Responsible Lending, payday lending "costs American families \$4.2 billion per year in excessive fees."¹⁴ Payday lending can be particularly oppressive because the practice targets society's most vulnerable—the poor, the uneducated and underserved minority groups—who

⁷ See Blake T. Williams, *The Dimensions of the Shark Tank: The Appropriate Regulation of Payday Lending in South Carolina*, 62 S.C. L. REV. 623, 625 (2011).

⁸ See *An Update on Emerging Issues in Banking: Payday Lending*, *supra* note 5.

⁹ See *id.*

¹⁰ See JOHN P. CASKEY, *THE ECONOMICS OF PAYDAY LENDING*, FILENE RESEARCH INST., 1 (2002), https://www.cuany.org/access_files/outreach/Filene_-_The_Economics_of_Pay_Day_Lending.pdf.

¹¹ See *id.* at 18.

¹² Michael Hudson & David Heath, *Fights Over Tribal Payday Lenders Show Challenges of Financial Reform*, IWATCH NEWS BY THE CTR. FOR PUB. INTEGRITY, Feb. 7, 2011, <http://www.iwatchnews.org/2011/02/07/2151fights-over-tribal-payday-lenders-show-challenges-financial-reform>.

¹³ See *Payday Lending: How the Debt Trap Catches Borrowers*, CTR. FOR RESPONSIBLE LENDING, www.responsiblelending.org/payday-lending/tools-resources/debttrap.html (last visited Apr. 1, 2012).

¹⁴ Uriah King, Leslie Parrish & Ozlem Tanik, *Financial Quicksand: Payday Lending Sinks Borrowers in Debt with \$4.2 Billion in Predatory Fees Every Year*, CTR. FOR RESPONSIBLE LENDING, 2 (Nov. 30, 2006), http://www.responsiblelending.org/payday-lending/research-analysis/tr012exec-Financial_Quicksand-1106.pdf.

lack savings and access to traditional lines of credit.¹⁵ Although there is some merit to the argument that payday lenders provide an important source of last-line credit for society's poor,¹⁶ many payday lenders' late fees and interest rates are more severe than penalties imposed by traditional lenders.

Owing to payday lending's predatory character, the lending practice has earned the opprobrium of consumer advocates like the Center for Responsible Lending, the Consumer Federation of America and the Better Business Bureau.¹⁷ More critical for their businesses and bottom lines, however, payday lenders draw the ire of state governments that have enacted legislation to curb their abusive practices.¹⁸ In recent years, more than thirty states passed laws that either place significant restrictions on maximum loan amounts, typically limiting loans to \$500, or cap finance charges.¹⁹

State regulations limiting loan amounts and finance charges, as well as lawsuits brought by attorney generals against predatory payday lenders, have reduced the fees charged by some payday

¹⁵ See Amanda Logan & Christian E. Weller, *Who Borrows From Payday Lenders*, CTR. FOR AM. PROGRESS, 5 (Mar. 2009), http://www.americanprogress.org/issues/2009/03/pdf/payday_lending.pdf?bcsi_scan_9AA99EB32CAE9A8A=0&bcsi_scan_filename=payday_lending.pdf; Creola Johnson, *The Magic of Group Identity: How Predatory Lenders Use Minorities to Target Communities of Color*, 17 GEO. J. ON POVERTY L. & POL'Y 165, 174-75 (2010).

¹⁶ *Myth v. Reality*, CMTY. FIN. SERVS. ASS'N OF AM., available at <http://cfsaa.com/about-the-payday-advance-industry/myth-vs.-reality.aspx> (last visited Apr. 1, 2012).

¹⁷ See, e.g., *BBB Warns Against Deceitful Online Payday Lenders*, BETTER BUS. BUREAU (Mar. 23, 2012), <http://www.bbb.org/us/article/bbb-warns-against-deceitful-online-payday-lenders-17855>; *Payday Lending: How a Short-Term Loan Becomes Long-Term Debt*, CTR. FOR RESPONSIBLE LENDING, <http://www.responsiblelending.org/payday-lending/> (last visited Apr. 1, 2012); CONSUMER FEDERATION OF AMERICA'S INFORMATION RESOURCE ON PAYDAY LENDING FOR CONSUMERS AND ADVOCATES, <http://www.paydayloaninfo.org/> (last visited Apr. 1, 2012).

¹⁸ See Emily Wagster Pettus, *Payday Lending Bill Passes in Mississippi House*, BLOOMBERG BUSINESSWEEK, Jan. 19, 2011, <http://www.businessweek.com/ap/financialnews/D9KRE2NG0.htm>; Thanh Tan, *Texas Senate OKs Bills Regulating Payday Lenders*, TEX. TRIBUNE, May 23, 2011, <http://www.texastribune.org/texas-legislature/82nd-legislative-session/texas-senate-oks-bills-regulating-payday-lenders/>.

¹⁹ See *Payday Lending Statutes*, NAT'L CONFERENCE FOR STATE LEGISLATURES (Nov. 1, 2011), <http://www.ncsl.org/?tabid=12473>.

lenders, particularly “brick and mortar” payday lenders that operate out of physical stores.²⁰ But in regulating one branch of this industry, governmental efforts catalyzed the development of another form: tribal-affiliated online payday lenders.

B. Online Payday Lending

Online payday lending is marketing services and providing loans through the Internet, often without maintaining a commercial presence in any physical location. It has existed for years.²¹ But as state governments and regulators reign in industry excesses, online payday lenders have sought refuge from oversight by negotiating with Native American tribes to charter their companies on tribal land to operate as “tribal enterprises” and thereby operate pursuant to tribal—not state—regulation.²² By operating as tribal enterprises and relocating on or near reservations, payday lenders can argue that they have sovereign nation status and are immune from state laws, such as interest rate regulations,²³ which had cut into their profits.²⁴

Critics contend that these payday lenders are not tribal enterprises.²⁵ Rather, their relationships with tribes are ploys to avoid regulation.²⁶ Even industry groups representing payday lenders have come out against their colleagues’ claims of tribal affiliations. In February 2011, the Community Financial Services Association of America, which represents the payday lending industry, condemned

²⁰ See Hudson & Heath, *supra* note 12; Herb Weisbaum, *These Payday Lenders Are Particularly Bad*, MSNBC.COM, Mar. 18, 2010, http://www.msnbc.msn.com/id/35914585/ns/business-consumer_news/t/these-payday-lenders-are-particularly-bad/.

²¹ Letter from National Consumer Law Center to Representatives of Congress (May 11, 2011), *available at* <http://www.consumerfed.org/pdfs/Group-Payday-CFPB-Hill-letter-2011.pdf>.

