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INTRODUCTION

Imagine being in an emergency or crisis—you need cash now that you do not have. You are desperate to pay your mortgage and feel as if you have nowhere to turn. Then you see an advertisement, a company offering fast cash advances to help people just like you in times of need! This advertisement, which is typical of payday lenders, praises the various aspects of the product that make it perfect for you: "[O]ur special qualification requirements ensure that you do not need good credit;"[1] "Your repayment is the best part. The minimum required payment will be deducted from your bank account;"[2] "Still a little short on payday? No problem! Online customers are

1. GREENSTARCASH, https://www.greenstarcash.com/ (last visited Nov. 15, 2012).

2. *Frequently Asked Questions*, AMERILOAN, https://ameriloan.com/?page=info_faq (last visited Nov. 15, 2012).

automatically renewed every pay period."[3] Though you are hesitant, thinking this product is too good to be true, you decide to cast aside your reservations and apply. Scenarios similar to the one just described cause many Americans to become victims of the predatory practices of payday lenders.[4] Deceptive advertisements targeted at desperate consumers frequently occur in the payday lending industry because of the large profits companies generate from these abusive and harmful tactics.

Although the desire for prosperity is a principle that drives our economy, regulators have recognized that this desire does not come without its risks. Before governments regulated the commercial sector, businesses seeking to increase their profits commonly used corrupt practices against consumers to gain an advantage over their competitors.[5] In response, state and federal agencies emerged to respond to these tactics by regulating businesses through consumer protection laws.[6]

In addition to protecting the rights of consumers, the federal government has historically protected the seemingly unrelated right of Native American tribes to govern their own affairs. This right has been essential to the relationship between the United States and tribes since the eighteenth century.[7] The federal government characterizes Native American tribes as sovereign entities, "free from state intrusion" on their right to self-governance.[8] As colonists immigrated to America, their encroachment on Indian lands created tension in the relationship between the colonists and tribes.[9] To avoid conflict, the federal government took control of Native American

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3. *Id.*

4. *See generally* Jessica Silver-Greenberg, *Payday Lenders Join with Indian Tribes*, WALL ST. J. (Feb. 10, 2011), http://online.wsj.com/article/SB10001424052748703716904576134304155106320.html (describing one woman's experience with payday lenders in Virginia).

5. *See* CAROLYN L. CARTER, NAT'L CONSUMER LAW CTR., CONSUMER PROTECTION IN THE STATES 6 (2009), http://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf.; Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 77–78 (2003).

6. *See* BLACK'S LAW DICTIONARY 359 (9th ed. 2009) (defining consumer protection laws as "state or federal statute[s] designed to protect consumers against unfair trade and credit practices involving consumer goods, as well as to protect consumers against faulty and dangerous goods").

7. *See* WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 74 (4th ed. 2004) ("The Trade and Intercourse Acts [passed between 1790 and 1834] made no attempt to regulate the conduct of Indians among themselves in Indian country; that subject was left entirely to the tribes.").

8. *Id.* at 74–75.

9. *Id.* at 12.

affairs[10] and recognized Indian tribes as "distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil."[11] The federal government continues to regard Native American self-governance as a highly protected interest, which has allowed this relationship to persist over time.[12]

In most modern contexts, the interests of consumers and tribes typically coexist without conflict. However, these interests have recently collided, causing problems for regulators. In the normal course of governance, state regulators take the primary role in protecting consumers through the enactment of consumer protection laws.[13] It is this important role of state regulators in protecting consumers, however, which has led to the new collision of interests.

As new consumer threats emerge, state agencies quickly respond with regulation and enforcement to combat those threats.[14] Yet, the emergence of a new threat—tribally owned Internet payday lending companies—has halted state enforcement efforts. Although the federal government has not yet regulated the payday lending industry,[15] consumer advocates have concluded that payday loans are unfair and abusive to consumers,[16] which has led states to be particularly active in regulating the industry.[17] While some states have restricted the terms of these loans to make their effect on consumers less harmful, others have eliminated the payday loan industry entirely.[18]

Characteristically, payday lenders adapt quickly to new consumer protection efforts by coming up with schemes to get around

10. *Id.*

11. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832), *superseded by*, various state Enabling Acts, *as recognized in* Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

12. *See* CANBY, *supra* note 7, at 75.

13. *See* CARTER, *supra* note 5, at 6; Colin Provost, *State Attorneys General, Entrepreneurship, and Consumer Protection in the New Federalism*, PUBLIUS: J. FEDERALISM, Spring 2003, at 37–38 (describing the regulation shift from the federal government to the states in the 1970s).

14. *See* CARTER, *supra* note 5, at 6.

15. *See* Nathalie Martin, *Payday Loans: Why This Should Make the CFPB's Short List*, 2 HARV. BUS. L. REV. ONLINE 44, 47–48 (2011), http://www.hblr.org/wp-content/uploads/2011/07/Martin-Payday-Loans.pdf.

16. *See, e.g.*, *id.* at 48–49.

17. *See id.* at 47–48.

18. *See generally* Leah A. Plunkett & Ana Lucía Hurtado, *Small-Dollar Loans, Big Problems: How States Protect Consumers from Abuses and How the Federal Government Can Help*, 44 SUFFOLK U. L. REV. 31 (2011) (examining state regulation of payday lenders).

restrictions.[19] Until recently, states have responded quickly and successfully to nullify these attempts.[20] Nonetheless, the latest method of circumventing state laws through tribally owned payday lenders may prove to be an exception to this norm, leaving states ill-equipped to protect consumers.

Tribal ownership of a company creates an obstacle for states due to the doctrine of Native American tribal immunity, which limits state control over tribes.[21] Under federal law, immunity prohibits states from bringing enforcement actions against federally recognized Indian tribes or the businesses that they own.[22] Instead, the authority to enforce regulations against the tribes belongs solely to the federal government.[23] Because states exclusively regulate payday lending[24] and may not bring enforcement actions against tribes, tribally owned lenders escape regulation, leaving them free to market harmful products to consumers.[25] Without federal regulation addressing this issue, tribal companies can evade laws applicable to other payday lenders while state regulators are powerless to stop them.

Tribal lenders who argue against enforcement highlight the importance of tribal economic development to their self-determination.[26] However, in the context of Internet payday lending, this argument has less force than it has in the past. For example, in the case of businesses such as Native American-owned casinos, which are located mostly on tribal land, consumers are aware of the company's tribal ownership and the business activity is geographically contained.[27] Internet tribal payday lenders, by contrast, offer their

19. *See* Martin, *supra* note 15, at 47–48 (describing the practice of payday lenders devising new schemes to get around consumer protection laws).

20. *See id.*

21. *See* CONFERENCE OF W. ATT'YS GEN., AMERICAN INDIAN LAW DESKBOOK 288–89 (Clay Smith et al. eds., 4th ed. 2008).

22. *See id.* at 288 ("A core element of tribal sovereignty is a common law immunity from suit against all but the federal government.").

23. *Id.*

24. *See* Martin, *supra* note 15, at 47–48 (noting that "[n]umerous states have made regulating payday loans a priority" and asserting that the Consumer Financial Protection Bureau has the authority to join in regulating payday loans if it chooses).

25. *See* Silver-Greenberg, *supra* note 4.

26. *See, e.g.*, Ameriloan v. Superior Court, 86 Cal. Rptr. 3d 572, 576 (Ct. App. 2008) (noting that the lending business was formed "for the purpose of supplying a self-sustaining and diversified stream of revenues for the tribe"); Silver-Greenberg, *supra* note 4 ("[T]he chief of the Modoc tribe in Miami, Okla., said getting into the payday-loan business has generated jobs that are a welcome addition to the tribal-owned [businesses].").

27. *See* Brian C. Lake, Note, *The Unlimited Sovereign Immunity of Indian Tribal Businesses Operating Outside the Reservation: An Idea Whose Time Has Gone*, 1996

products online to consumers anywhere in the United States, many of whom are completely unaware of the company's tribal ownership.[28] To make matters worse, many regulators believe that tribal lenders organize under "rent-a-tribe" schemes,[29] where existing nontribal lenders "affiliat[e] with tribes . . . to skirt existing laws and oversight."[30]

As tribal payday lending becomes more prevalent, there is a dire need for federal action to halt the trend's momentum. In 2010, tribal payday lenders made up "[m]ore than 35 of the 300" Internet payday lenders and made "about $420 million in payday loans."[31] The need for regulation of this conduct is imminent—"[s]ome observers predict that the number of tribes with payday-loan operations eventually could climb close to the 400 that now have casinos."[32] Additionally, various lenders have shown an interest in copying the tribal lending business model, which will likely result in additional industry growth.[33] In the absence of federal regulation, the number of companies targeting consumers will increase, rendering previous state regulation efforts futile.

This Comment argues that federal action is necessary to block attempts by payday lenders to bypass consumer protection laws by organizing as tribal entities. Because the federal government does not currently regulate payday lending and tribes are immune from state suit, states are unable to protect their consumers from the practices that they have previously fought to curtail. Due to these obstacles, this Comment proposes possible solutions that can prevent tribal payday lending companies from circumventing state consumer protection laws. Part I provides background information introducing the specific problems that states have encountered in their initial

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COLUM. BUS. L. REV. 87, 88 (1996) (arguing that unlimited sovereignty should not be extended to off-reservation tribal businesses because conditions that apply only to off-reservation businesses would result in unfairness to third parties).

28. *See* Silver-Greenberg, *supra* note 4 (noting that one borrower was unaware that her loan was coming from an Indian tribe).

29. Karen K. Harris & Kelly Ward, *Rent-a-Tribe Payday Lenders*, THE SHRIVER BRIEF (Feb. 14, 2011), http://www.theshriverbrief.org/2011/02/articles/asset-opportunity/asset-building/rentatribe-payday-lenders/.