²² See Joe Mont, *Tribal-Land Payday Loans Spark Reservations*, THESTREET.COM, July 6, 2011, <http://www.thestreet.com/story/11174918/tribal-land-payday-loans-spark-reservations.html>); Hudson & Heath, *supra* note 12.

²³ See Mont, *supra* note 22.

²⁴ See Hudson & Heath, *supra* note 12.

²⁵ See *id.*

²⁶ See *id.*

the practice of affiliating with tribes to circumvent state regulation and threatened such lenders with expulsion.²⁷

Despite criticism from consumer advocates and industry groups, as well as the mostly unsuccessful efforts of state attorney generals to enforce regulations, tribal-affiliated payday lenders operate with relative impunity. Their status beyond the effective reach of regulation is especially troubling as the practice of affiliating with tribes is becoming more common. For example, in July 2011, the Native American Fair Commerce Commission, an inter-tribal Native American lobbying group, issued a press release in support of tribal-affiliated payday lending operations and their immunity from state regulation.²⁸

II. *Tribal Immunity in U.S. Law*

Throughout American history, tribal sovereignty has been a controversial and complicated issue. In 1831, Chief Justice John Marshall formulated the often-repeated description of Native American tribes as “‘domestic dependent nations’ that exercise inherent sovereign authority over their members and territories.”²⁹ In some ways, tribal sovereignty is analogous to the sovereignty enjoyed by foreign nations and states.³⁰ But tribal sovereignty is a *sui generis* legal construction, deviating from traditional forms of sovereignty in critical aspects. While the territorial aspect of tribal sovereignty—concrete geographic boundaries and the identification of tribal land with tribal ownership—has been diminished by legislation and case law over the last 150 years, tribal immunity—the

²⁷ See Press Release, Cmty. Fin. Servs. Ass’n. of America, Storefront Payday Lenders Reject Native American Partnerships (Feb. 10, 2011), available at <http://www.businesswire.com/news/home/20110210006485/en/Storefront-Payday-Lenders-Reject-Native-American-Partnerships>.

²⁸ See Press Release, Native Am. Fair Commerce Coal., The Native American Fair Commerce Coalition Cites the Community Financial Services Association of America (CFSA) With Sovereignty Interference and Discrimination (July 11, 2011), available at <http://www.marketwire.com/press-release/native-american-fair-commerce-coalition-cites-community-financial-services-association-1536716.htm> (last visited Apr. 1, 2012).

²⁹ Okla. Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509 (1991) (citing Cherokee Nation v. Ga., 30 U.S. 1, 2 (1831)).

³⁰ See *id.* at 515.

freedom from suit in U.S. courts—has been strengthened to such a degree that tribes enjoy an immunity possibly exceeding the immunity of state governments.³¹ The paradoxical nature of tribal sovereignty and immunity uniquely situates tribes outside the bounds of federal and state regulation.

Although courts dealt with tribal sovereign immunity at least as far back as the nineteenth century, the Supreme Court did not clearly address the issue until the mid-twentieth century.³² The Supreme Court's decision in *United States v. United States Fidelity & Guaranty Corporation* in 1940 was the seminal case upon which subsequent expansion of tribal immunity was founded.³³ In that case, the Supreme Court held that a bondholder could not enforce a surety against five Native American tribes. The Court explicitly and authoritatively confirmed that tribal governments were exempt from lawsuits in federal court absent congressional authorization.³⁴ The Supreme Court reaffirmed and expanded this principle half a century later in *Oklahoma Tax Commission v. Citizen Band* when it decided that a state could not sue a tribe in federal court to collect taxes on cigarette sales, determining that tribal immunity was broader than "tribal courts and the internal affairs of tribal government."³⁵ "Suits against Indian tribes are thus barred by sovereign immunity absent a

³¹ Under the doctrine of state sovereign immunity, which is affirmed in the Eleventh Amendment of the Constitution, a state possesses sovereign immunity and cannot be sued in federal court unless the state has: 1) consented to suit; 2) the plaintiff is another state; 3) Congress has expressly abrogated area of state immunity; or 4) an *Ex Parte Young* exception applies. See Bless Young & Kurt Gurtka, *An Overview of State Sovereign Immunity*, UTAH STATE BAR (Oct. 24, 2004), http://webster.utahbar.org/barjournal/2004/10/an_overview_of_state_sovereign.html. See also Katherine J. Florey, *Indian Country's Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 597–98 & 623 (2010).

³² Florey, *supra* note 31, at 616. For examples of the Court's nineteenth century decisions, see *Parks v. Ross*, 52 U.S. 362, 374 (1850) and *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 373–74 (8th Cir. 1895).

³³ See Jeff M. Kosseff, *Sovereignty for Profits: Courts' Expansion of Sovereign Immunity to Tribe-Owned Businesses*, 5 FLA. A & M U. L. REV. 131, 134–35 (2009) (surveying the development of tribal immunity law through case law). See generally *U.S. v. U.S. Fid. & Guar. Co.*, 309 U.S. 506 (1940) (recognizing tribal sovereignty).

³⁴ See *U.S. Fid. & Guar. Co.*, 309 U.S. at 512.

³⁵ *Id.* at 510.

clear waiver by the tribe or congressional abrogation.³⁶ Furthermore, in *Santa Clara Pueblo v. Martinez*, the Court ruled that tribes could not be sued for violations of the Indian Civil Rights Act, establishing that tribal immunity included freedom from substantive regulation.³⁷

These precedents firmly established the immunity of tribal governments under U.S. law. But until 1998 the law consistently recognized a distinction between tribal governmental activities, to which immunity applied, and tribal activities, to which it did not. A sea of change occurred with the Supreme Court's 1998 decision in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*³⁸ In *Kiowa*, a company instituted a civil lawsuit in state court to collect on a promissory note signed by a tribal development corporation in Oklahoma City.³⁹ In order to defeat the tribe's claim of immunity from suit, the petitioners contended that tribal sovereign immunity should be limited to transactions made on reservations that specifically involve governmental activities.⁴⁰ The Supreme Court rejected this position. Writing for the majority, Justice Kennedy stated that "[t]o date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred. . . . Nor have we yet drawn a distinction between governmental and commercial activities of a tribe."⁴¹ The Supreme Court concluded that tribal governments enjoyed sovereign immunity for governmental and commercial activities alike, regardless of whether a tribe's actions occurred on or off of tribal land.

Kiowa's recognition of a tribal governmental body's freedom from suit in court did not radically alter the court's conception of tribal immunity. However, subsequent courts interpreted *Kiowa* to extend tribal immunity beyond the governmental sphere to tribally-owned businesses that were operated solely for profit.⁴²

In *Florida Paraplegic Association v. Miccosukee Tribe of Indians*, the Eleventh Circuit relied on *Kiowa* when it ruled that

³⁶ *Id.* at 509.