30. Amy Biegelsen, *Maryland Challenges Online Payday Lender Owned by Tribal Member*, CENTER FOR PUB. INTEGRITY (Mar. 21, 2011, 3:09 PM), http://www.publicintegrity.org/2011/03/21/3692/maryland-challenges-online-payday-lender-owned-tribal-member.

31. Silver-Greenberg, *supra* note 4.

32. *Id.*

33. *See id.* ("In the past 18 months, more than 1,000 payday lenders have expressed interest in cloning the strategy used at the Overland Park call center . . . .").

regulation efforts against these companies. Part II describes why tribal payday lending cases are so rare and analyzes this body of case law. Part III analyzes why state regulation is inadequate and the reasoning behind the need for a federal response to this practice. Finally, Part IV examines what courses of action may be taken and which of those proposals are most likely to quickly and effectively address the problem.

I. INTERSECTION OF PAYDAY LENDING AND TRIBAL IMMUNITY

A. *Payday Lending*

The harmful lending structure of payday loans has caused many state regulators to take action to combat these abusive practices. Payday loans uniquely combine very high interest rates, short loan periods, and small loan amounts in a way that, many times, leaves consumers in a debt trap.[34] Typically, the process requires the borrower to provide an advance check or an authorization to directly debit money from a personal account as a promise to repay the loan in full, plus a large lender fee, at some future date.[35] When the loan is due for repayment, the lender notifies the borrower of his intention to process the advance payment or direct debit, though many borrowers are unable to repay the loan amount in full.[36] In an effort to avoid fees for bounced checks or overdrafts, the borrower can agree to an additional lender fee to extend the loan, which he is also often unable to pay. This process traps the borrower in a debt cycle as the borrower continually adds fees to the loan in an effort to keep the existing loan outstanding.[37]

The need for payday loan regulation arises as a result of payday lenders' predatory lending methods and practices.[38] When applying for a traditional loan, the lender evaluates the borrower's ability to repay before the lender is willing to fund the loan. The lender will not fund a loan if the lender believes that the borrower will be unable to

34. *See* LAUREN K. SAUNDERS, LEAH A. PLUNKETT & CAROLYN CARTER, NAT'L CONSUMER LAW CTR., STOPPING THE PAYDAY LOAN TRAP 4 (2010) (describing the characteristics of payday loans).

35. *Payday Lending: How the Debt Trap Catches Borrowers*, CENTER FOR RESPONSIBLE LENDING, http://www.responsiblelending.org/payday-lending/tools-resources/debttrap.html (last visited Nov. 15, 2012) [hereinafter *Debt Trap*].

36. *Id.*

37. *Id.*

38. *See generally* Plunkett & Hurtado, *supra* note 18 (arguing that states, Congress, and the Consumer Financial Protection Bureau should work together to regulate small-dollar lending).

repay the loan according to its terms.[39] However, in the payday loan industry, this initial evaluation does not take place. In fact, payday lenders characteristically target poor Americans, who are less likely to repay their loan in full, which increases the lender's revenue through extensive charges.[40] The Federal Reserve Board reported in 2007 that the median income of payday borrowers was just above $30,000.[41] By targeting these vulnerable borrowers—namely those consumers who are poor, elderly, minorities, or dependent on government benefit programs for their main source of income[42]—lenders profit by providing loans to individuals who are likely unable to pay them back.[43] As stated above, when a consumer finds himself unable to pay back a loan, he will typically extend his loan to avoid default.[44]

The payday loan industry's practice of attracting repeat borrowers is incredibly profitable.[45] The Center for Responsible Lending, reporting on loan data generated from public records, found that "more than 80 percent of borrowers . . . take out more than one payday loan a year."[46] Focusing on these repeat borrowers, the study found that borrowers "open new loans in rapid succession, with 87 percent of all new loans to these borrowers occurring during the very next pay period."[47] Borrowers who immediately take out new loans during their next pay period account "for three-fourths of all payday loan volume . . . totaling more than $20 billion" in loans and "$3.5 billion in fees each year."[48]

Additionally, payday loans come with exorbitantly high interest rates—running from "391% to 782%."[49] Lenders pair such interest

39. *Debt Trap*, *supra* note 35.

40. *See* SAUNDERS, PLUNKETT & CARTER, *supra* note 34, at 4 (noting that payday lenders "use specialized credit reporting services that track the subprime market" and depend largely on those who take out new loans to pay off previous payday loans).

41. *Id.* at 5.

42. *See id.*; Scott A. Hefner, *Payday Lending in North Carolina: Now You See It, Now You Don't*, 11 N.C. BANKING INST. 263, 267 (2007) (describing typical payday loan borrowers).

43. SAUNDERS, PLUNKETT & CARTER, *supra* note 34, at 4.

44. *See Debt Trap*, *supra* note 35.

45. *See id.* (describing the profitability of repeat customers for payday loan companies); *see also* SAUNDERS, PLUNKETT & CARTER, *supra* note 34, at 4.

46. LESLIE PARRISH & URIAH KING, PHANTOM DEMAND: SHORT-TERM DUE DATE GENERATES NEED FOR REPEAT PAYDAY LOANS, ACCOUNTING FOR 76% OF TOTAL VOLUME 2 (July 9, 2009), http://www.responsiblelending.org/payday-lending/research-analysis/phantom-demand-final.pdf.

47. *See id.*

48. *Id.* at 3.

49. SAUNDERS, PLUNKETT, & CARTER, *supra* note 34, at 4.

rates with a complete lack of transparency in loan terms, leaving the majority of borrowers unaware of the actual terms of their lending agreements.[50] As a result, payday loan borrowers frequently allege that their lender failed to disclose various harmful loan terms before they entered into the agreement.[51]

Meanwhile, payday lenders deny the findings of consumer advocates and insist that they market their loans to middle-class Americans as short-term relief in rare times of crisis.[52] Despite the contentions of industry leaders, the facts above stand in direct opposition to these claims.[53] Lenders also argue that payday loans are beneficial to consumers—by providing emergency cash to consumers without other options, lenders help borrowers avoid overdrawing their accounts.[54] However, it is inaccurate to depict most borrowers as without other options; research suggests that "payday borrowers tend to have a variety of options besides taking [a] payday loan or incurring an overdraft fee."[55]

States have reacted to the harmful practices of payday lenders by restricting or eliminating payday lending through regulation of loan terms, amounts, costs, fees, annual percentage rates ("APR"), and the number of loans a person may take out.[56] Many states also have interest rate caps that apply to all loans. Previously, before states fully realized the dangers of payday lending, payday lenders successfully lobbied for exemptions from these caps.[57] As the harmful effects of these loans became more apparent to lawmakers, many states eliminated these exemptions.[58] States that have banned the payday loan industry or capped interest rates have been extremely successful in protecting consumers from payday lenders.[59] If tribal lenders

50. Martin, *supra* note 15, at 46–47.

51. *See id.*; *see also* Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending?*, 87 MINN. L. REV. 1, 119–20 (2002).

52. *See* CTR. FOR RESPONSIBLE LENDING, PAYDAY LOANS PUT FAMILIES IN THE RED 1 (Feb. 2009), http://www.responsiblelending.org/payday-lending/research-analysis/payday-puts-families-in-the-red-final.pdf [hereinafter FAMILIES IN THE RED].

53. *See supra* text accompanying notes 40–48.

54. FAMILIES IN THE RED, *supra* note 52, at 1.

55. *Id.*

56. *See generally* Plunkett & Hurtado, *supra* note 18 (examining state regulation of payday lenders).

57. SAUNDERS, PLUNKETT & CARTER, *supra* note 34, at 10.

58. *Id.*

59. *See id.* at 10–11 ("Currently, 14 jurisdictions—soon to be 15—either ban payday loans or subject them to an interest rate cap of 36% annual percentage rate ("APR") or less. Some of these states permit an origination fee, but the APR for a two-week, six-month, and 12-month loan is well below triple-digits in all of those states even with the fee included.").

remain unregulated, these successful state efforts to protect consumers will likely have been in vain.

B. Tribal Immunity

Tribal immunity significantly hinders the State's ability to effectively regulate tribal payday lenders. Since colonization, American governments have considered Native American tribes to be "domestic dependent nations"[60] that retain the right of self-governance over their lands.[61] Due to the sovereign nature of tribes, the United States Supreme Court developed the doctrine of Native American tribal immunity in *United States v. United States Fidelity & Guarantee Co.*[62] Under this doctrine, Native American tribes are generally immune from suit in any court unless they consent to being subject to jurisdiction.[63] Though this domestic dependent status grants tribal immunity from suit, Congress has always retained plenary control over tribal affairs.[64]

While the Constitution protects Native American property interests, there is no such constitutional right to sovereign immunity. Thus, Congress has the power to limit tribal immunity through legislation.[65] However, it is overwhelmingly clear that this power to intrude into tribal affairs does not extend to the states.[66] The prohibition against state laws being applied to tribes prevents states without tribal territory from undermining the tribal right to self-governance.[67] Based on these standards, the Supreme Court in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*[68] barred suits against tribes "absent a clear waiver by the tribe or congressional abrogation."[69] Regarding tribal activity outside of tribal territory, however, states are free to regulate tribal conduct where federal law does not preempt them from doing so.[70]

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60. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

61. CONFERENCE OF W. ATT'YS GEN., *supra* note 21, at 287.

62. 309 U.S. 506 (1940).

63. *See id.* at 514.

64. *See* CANBY, *supra* note 7, at 93.

65. *See id.*

66. *See id.* at 87 ("[T]he Supreme Court has almost always held the line against permitting state law to apply to Indians in Indian country.").

67. Williams v. Lee, 358 U.S. 217, 223 (1959).

68. 498 U.S. 505 (1991).

69. *Id.* at 509.

70. *See* Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 755 (1998) ("We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country.").