³⁷ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978). *See also* Florey, *supra* note 31, at 620–21.

³⁸ 523 U.S. 751 (1998).

³⁹ *Id.* at 753–54.

⁴⁰ *Id.* at 755.

⁴¹ *Id.* at 754–55.

⁴² *See* Kosseff, *supra* note 33, at 132.

plaintiffs could not sue a tribal casino for failing to install wheelchair ramps as required by the Americans with Disabilities Act (“ADA”).⁴³ The court stated that although tribes and tribal businesses are “subject” to general applicability statutes, such statutes can only be “enforced” if a “tribe waives its immunity or Congress expressly abrogates it.”⁴⁴ Because the Miccosukee Tribe did not waive its immunity and “no specific reference to Indians or Indian tribes exists anywhere” in the relevant sections of the ADA, the tribal casino was immune from suit.⁴⁵

Courts have even extended tribal immunity to non-member employees of tribal businesses. In *Cook v. AVI Casino Enterprises*, a tribal casino employee, after becoming intoxicated at a work function, drove into a motorcyclist with her car, causing more than \$1 million in personal injuries that included the loss of the motorcyclist’s leg.⁴⁶ The plaintiff sued non-member tribal casino employees who assisted the intoxicated driver to her car, alleging negligence and dram shop liability.⁴⁷ The Ninth Circuit dismissed the plaintiff’s case because the “tribal corporations acting as an arm of the tribe enjoy the same sovereign immunity granted to a tribe itself.”⁴⁸ The court determined that immunity was proper because “economic advantages created by the casino ‘inure[d] to the benefit of the Tribe,’ and that ‘[i]mmunity of the casino directly protect[ed] the sovereign Tribe’s treasury.’”⁴⁹ Furthermore, the court reasoned that “tribal immunity protects tribal employees acting in their official capacity and within the scope of their authority.”⁵⁰ Because the court determined that the employees were acting in their official capacity when they helped the drunk driver to her car, the casino employees named in the suit were protected by tribal immunity.

Since *Kiowa*, courts have extended immunity to tribal businesses and even non-Native American tribal employees, fundamentally transforming tribal sovereign immunity. This broad

⁴³ See *Fla. Paraplegic, Ass’n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1127 & 1130 (11th Cir. 1999) (internal citations omitted).

⁴⁴ *Id.* at 1130–32.

⁴⁵ *Id.* at 1131.

⁴⁶ See *Cook v. AVI Casino Enter.*, 548 F.3d 718, 720–21 (9th Cir. 2008).

⁴⁷ See *id.* at 720.

⁴⁸ *Id.* at 725.

⁴⁹ *Id.* at 726 (citing *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046–47 (9th Cir. 2006)).

⁵⁰ *Id.* at 727.

conception of tribal immunity has permitted tribal groups to pursue a wide range of commercial activities that are beyond effective regulation, including payday lending.⁵¹

III. State and Federal Law and Regulation of Tribal Payday Lenders

State and federal governments are the two sources of possible governmental authority to regulation tribal-affiliated payday lenders. States are the traditional sources of payday lender regulation. But given the exceptional character of tribal-affiliated lenders, the federal government is arguably the appropriate actor to address the development. Below is an overview of recent efforts by several states to regulate tribal-affiliated payday lenders. This overview is followed by an argument that federal government involvement is essential to restrain these lenders.

A. Regulation by State Agencies

During the last decade, state governments have struggled to bring tribal-affiliated payday lenders under their regulatory purview. In 2005, the Colorado Attorney General sought a contempt citation in state court against two online payday lenders that failed to comply with investigative subpoenas.⁵² Unexpectedly, these payday lenders announced that they were enterprises of federally-recognized tribes and therefore immune from suit in state court.⁵³ Colorado's case against these online payday lenders was the first time that a state government encountered a payday lender seeking to avoid regulation based on tribal immunity.⁵⁴ But since that time, other state governments, including California, Maryland, and West Virginia, have confronted tribal immunity defenses when attempting to regulate online payday lenders. Although some states have successfully negotiated settlements with individual payday lenders, such successes are the exception to the rule.

⁵¹ See Kosseff, *supra* note 33, at 132.

⁵² See *Cash Advance & Preferred Cash Loans v. Colorado*, 242 P.2d 1099, 1103 (Colo. 2010).

⁵³ See *id.*

⁵⁴ Hudson & Heath, *supra* note 12.

1. Colorado

In 2005, the Colorado Attorney General and the Administrator of the Uniform Consumer Credit Code (collectively referred to as “Colorado”) issued investigative subpoenas to two out-of-state online payday lenders: Cash Advance and Preferred Cash Loans.⁵⁵ After the lenders’ repeated failures to comply with the subpoena, Colorado sought a contempt citation against the payday lenders.⁵⁶ In response to the contempt citations, Cash Advance and Preferred Cash Loans asserted that they were subdivisions of the Miami and Sioux Nations respectively, claimed tribal immunity and filed a joint motion to dismiss for lack of subject matter and personal jurisdiction.⁵⁷

In response to the payday lenders’ claims of tribal immunity, Colorado pointed out that the divisions of the tribes that allegedly did business as Cash Advance and Preferred Cash Loans did not exist until the spring of 2005, which was two years after the payday lenders started doing business.⁵⁸ Moreover, the tribal enterprises were only incorporated after Colorado started its enforcement actions against the payday lenders.⁵⁹ After two years of consideration, the trial court denied the defendants’ motion to dismiss, stating, “tribal sovereign immunity does not prohibit a state from investigating violations of its own laws within its own borders.”⁶⁰ The payday lenders appealed this decision.⁶¹ The Colorado Court of Appeals reversed the trial court, holding that if the payday lenders were “arms” of the tribes, they would be immune from responding to state investigative subpoenas.⁶² The appeals court remanded the case back to the trial court to determine whether the payday lenders were in fact “arms” of the tribe.⁶³ In 2010, the Colorado Supreme Court

⁵⁵ See *Cash Advance*, 242 P.2d at 1103.

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See Heath & Hudson, *supra* note 12.

⁵⁹ *Id.*

⁶⁰ *Cash Advance*, 242 P.2d at 1104.

⁶¹ See *id.*

⁶² State ex rel. Suthers v. Cash Advance & Preferred Cash Loans, 205 P.3d 389, 405–06 (Colo. App. 2008).