As tribes increasingly began to engage in commercial activity, regulators argued that immunity should not protect this activity on the grounds that it was "so detached from traditional tribal interests that the . . . doctrine no longer ma[de] sense."[71] Initially, Justice Stevens stated that it was unclear whether the doctrine required immunity to protect commercial activity outside of tribal territory.[72] However, the Supreme Court subsequently clarified Justice Stevens' assertion by adamantly confirming that tribal immunity applies equally to commercial activity, even activities occurring outside of tribal land.[73] Thus, while states technically have the authority to "regulate" tribal activity outside of tribal land, states may not enforce these regulations because tribes are immune from state enforcement.[74] The Court in *Kiowa Tribe v. Manufacturing Technologies, Inc.* explained the state authority to regulate tribes by noting that "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them."[75]

While the Supreme Court holds that tribes are immune from suits based on their commercial activities,[76] this immunity applies only to the tribe itself and to "arms of the tribe."[77] The tribe's immunity does not protect businesses that are completely independent of the tribe.[78] While this standard is clear, it is difficult for state courts to determine when a company is an "arm of the tribe" for various reasons.

First, the Supreme Court has not established a test for courts to determine when a business entity is an "arm of the tribe" and thus entitled to the tribe's immunity. Because raising a tribal immunity defense does not confer independent federal question jurisdiction, the

71. *Citizen Band*, 498 U.S. at 510.

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

73. *See Kiowa Tribe*, 523 U.S. at 760 ("Tribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation.").

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

75. *Id.*

76. *See, e.g.*, Ameriloan v. Superior Court, 86 Cal. Rptr. 3d 572, 578 (Ct. App. 2008) (citing *Kiowa Tribe*, 523 U.S. at 754) (acknowledging the Supreme Court's position that "[a]n Indian tribe's sovereign nation status confers an absolute immunity from suit in federal or state court, absent an express waiver of that immunity or congressional authorization to sue").

77. FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 7.05[1][a], at 636 (2005).

78. *See id.*

defense leaves state courts to determine the relationship between the business entity and the tribe.[79] This has resulted in the use of different test in different states to determine whether a business is an "arm of the tribe" and thus protected by the tribe's immunity.[80] Although courts may use the factors in different ways,[81] they normally look to some combination of these factors to determine whether a tribe's immunity protects a business entity: (1) "[w]hether a judgment against the tribal entity will reach the tribe's assets," (2) "[w]hether the tribal entity has the power to bind the tribe's assets or to obligate tribal funds," (3) "[w]hether the tribe and the tribal entity are closely linked through governance structure and other characteristics," (4) "[w]hether federal Indian law policies intended to promote tribal self-determination would be furthered by extending immunity to the entity," (5) "[w]hether the entity is organized for governmental or for 'commercial' purposes," (6) "[w]hether the entity holds title to property in its own name," and (7) "[w]hether the entity is legally separate and distinct from the tribe."[82] Because each state court employs a different test to determine the status of a business entity, contradictory outcomes may result for the same company in different states.[83]

Second, the various structures used to incorporate tribal businesses further complicate the state courts' determinations. Corporations may organize under the Federal Indian Reorganization Act,[84] tribal corporate law, or state corporate law.[85] Courts are split over whether to treat corporations organized under the Indian Reorganization Act as arms of the tribe; some have held that tribal immunity extends to the business activities of those corporations, whereas others have found the "sue and be sued" clause of the corporate charter to function as a waiver of immunity.[86] To form a corporation under federal law, the tribe must apply to the Secretary

79. *See* Okla. Tax Comm'n v. Graham, 489 U.S. 838, 841 (1989) ("[T]he existence of a federal immunity to the claims asserted does not convert a suit otherwise arising under state law into one which, in the statutory sense, arises under federal law.").

80. *See* KAREN J. ATKINSON & KATHLEEN M. NILLES, OFFICE OF INDIAN ENERGY & ECON. DEV., TRIBAL BUSINESS STRUCTURE HANDBOOK A-1 (2008), http://permanent.access.gpo.gov/lps125418/tribal_business_structure_handbook.pdf.

81. *Id.*

82. *Id.*

83. Petition for Writ of Certiorari at 16, Wright v. Colville Tribal Enter. Corp., 550 U.S. 931 (2007) (No. 06-1229), 2007 WL 737603 at *16 [hereinafter Petition for Writ of Certiorari].

84. 25 U.S.C. § 477 (2006).

85. ATKINSON & NILLES, *supra* note 80, I-5 to I-6.

86. *Id.* at I-5.

of the Interior, who scrutinizes its application and makes a determination of the business's status as an "arm of the tribe."[87] Although this process is more difficult than incorporating under tribal law, once a business is characterized as an "arm of the tribe," immunity automatically attaches.[88] In contrast, businesses chartered under tribal law are beneficial to the corporation because "they are relatively easy to establish compared to federally chartered corporations."[89] Under tribal law, a corporation follows whatever incorporation process the tribe requires and is not first scrutinized by the federal or a state government. Because companies that organize under tribal law do not undergo any scrutiny by federal or state governments, it seems illogical for courts to use the same test to determine tribal ownership of federally chartered and tribally chartered corporations—however, courts tend to do so.[90] As a result, courts generally consider tribally organized corporations immune from state regulation.[91]

Finally, after tribal corporations are organized, they may evolve into various business entities and diminish the business's connection to the tribe.[92] It is unlikely that any court would deem these evolved entities "arms of the tribe," but because tribal immunity extends to the discovery phase of litigation, courts are unable to investigate the disconnected nature of the evolved businesses.

Although the federal government originally considered tribal immunity necessary to "promote tribal self-government and economic development,"[93] in recent years, the Supreme Court has questioned the doctrine's continued propriety.[94] In questioning tribal immunity, the Court acknowledged that "tribal immunity extends beyond what is needed to safeguard tribal self-governance."[95] In the context of contemporary commerce, it was evident to the Court that

87. *See id.*

88. *Id.*

89. *Id.* at III-1.

90. *See, e.g.*, Petition for Writ of Certiorari, *supra* note 83, at 13.

91. *See* ATKINSON & NILLES, *supra* note 80, at III-1. ("[T]ribally chartered corporations, unlike state chartered entities, are considered to be largely exempt from state regulation . . . .").

92. Petition for Writ of Certiorari, *supra* note 83, at 13.

93. CONFERENCE OF W. ATT'YS GEN., *supra* note 21, at 290 (citing Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 510 (1991)).

94. *See id.*; *see also* Kiowa Tribe v. Mfg. Tech., Inc., 523 U.S. 751, 758 (1997) (stating that "there are reasons to doubt the wisdom of perpetuating the doctrine"); *Citizen Band*, 498 U.S. at 514 (lamenting that "[t]he doctrine of sovereign immunity is founded upon an anachronistic fiction" (Stevens, J., concurring)).

95. *Kiowa Tribe*, 523 U.S. at 758.

this doctrine is overly broad.[96] Today, unlike when the Court created the doctrine, tribal businesses have influence outside tribal territory and "operate in an increasingly commercial climate affecting large numbers of consumers."[97] In addition to the overly broad use of the doctrine, the Court also acknowledged that providing this immunity to businesses may be harmful to consumers who are "unaware that they are dealing with a tribe" that they are unable to sue.[98]

Although the Court acknowledged the need for dispensing with the tribal immunity doctrine in some instances, it continues to confirm that it is "Congress, not the courts" that should determine when to abandon the doctrine.[99] Thus, it is essential for the federal government to develop regulations to combat the consumer harms that can occur from the unregulated nature of tribal business entities.

II. LIMITED CASE LAW ADDRESSING TRIBAL LENDING

Although many states recognize that tribal payday lending companies circumvent state consumer protection laws,[100] the matter has produced minimal case law for two reasons. First, regulators have found that tribal businesses simply do not respond to court enforcement actions.[101] Second, immunity is a jurisdictional question,[102] and state courts dismiss cases due to lack of jurisdiction.[103]

While the Supreme Court has held that tribes are subject to state laws for their activities off the reservation, their immunity still protects them from state enforcement actions based on those laws.[104] Immunity from state enforcement actions includes protection from "state investigatory actions with respect to alleged violations of state

96. *Id.*

97. Ameriloan v. Superior Court, 86 Cal Rptr. 3d 572, 582 (Ct. App. 2008).

98. *Kiowa Tribe*, 523 U.S. at 758.

99. *Ameriloan*, 86 Cal. Rptr. 3d at 582 (discussing *Kiowa Tribe*, 523 U.S. at 760, and *Citizen Band*, 498 U.S. at 514).

100. *See* David Heath, *Payday Lending Bankrolls Auto Racer's Fortune*, CENTER FOR PUB. INTEGRITY (Sept. 26, 2011), http://www.publicintegrity.org/2011/09/26/6605/payday-lending-bankrolls-auto-racers-fortune; *see also* Silver-Greenberg, *supra* note 4 (noting that "[t]ribal lenders can even lend in the twelve U.S. states where lawmakers have kicked out the rest of the payday loan industry").

101. *See Ameriloan*, 86 Cal Rptr. 3d at 576; Cash Advance & Preferred Cash Loans v. State *ex rel.* Suthers, 242 P.3d 1099, 1103 (Colo. 2010).

102. *See* CONFERENCE OF W. ATT'YS GEN., *supra* note 21, at 289; *see also Cash Advance*, 242 P.3d at 1102 (holding "tribal sovereign immunity is jurisdictional in nature").

103. *See generally* United States v. James, 980 F.2d 1314 (9th Cir. 1992) (holding that the district court property quashed a subpoena against a tribe on tribal immunity grounds).