⁶³ See *id.*

affirmed the Colorado Court of Appeals' order to remand the case to the trial court for further fact-finding.⁶⁴

2. California

In 2007, the California Department of Corporations (“CDC”) sought a court order prohibiting five payday lenders, including Ameriloan, US Fast Cash, and One Click Cash from doing business with California residents.⁶⁵ Shortly thereafter, the Miami Nation Enterprise (“MNE”), a subdivision of the Miami Tribe of Oklahoma, filed a motion to dismiss based on lack of subject-matter jurisdiction, alleging Ameriloan, US Fast Cash, and United Cash Loans were trade names that it used for payday lending and were immune from state oversight under tribal sovereign immunity.⁶⁶

The California Superior Court denied this motion, concluding “that tribal sovereign immunity does not apply to off-reservation commercial activity” and that “the application of the tribal sovereign immunity doctrine in this enforcement action would intrude on California's exercise of state sovereignty protected by the Tenth Amendment.”⁶⁷ The California Court of Appeals overturned the lower court, ruling that tribal sovereign immunity extends to “for-profit commercial entities that function as ‘arms of the tribes’” like payday lending businesses.⁶⁸ The appeals court remanded the case to the lower court to determine whether the payday loan companies were “arms of the tribe.”⁶⁹

3. Maryland

In 2011, the Maryland Commissioner of Financial Regulation (“Maryland Commissioner”) sought a cease and desist order against Western Sky Financial, an online payday lender.⁷⁰ In its

⁶⁴ See *Cash Advance*, 242 P.2d at 1110.

⁶⁵ See *Ameriloan v. Superior Court*, 86 Cal.Rptr. 3d 572, 575–76 (Cal. App. 2008).

⁶⁶ See *id.* at 576.

⁶⁷ *Id.* at 575.

⁶⁸ *Id.* at 585.

⁶⁹ *Id.* at 585–86.

⁷⁰ See *In re W. Sky Fin., LLC*, 2011 WL 1540518, at *1 (MD Comm. Fin. Reg.). Western Sky Financial is also currently in litigation with Colorado. See generally Kenneth Long, *Colorado Sues Western Sky Financial for*

complaint, the Maryland Commissioner charged the company with “usurious and unlicensed lending to Maryland consumers” in violation of Maryland’s Financial Institutions Law and Commercial Law Article, which are collectively Maryland’s Consumer Loan Law.⁷¹ Although the Maryland Commissioner recognized that Western Sky Financial’s principal place of business was located on the Cheyenne River Sioux Reservation in South Dakota, the Maryland Commissioner contended that Western Sky Financial is not entitled to tribal sovereign immunity because: 1) the Western Sky Financial’s owner created the business under the laws of South Dakota, not tribal law; 2) the tribe does not own or operate any of the business entities; and, 3) the owner is not a tribal officer of the Cheyenne River Sioux Tribe.⁷²

In response to the cease and desist order, Western Sky Financial utilized tribal sovereign immunity as a mechanism to defeat the order. In March 2011, Western Sky Financial, citing its tribal affiliation, removed the action to United States District Court of Maryland and sought dismissal for lack of subject matter jurisdiction.⁷³ After trading motions to dismiss and motions to remand to state court, the district court eventually remanded the case back to Maryland state court in October 2011.⁷⁴ After six months of procedural jockeying, Maryland can now proceed against Western Sky Financial. But even though the case has been remanded to Maryland state court, Maryland can only now begin addressing whether the payday lender actually enjoys tribal sovereign immunity.

4. West Virginia

In at least one case, a state agency has been able to hold a tribal-affiliated payday lender accountable. In 2007, the West

Exceeding Permissible Interest Rates for Unlicensed Lenders, DEBTORSUNITE.COM (Mar. 29, 2011, 10:57 PM), <http://www.debtorsunite.com/Blog/Debtors-Fight-Back/March-2011/Colorado-Sues-Western-Sky-Financial-for-Exceeding-.aspx>.

⁷¹ In re W. Sky Fin., 2011 WL 1540518, at *5–8.

⁷² See *id.* at *8.

⁷³ See Md. Comm’r of Fin. Regulation v. W. Sky Fin., LLC, et al., Civil No: WDQ-11-0735, 4 (Oct. 12, 2011), available at <http://turtletalk.files.wordpress.com/2011/10/dct-order-granting-remand-to-agency.pdf>.

⁷⁴ See *id.* at 18.

Virginia Attorney General sought to enforce investigative subpoenas against seventeen online payday lenders.⁷⁵ After a hearing, a West Virginia court ordered eight of the lenders to comply with the investigative subpoena.⁷⁶ However, the remaining three lenders—Miami Nation Enterprises, MTE Financial Services and SFS, Inc.—challenged the court's subject matter jurisdiction by claiming tribal sovereign immunity.⁷⁷

Before the court reached the issue of whether these tribal enterprises were immune from West Virginia's investigative subpoena, the West Virginia Attorney General reached a settlement with the three payday lenders in 2008.⁷⁸ According to the terms of the settlement, the tribal lenders would offer cash refunds and cancel debts for 946 West Virginia consumers worth \$128,239.50.⁷⁹ The settlement did not require the tribes to admit any wrongdoing.⁸⁰

In his confrontation with online payday lenders claiming tribal affiliation, West Virginia's Attorney General fared better than most other states. Colorado and California have been unable to overcome sovereign tribal immunity claims. Meanwhile, Maryland had to defeat the tribal-affiliated lenders' attempts to remove to federal court before it could begin to address the merits of its cease-and-desist order in state court.

But West Virginia's settlement was not an unalloyed victory. No tribal payday lenders had to admit guilt, meaning that the West Virginia litigation did not create any precedent that could be used against the lender if they were to harm West Virginia consumers again. Nor did it result in any sort of injunction that would alter the payday lenders' behaviors. In addition, a \$128,000 award split between three payday-lending companies is a relatively meager settlement, which probably has little deterrent effect. Considering the billions that the industry earns every year, the payday lending

⁷⁵ See W. VA. ATT'Y GEN.'S OFFICE, 2007 ANNUAL REPORT, 31 (2007), available at http://www.wvago.gov/pdf/annualreports/2007_report.pdf.

⁷⁶ See *id.* at 32.

⁷⁷ See *id.* See generally Heath & Hudson, *supra* note 12.

⁷⁸ See Press Release, W. Va. Att'y Gen.'s Office, Attorney General McGraw Continues His Success in Halting the Making and Collection of Payday Loans in WV. \$1.57 Million in Total Relief to Date (Sept. 17, 2008), available at <http://www.wvago.gov/press.cfm?fx=more&ID=447>.