104. *See generally* Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (rejecting a state tax enforcement action).

law."[105] Thus, tribes are able to avoid punishment for failing to comply with state investigatory actions, such as subpoenas and discovery requests.[106] Knowing that immunity protects against such actions, regulators have found that tribal businesses largely ignore subpoenas issued against them.[107] This leads to reluctance by state regulators to allocate time and resources to commence these actions, fearing that such actions will waste resources and be ignored.[108] In a few states, namely North Carolina and Washington, regulators have given up fighting tribal payday lenders, realizing that the legal battle would be too expensive and complicated.[109]

It is not surprising that states hold this belief, considering the legal battle playing out in Colorado against two payday lenders that has continued since 2004.[110] Only a few cases have successfully reached courts. In these cases, regulators either have held the corporation in contempt[111] or have brought actions against individuals who are not members of the tribe but are associated with the tribal corporation.[112] However, even in cases that have actually managed to reach the courtroom, tribal companies often moved to dismiss for lack of jurisdiction due to tribal immunity.[113] These cases have been unsuccessful in vindicating consumers' rights because, upon raising the jurisdiction issue, courts dismiss the complaints.[114] Currently, only two cases have advanced far enough in state courts to reach any

105. *Cash Advance*, 242 P.3d at 1108.

106. *Id.*

107. *See id.* at 1103 (stating that this enforcement action commenced after the defendant lending company repeatedly ignored subpoenas). For a detailed account of the allegations against Cash Advance, see David Heath, *Race Car Driver Scott Tucker Drew an Elaborate Façade Around His Payday Loan Businesses*, CENTER FOR PUB. INTEGRITY (Sept. 28, 2011), http://www.publicintegrity.org/2011/09/28/6656/race-car-driver-scott-tucker-drew-elaborate-facade-around-his-payday-loan-businesses (reporting that Tucker's attorney wrote that Tucker would continue ignoring the state's subpoenas).

108. *See* Heath, *supra* note 107, at 8 (stating that some states claim that they do not have the resources or expertise to fight predatory payday lenders affiliated with tribes).

109. Heath, *supra* note 100.

110. *Id.*

111. *Cash Advance*, 242 P.3d at 1103.

112. *See* State *ex rel.* Suthers v. Cash Advance & Preferred Cash Loans, 205 P.3d 389, 402–04 (Colo. App. 2008) (enforcing subpoenas against director of lending businesses in addition to tribes).

113. *See* Ameriloan v. Superior Court, 86 Cal Rptr. 3d 572, 576 (Ct. App. 2008); *Cash Advance*, 205 P.3d at 408–09.

114. *See, e.g.*, State v. Cash Advance, No. 05CV1143, at 27, 2012 WL 3113527 (Colo. Dist. Ct. Feb. 18, 2012); Petition for Review and Request for Stay at 16–17, Baillie v. Account Receivable Mgmt. of Fla., 2011 Cal. LEXIS 6622 (June 29, 2011) (No. S194110), 2011 CA S. Ct. Briefs LEXIS 1013 at *26–27.

discussion on the merits—despite the fact that various other states have attempted to bring similar actions.[115]

In *Ameriloan v. Superior Court*,[116] the California Department of Corporations sought preliminary injunctions against five payday lenders to stop them from doing business with California residents after these companies ignored various cease-and-desist orders.[117] The court then issued a show-cause order against these companies after it opposed the preliminary injunctions.[118] A subdivision of the Miami Tribe of Oklahoma specially appeared and moved to quash based on a lack of subject matter jurisdiction.[119] The tribe claimed that they established the businesses "for the purpose of supplying a self-sustaining and diversified stream of revenues for the tribe."[120] The trial court agreed with the Department's argument that sovereign immunity did not apply to off-reservation commercial activities, and it denied the tribe's motion to quash.[121] However, the appellate court disagreed, holding that tribal immunity extends to tribes' off-reservation commercial conduct, and the ability of states to regulate tribal conduct off the reservation does not mean that tribes are not immune from enforcement.[122] The court then remanded the case for limited discovery "directed solely to matters affecting the tribal court's subject matter jurisdiction" to determine if the companies function as "arms of the tribe."[123]

In *Cash Advance & Preferred Cash Loans v. Colorado*,[124] the Colorado Attorney General sued two payday-lending companies for failing to comply with investigative subpoenas issued in relation to the company's transactions with Colorado consumers.[125] After the companies ignored the trial court's order to enforce the subpoenas,

115. For further reporting on how regulators in Maryland, West Virginia, and New Mexico have attempted to bring tribally affiliated payday lenders into court, see Biegelsen, *supra* note 30; Michael Hudson & David Heath, *Debt and Tribal Payday Lenders*, DAILY YONDER (FEB. 13, 2011), www.dailyyonder.com/debt-and-tribal-payday-lenders/2011/02/11/3177; Zac Taylor, *Payday Lender Can't Hide Behind Indian Tribe Status, Judge Says*, CHARLESTON GAZETTE (Nov. 16, 2011), http://sundaygazettemail.com/News/201111160149.

116. 86 Cal. Rptr. 3d 572.

117. *Id.* at 575–76.

118. *Id.* at 576.

119. *Id.*

120. *Id.*

121. *Id.* at 577.