⁷⁹ See *id.*

⁸⁰ See Hudson & Heath, *supra* note 12.

enterprises might well consider a settlement just north of \$100,000 as a cost of doing business.

Although state-level regulation is generally regarded as the appropriate source of regulation for the payday industry, the lack of success in enforcing state-level regulation of online tribal-affiliated payday lenders is not encouraging. Given the difficulty states face, the federal government would seem the proper authority to address the issue. Unfortunately, existing federal agencies that could feasibly impose regulations on tribal-affiliated online payday lenders—such as the Federal Trade Commission (“FTC”), and the Consumer Financial Protection Bureau (“CFPB”)—will unlikely be able to do so.

B. Federal Law and Tribal Sovereignty

Federal laws, unlike state laws, are presumed to apply to all persons, including Native Americans.⁸¹ This presumption also applies “to agency regulations promulgated pursuant to statutes,” such as the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act” or “Dodd-Frank”) or the FTC Act.⁸² Although courts hesitate to apply general federal laws and regulations to matters in the sphere of tribal self-government, courts have held that a tribe’s commercial activities with non-Indians that do not involve a tribal right to self-governance do not receive tribal immunity.⁸³ Courts have specifically held that tribal businesses, including payday lenders, are subject to federal laws when they act in their “own commercial interest and not in any official capacity, even if the business is conducted from within Indian lands.”⁸⁴

⁸¹ See *E.E.O.C. v. Fond du Lac Heavy Equip. & Constr. Co.*, 986 F.2d 246, 248 (8th Cir. 1993) (citing *Fed. Power Comm’n v. Tuscarora Indian Nation*, 362 U.S. 99, 120 (1960)).

⁸² Plaintiff’s Motion for Temporary Restraining Order and Other Equitable Relief and an Order to Show Cause Why a Preliminary Injunction Should Not Issue at 27, *FTC v. Payday Fin., LLC, et al.* No. 11-3017 (C.D.S.D. Sept. 6, 2011) (citing *Phillips Petroleum Co. v. U.S. E.P.A.*, 803 F.2d 545, 556 (10th Cir. 1986)) [hereinafter *Plaintiff’s Motion*].

⁸³ See *id.* at 27–28 (citing *In re Nat’l Cattle Cong.*, 247 B.R. 259, 265 (Bankr. N.D. Iowa 2000); *Fla. Paraplegic, Ass’n, Inc. v. Miccosukee Tribe of Indians of Fla.*, 166 F.3d 1126, 1130 (11th Cir. 1999)).

⁸⁴ Plaintiff’s Motion, *supra* note 82, at 28–29 (citing *Gristede’s Foods, Inc. v. Unkechuge Nation*, 660 F. Supp. 2d. 442, 477 (E.D.N.Y. 2009)).

Historically, the Office of the Comptroller of the Currency (“OCC”) oversaw regulation of payday lenders. But under the Dodd-Frank Act, the OCC’s consumer protection duties have been transferred to the CFPB: the CFPB, along with the FTC, has jurisdiction to promulgate and enforce federal consumer protection laws pertaining to financial services.⁸⁵ In contrast to state agencies, courts recognize that federal agencies presumptively have authority to enforce rules on Native American tribes.⁸⁶ But even though courts are more willing to brush aside tribal immunity claims before federal power, there are serious reasons to doubt that the CFPB or the FTC will bring to heel tribal-affiliated payday lenders. While the CFPB is expressly authorized to regulate payday lenders, it is a new agency with a broad mandate, limited resources and an uncertain future. The FTC’s powers, on the other hand, are circumscribed and primarily confined to policing tribal-affiliated payday lenders only where they violate Section 5 of the FTC Act by engaging in unfair and deceptive practices.

1. Consumer Financial Protection Bureau

The Dodd-Frank Act expands federal oversight of financial services, including payday loans. Although payday loans had nothing to do with the recent financial crisis, which motivated the law’s passage, “the Dodd-Frank Act became something of a Christmas tree of provisions favored by those who want to restrict access to certain forms of consumer credit.”⁸⁷ The bill’s drafters vested authority to enforce much of this new regulation with the freshly-minted CFPB.

Pursuant to Dodd-Frank, the CFPB is responsible for enforcing “[f]ederal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and

⁸⁵ See Jenna Greene, *FTC, CFPB Sorting Out Respective Roles in Reducing Financial Fraud*, LAW.COM, Sept. 15, 2011, <http://www.law.com/jsp/article.jsp?id=1202514307035&slreturn=1>.

⁸⁶ See Plaintiff’s Motion, *supra* note 82, at 27.

⁸⁷ Alvin C. Harrell, *Teaching Consumer Law*, 14 J. CONSUMER & COM. L. 87, 95 (2011).

competitive.”⁸⁸ Among the CFPB’s numerous mandates is “issuing rules, orders, and guidance implementing Federal consumer financial law.”⁸⁹ The Dodd-Frank Act specifically grants the CFPB authority to promulgate regulations and supervise non-depository institutions, including payday lenders.⁹⁰

Given its authority over non-depository financial institutions, some commentators identify the CFPB as the appropriate agency to regulate tribal-affiliated payday lenders.⁹¹ Comments from persons associated with the CFPB suggest that the CFPB is likely having internal discussions about its role in regulating tribal-affiliated payday lenders. While she was still being considered for the CFPB’s leadership role, Elizabeth Warren openly addressed the problems of disclosure in payday loan transactions.⁹² According to the Department of the Treasury, the Dodd-Frank Act will empower the CFPB with “robust federal supervision and oversight over larger alternative financial service companies” such as payday lenders on tribal lands.⁹³

In theory, the CFPB could do much to regulate payday lenders. Although the CFPB does not have authority to determine what interest rates payday lenders could set, the CFPB could impose more robust disclosure requirements, limit loan rollovers and loan volume per customer, annul mandatory arbitration or class action waivers or regulate company advertising.⁹⁴ But, the CFPB’s ability to regulate tribal-affiliated payday lenders may be overstated. The

⁸⁸ The Dodd-Frank Wall Street Reform and Consumer Protection Act § 1021(a), 12 U.S.C.A. §5511(a) (West 2010).

⁸⁹ *Id.* at § 1021(c)(5).

⁹⁰ *Id.* at § 1024(a)(1)(E) (granting the Bureau the ability to supervise payday lenders). *See also* Elizabeth Warren, *Warren Outlines CFPB’s Mission for Consumers*, 30-APR AM. BANKR. INST. J. 10, 10 & 103 (2011).

⁹¹ *See, e.g.*, Johnson, *supra* note 15, at 168–69 (advocating for the creation of a federal consumer protection agency and outlining the agency’s purpose).

⁹² *See* Warren, *supra* note 90, at 10 & 103.

⁹³ Fact Sheet, Dep’t of Treasury, The Dodd-Frank Wall Street Reform and Consumer Protection Act Benefits Native Americans (Oct. 2010), *available at* <http://www.treasury.gov/initiatives/wsr/Documents/Fact%20Sheet%20-%20Benefits%20Native%20Americans,%20Oct%202010%20FINAL.pdf>.

⁹⁴ *See* Nathalie Martin, *What Can the CFPB Do To Regulate Payday Lenders?*, CREDITSLIPS.ORG (June 28, 2011, 5:01 PM), <http://www.creditslips.org/creditslips/2011/06/what-can-the-cfpb-do-to-regulate-payday-lenders.html>.

CFPB, despite its robust mandate, has limited resources and, as it establishes its priorities, tribal-affiliated payday lending might fall between the cracks. In addition, the controversial appointment of the CFPB's leader, Richard Cordray, could expose the agency's regulatory actions to legal challenges.⁹⁵ Finally, to date the CFPB has not issued a single enforcement action. The exact scope of the CFPB's jurisdiction will not be clear until 2012 when the CFPB and FTC agree how they will divide their authority.⁹⁶ Although it affects Americans across the country, payday lending is relatively small compared to the CFPB's other prerogatives, which include credit card companies, mortgages companies, and for-profit educational institutions. With the CFPB facing these conflicting priorities, consumers should not be confident that the agency will have the time or resources to address the issue.

2. Federal Trade Commission

In order to ensure a fair and competitive marketplace, the FTC has authority to regulate payday lenders to prevent "unfair" or "deceptive" practices pursuant to Section 5 of the FTC Act.⁹⁷ Because the FTC Act is a law of general applicability, it empowers the FTC to defeat tribal sovereignty immunity in cases involving Section 5 violations.⁹⁸ For example, in September 2011 Payday Financial, LLC ("Payday Financial"), which does business as Lakota and Cash and Big Sky Cash, agreed to stop illegally garnishing borrowers' wages after the FTC filed an action in U.S. District Court.⁹⁹

⁹⁵ See Donal Griffin, *Citigroup Lobbyist Casts Doubt on Obama's Recess Appointment*, BLOOMBERG, Jan. 11, 2012, <http://www.bloomberg.com/news/2012-01-11/citigroup-lobbyist-casts-doubt-on-obama-s-recess-appointment-of-cordray.html>.

⁹⁶ See Greene, *supra* note 85.

⁹⁷ See 15 U.S.C. § 45(a)(1) (2006).

⁹⁸ See *id.* at § 45(a)(2). See, e.g., Plaintiff's Motion, *supra* note 82, at 27.

⁹⁹ See Press Release, Fed. Trade Comm'n, *FTC Action Halts Allegedly Illegal Tactics of Payday Lending Operation That Attempted to Garnish Consumers' Paychecks* (Sept. 12, 2011), available at www.ftc.gov/opa/2011/09/payday.shtm (last visited Apr. 1, 2012). Payday Financial and related businesses offered payday services to consumers through the country, advertising on television and its websites. *Id.* The FTC complained that if consumers missed payment on Payday Financial loans, Payday Financial would send documents to consumers' employers that resembled

The FTC's ability to regulate Payday Financial, however, was based on facts specific to the case. The FTC is not empowered to promulgate rules that cap payday lending interest rates or loan volumes. Nor is the FTC empowered to enforce state laws on behalf of state governments that, unlike the FTC, are often powerless to bring suit against tribal-affiliated payday lenders in court. In *PayDay Financial*, the defendant had a tenuous relationship to the Tribe. Although PayDay Financial's owner was a tribal member, he was not a tribal official.¹⁰⁰ The business was located on a Tribal land, but it was chartered under South Dakota law, not tribal law.¹⁰¹ Furthermore, the defendants admitted that the company was not owned or operated by the tribe.¹⁰²

Even with this loose affiliation, the FTC could only take action because Payday Financial's garnishment of employee wages without a court order was a Section 5 violation. Without this jurisdictional hook, the FTC could not have taken any action against the lender. Unfortunately, payday lenders can cause significant consumer harm without resorting to unfair or deceptive practices that would give rise to a Section 5 violation. Consequently, the FTC will not be able to address the problem of tribal-affiliated payday lenders comprehensively.

IV. Congressional Action: The Prescription for Payday Lending

Because of the difficulties facing government regulators that would regulate tribal-affiliated online payday lenders, Congress should address the industry directly through legislation. Through the U.S. government's treaties with Native American tribes, Congress has the authority to define the scope of tribal sovereign immunity.¹⁰³ It should use this authority to draft legislation that will either exclude online payday lenders from the definition of "tribal-affiliated businesses" or to abrogate tribal sovereign immunity for payday

documents that federal debt collectors use to garnish wages owed to the federal government without a court order. *Id.* The FTC contended that this activity violated Section 5 of the FTC Act as well as the FTC's Credit Practices Rule, the Electronic Funds Transfer Act, and Regulation E. *Id.*

¹⁰⁰ See Plaintiff's Motion, *supra* note 82, at 29.

¹⁰¹ *Id.*

¹⁰² *Id.* at 29–30.

¹⁰³ See *infra* text accompanying notes 110–12.

lending. Congressional action could immediately clarify the law in such a way that would eliminate a predatory practice without resorting to protracted and costly litigation.

The Constitution expressly grants Congress the power “[t]o regulate Commerce with foreign Nations, among the several States, and within the Indian tribes.”¹⁰⁴ Congress’s power over Indian affairs is “plenary and exclusive.”¹⁰⁵ Congress, in its discretion, “may restrict the retained sovereign power” of Native American tribes.¹⁰⁶ Given Congress’s sweeping powers over Indian affairs, Congress has a number of potential tools to end tribal-affiliated payday lenders’ ability to avoid regulation. For example, Congress could employ its powers of “abrogation,” outright restricting tribal sovereign immunity for payday lending activities. Although extreme, courts have recognized that defining the scope and substance of tribal sovereign immunity is within Congress’s powers.¹⁰⁷ Moreover, affirmative congressional action to shape tribal sovereign immunity is not without recent precedent. The Native American Laws Technical Corrections Act of 2000 limited the ability of insurance carriers that work with tribes from raising tribal immunity as a defense in litigation.¹⁰⁸

Removing payday lending from beneath the umbrella of tribal immunity would close the regulatory gap exploited by payday lenders claiming tribal affiliation. However, this remedy, which is most decisive and arguably best for consumers is politically impractical given Washington gridlock and the political influence of payday lenders.¹⁰⁹ Congress is generally reluctant to completely

¹⁰⁴ U.S. CONST. art. I, § 8. *See, e.g.*, *Richmond v. Wampanoag Tribal Court Cases*, 431 F. Supp. 2d 1159, 1163 (D. Utah 2006).

¹⁰⁵ *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 470 (1979).

¹⁰⁶ *Id.* at 501 (citing *United States v. Wheeler*, 435 U.S. 313 (1978)).

¹⁰⁷ *Cook v. AVI Casino Enterprises, Inc.*, 548 F.3d 718, 728 (9th Cir. 2008). *See also Washington*, 439 U.S. at 501; *Wheeler*, 435 U.S. at 313.

¹⁰⁸ *See Kosseff, supra* note 33, at 149.

¹⁰⁹ Figures specifically addressing political spending by tribal-affiliated payday lenders are not available. The payday lending industry has deep pockets that it has used for political purposes in the past: in 2008 in Arizona and Ohio, the industry spent \$30 million in support of a ballot initiative that would have eliminated regulations on payday lending. *See Keith Epstein, Profiting From Recession, Payday Lenders Spend Big to Fight Regulation*, HUFFINGTON POST, May 2, 2010,

curtail an area of tribal sovereign immunity.¹¹⁰ Fortunately, Congress has other more subtle and politically palatable options.

Another method that Congress could employ would be to expressly delegate a portion of its authority over tribes to state governments so that states would have the power to regulate tribal-affiliated payday lenders. Congress is empowered to vest federal authority with the states and has done so in the context of tribal governance.¹¹¹ In 1953, Congress passed PL 83-280, commonly referred to as Public Law 280, which shifted criminal authority to certain states, essentially granting them the power “to enforce the same criminal laws inside Indian country that they enforce[d] outside of it.”¹¹² Theoretically, Congress could similarly delegate responsibility for addressing payday lending.

But just because Congress could vest federal jurisdiction over payday lending to states, Congress should not necessarily take this route. First, carefully defining the grant of power necessary to ensure that states had the authority to comprehensively address the problems associated with payday lending could be difficult. For example, critics contend that Public Law 280 is a complicated statute that has been misapplied by federal and state governments, allowing for states to overreach in some cases.¹¹³ Second, a radical shift of jurisdictional power from the federal government to the states can cause friction with Native American groups. In part, the political controversy surrounding the Public Law 280 resulted in Congress amending the law in 1968 to require tribal consent for the delegation.¹¹⁴

As opposed to an outright ban on payday lending or an unsettling shift of authority to state governments, Congress could do what states are unable to do and what courts have neglected to do: articulate authoritatively the criteria for when payday lenders

http://www.huffingtonpost.com/2010/03/02/profitting-from-recession_n_482297.html.

¹¹⁰ See *Foxworthy v. Puyallup Tribe of Indians Ass'n*, 169 P.3d 53 (Wash. Ct. App. 2007).

¹¹¹ See Eileen M. Luna, *Law Enforcement Oversight in the American Indian Community*, 4 GEO. PUB. POL'Y REV. 149, 152 (1999).

¹¹² *Id.*

¹¹³ See Ada Pecos Melton & Jerry Gardner, *Public Law 280: Issues and Concerns for Victims of Crime in Indian Country*, <http://aidainc.net/Publications/pl280.htm> (last visited Apr. 1, 2012).

¹¹⁴ See K. Bliss Adams, *Order in the Courts: Resolution of Tribal/State Criminal Jurisdictional Disputes*, 24 TULSA L.J. 89, 110 n.182 (1988).

affiliating with Native American tribes are protected by tribal sovereign immunity. Perhaps the simplest way that Congress could define how tribal immunity extends to a payday lending business would be to base immunity on whether the payday lender was created under tribal law and owned by the tribal government.

This approach would have several advantages. First, adopting a litmus-like test premised on tribal ownership is an elegant solution that would provide predictability to payday lenders and tribes as well as being easily administrable by courts. Second, Congress has employed the “tribal-owned” distinction in the past when it established rules governing tribal gaming.¹¹⁵ Under the Indian Gaming Regulatory Act, only tribal-owned gaming businesses are permissible by Congress.¹¹⁶ Congress could feasibly pass an analogous law pertaining to tribal-owned payday lenders. Third, beyond precedent and practicability, immunity based on tribal-ownership would serve the ends of justice as it would specifically prevent non-tribal payday businesses from opportunistically seeking out tribal affiliations to skirt regulation. Fourth, a bright-line rule focusing on tribal ownership would reverse the expansion of tribal immunity by lower courts that has occurred since the *Kiowa* decision.

Alternatively, Congress could opt to define which businesses qualify as “arms” of the tribal government. By prescribing a general arms-of-the-tribe analysis, instead of a payday lending specific rule, Congress could create a global test to determine when a tribal-affiliated business in any industry would enjoy tribal immunity.

To a significant extent, payday lenders affiliating with tribes have been able to avoid regulation not because of the robustness of tribal sovereign immunity, but because of the conflicting standards adopted by state and federal courts to decide whether payday lenders qualify as tribal arms. Courts agree that legitimate tribal agencies, or entities acting “as an arm of the tribe,” are entitled to tribal immunity.¹¹⁷ But with the Supreme Court deferring to a silent Congress on tribal immunity questions, lower courts have devised a

¹¹⁵ Aaron F.W. Meek, *The Conflict Between State Tests of Tribal Entity Immunity and the Congressional Policy of Indian Self-Determination*, 35 AM. INDIAN L. REV. 141, 170 (2011).

¹¹⁶ See Indian Gaming Regulatory Act, 25 U.S.C. §2710(b)(3)(D) (2006).

¹¹⁷ *Allen v. Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006).

multiplicity of tests to determine whether a business is a tribal arm.¹¹⁸ While Alaska primarily analyzes the financial relationship between a business and a tribe when considering whether to extend tribal immunity, Minnesota adopts a more comprehensive multi-factor test.¹¹⁹ New York jurisprudence holds that no arm-of-the-tribe analysis is dispositive and merely suggests factors to courts to consider.¹²⁰ In just Colorado's long-running litigation against the payday lenders Cash Advance and Preferred Cash Loans, Colorado courts articulated arm-of-the-tribe analyses that ranged between three and eleven factors.¹²¹ Unfortunately, federal courts do little to

¹¹⁸ See, e.g., *Kiowa Tribe of Okla. V. Mfg. Tech., Inc.*, 523 U.S. 751, 759 (1998); *Gristede's Foods, Inc. v. Ukechua Nation*, 660 F. Supp. 2d. 442, 467 (E.D.N.Y. 2009).

¹¹⁹ See *Meek*, *supra* note 115, at 158.

¹²⁰ See *id.* (citing *Ransom v. St. Regis Mohawk Educ. & Cmty. Fund, Inc.*, 658 N.E.2d 989, 992 (N.Y. 1995)).

¹²¹ The Colorado Court of Appeals suggested an eleven-factor test to determine whether the payday lenders were arms of the tribe:

- (1) [W]hether Cash Advance and Preferred Cash are organized under the Tribes' laws or constitutions;
- (2) whether the purposes of Cash Advance and Preferred Cash are similar to the Tribes' purposes;
- (3) whether the governing bodies of Cash Advance and Preferred Cash are composed predominantly of tribal officials;
- (4) whether the Tribes have legal title to or own the property used by Cash Advance and Preferred Cash;
- (5) whether tribal officials exercise control over Cash Advance's and Preferred Cash's administration and accounting;
- (6) whether the Tribes' governing bodies have the authority to dismiss members of the governing bodies of Cash Advance and Preferred Cash;
- (7) whether Cash Advance and Preferred Cash generate their own revenues;
- (8) whether a suit against Cash Advance and Preferred Cash will affect the Tribes' finances and bind or obligate tribal funds;
- (9) the announced purposes of Cash Advance and Preferred Cash;
- (10) whether Cash Advance and Preferred Cash manage or exploit tribal resources; and
- (11) whether protection of tribal assets and autonomy will be furthered by extending immunity to Cash Advance and Preferred Cash.

Cash Advance and Preferred Cash Loans v. State, 242 P.3d 1099, 1105 (Colo. 2010) (citing *State v. Cash Advance and Preferred Cash Loans*, 205 P.3d 389, 406 (Colo. App. 2008)). On appeal, the Colorado Supreme Court

provide guidance to this schizophrenic landscape of standards. Federal courts have not adopted an authoritative test to determining whether a business is an arm of a tribe protected by tribal immunity.¹²²

The articulation by Congress of an arm-of-the-tribe standard would eliminate the conflicting approaches devised by courts, thereby clarifying the law and eliminating the uncertainty that hinders regulators from enforcing rules on tribal-affiliated payday lenders. Although a congressional rule defining an arm-of-the-tribe would be more difficult to draft than a narrow curtailment of tribal immunity for payday lending, an arm-of-the-tribe standard has advantages. Like a rule based on tribal ownership, defining what counts as an arm-of-the-tribe would settle unsettled law and prevent the abuse of tribal sovereign immunity. However, the arm-of-the-tribe test would achieve this end without rolling back tribal immunity, which could be politically unpopular.

Beyond providing clarity and coherence, an arm-of-the-tribe rule would also provide continuity. In the two decades since *Kiowa* was decided, lower courts have developed significant case law extending and defining tribal sovereign immunity. For good or ill, parties have come to rely on the opinions and interpretations developed in these cases. To nullify them by radically eliminating tribal immunity in an entire industry would create a rupture in the law and the real world. Payday lenders that are owned and operated by tribal members or provide loans specifically to tribal members on tribal lands are likely legitimate organizations. These companies and their customers would be unfairly impacted by a radical reinterpretation of tribal sovereign immunity. Devising a clear arm-of-the-tribe test would coexist with case law since *Kiowa*, providing an incrementalist solution that promotes justice and administrability through redefinition, not revolution.

Perhaps most importantly, the creation of an arm-of-the-tribe rule would have a positive impact beyond the debate about tribal-affiliated online payday lenders. The question about the appropriateness of tribal immunity regularly arises in a variety of legal contexts as well as in other industries where tribes are active,

reduced the arm-of-the-tribe to a three factor test: “(1) whether the tribes created the entities pursuant to tribal law; (2) whether the tribes own and operate the entities; and (3) whether the entities’ immunity protects the tribes’ sovereignty.” *Id.* at 1110.

¹²² See, e.g., *Gristede’s Foods*, 660 F. Supp. 2d. at 477.

such as casinos and ski resorts. By defining which entities outside of the tribal government enjoy tribal sovereign immunity, Congress can clarify a wide range of cases, which will likely only increase as tribal businesses across the country continue to earn large revenues and diversify into new industries.¹²³

Conclusion

Abuses in the payday lending industry have negatively impacted families and individuals across the United States. Although state governments have passed and enforced laws that have transformed payday lending terms and practices to the benefit of consumers, the trend of online payday lenders affiliating with Native American tribes threatens to undermine these regulations.

In many cases, tribal immunity prevents state governments from imposing financial regulation and oversight on entities claiming tribal affiliation. While federal agencies charged with consumer financial protection could theoretically restrain these payday lenders' practices, jurisdictional constraints, in the case of the FTC, or limited resources and expertise, as with the CFPB, raise doubts about whether they can effectively address the issue. Nor is a solution from courts forthcoming given the Supreme Court's express deference to Congress on the issue of tribal immunity. Because of its plenary power over Native American tribes, Congress has the authority and ultimate responsibility to ensure that online payday lenders cannot avoid regulation by claiming ersatz affiliation with a tribe. Congress has many means at its disposal, but the best solution would be to pass legislation authoritatively defining what constitutes an arm of a tribe for the purposes of determining the scope of tribal immunity. This course of action would instill greater uniformity, predictability and fairness in the payday lending industry while articulating a standard applicable to regulation of all tribal businesses.

During this time of economic crisis and flux, Congress has many competing priorities. While payday lending is not as compelling as bank bailouts, comprehensive financial reform and debt ceiling debates, Congress should not neglect this issue. Abuses by payday lenders have cost vulnerable families billions of dollars. Although poverty knows no race, these families disproportionately

¹²³ See generally Alysa Landry, *Census: American Indian Populations Are on the Rise*, FARMINGTON DAILY TIMES, Nov. 29, 2011, http://www.daily-times.com/ci_19429836.

include minorities such as blacks, Latinos and, ironically, Native Americans, who overwhelmingly consider payday lending a problem in their communities.¹²⁴ It is incumbent on Congress to protect the neediest in society from rogue financial companies that evade regulation for their own enrichment. Furthermore, Congress energetically addressing fabricated tribal affiliation would send a message to Native American groups that, by allowing tribal immunity to be used as a shield for unfair lending practices, tribes hazard the possibility that Congress might restrict their tribal sovereign immunity. This warning should resonate with tribes that are now experiencing unprecedented economic growth and have much to lose by the curtailment of their tribal sovereign immunity.

¹²⁴ See FIRST NATIONS DEVELOPMENT INSTITUTE, *BORROWING TROUBLE: PREDATORY LENDING IN NATIVE AMERICAN COMMUNITIES 2* (2008).