122. *Id.* at 579 (citing Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 760 (1997)).

123. *Id.*

124. 242 P.3d 1099 (Colo. 2010).

125. *Id.* at 1103.

the court issued contempt citations to the two companies.[126] The companies responded to the contempt citations by filing a motion to dismiss, claiming that the court lacked jurisdiction because the companies were "wholly owned subdivisions of federally recognized Indian tribes."[127] The trial court withheld ruling on the motion to dismiss for two years while the State compiled information about the companies' relations to the Indian tribes.[128] During this time, the companies voluntarily complied with the State's requests for documents while also continuing to claim that they sufficiently established their immunity protection.[129] Upon review of the documents, the trial court noted that immunity does not protect against investigative subpoenas and denied the motion to dismiss.[130] However, on appeal, the Colorado Supreme Court overturned the trial court's denial of immunity for investigatory actions.[131] The court found that, because the companies voluntarily allowed extensive discovery initially, they waived their immunity with respect to discovery requests for determining the relationship between the lenders and the tribe.[132] This waiver gave the State broader access to discovery documents than they would typically have had to establish jurisdiction.[133] The court then remanded the case to determine whether the businesses were acting as "arms of the tribe" when conducting business.[134] On remand, the action was dismissed based on the company's sovereign immunity.[135]

III. WHY IS STATE REGULATION INADEQUATE?

The decisions discussed above do not provide much additional guidance about how states should approach tribally owned companies, but they do shed light on the problems that have led to the failure of state enforcement efforts against these lenders. Further, these decisions help to clarify the need for a federal response by

126. *Id.*
127. *Id.*
128. *Id.* at 1104.
129. *Id.*
130. *Id.*
131. *Id.* at 1108.
132. *Id.* at 1115.
133. *Id.* (noting that "[t]he tribal entities' voluntary disclosure of some information functions as a limited waiver of their immunity with respect to all information").
134. *Id.*
135. State v. Cash Advance, No. 05CV 143, 2012 WL 3113527, at *3 (Colo. Dist. Ct. Feb. 18, 2012).

highlighting that state regulation efforts are inadequate in combating these abuses.

A. *Rent-A-Tribe Schemes*

While legitimate tribal businesses' potential ability to circumvent consumer protection laws seems unjust in itself, the problem is compounded by the fact that a majority of state regulators believe that these companies are not actually owned by Indian tribes. Rather, regulators believe that many of these businesses are sham businesses that use a so-called "rent-a-tribe" scheme.[136] Such schemes involve payday lenders offering tribes compensation to allow the company to organize under the tribe's name, while the lenders maintain functional control of the entity.[137] Typically, a payday lender will reorganize an existing company under a tribe's name in exchange for monthly payments to the tribe—usually a percentage of monthly profits.[138] These impoverished tribes often accept these arrangements; yet, they seldom get a significant cut of the amount of money generated by the tribal ownership of these companies.[139] Observers claim "most payday lenders have no physical presence on tribal land;" instead, they operate from call centers in distinct locations.[140] Affiliating under a tribe allows payday lenders to continue the harmful practices that regulators previously ceased and allows the company to escape state regulation completely or stall the process for years.[141]

In *Colorado v. Cash Advance & Preferred Cash Loans*, the Colorado Attorney General's office uncovered evidence of this practice as part of their investigation into Cash Advance.[142] Colorado claimed that Cash Advance Loans, which was originally owned by Scott Tucker, is a sham business that uses the tribe as a shield for regulation.[143] Regulators alleged that Mr. Tucker sold his business to

136. David Heath, *Courts Debate Validity of Indian-owned Payday Lenders*, CENTER FOR PUB. INTEGRITY (Dec. 20, 2011), http://www.publicintegrity.org/2011/12/20/7716/courts-debate-validity-indian-owned-payday-lenders.

137. *Id.* For further reporting detailing the process of how payday lenders affiliate with tribes to claim sovereign immunity, see Alicia Caldwell, *Payday Lenders Are Able to Get Around State Regulations by Claiming Sovereign Immunity*, DENVER POST (Feb. 13, 2011), www.denverpost.com/opinion/ci_17355660.

138. *See* Heath, *supra* note 136.

139. *See id.*

140. Silver-Greenberg, *supra* note 4.

141. Caldwell, *supra* note 137.

142. *See* Heath, *supra* note 136.

143. *Id.*

the Miami tribe in 2008 due to pressures from regulators to shut it down.[144] Curiously, the Miami tribe only paid $120,000 for the business, although when they purchased it the company was grossing up to $20 million per month.[145] Additionally, Colorado claims to have evidence, based on Tucker's emails, indicating that Tucker sought out a tribe to "buy" the company after Colorado initially brought enforcement actions in 2004.[146] Currently, Tucker identifies himself as a mere employee of the business, yet he seems to remain in control of the company's bank account.[147] Based on discovery documents, Colorado asserted that the tribe received a mere one percent of the company's revenue from those accounts.[148]

The number of companies seeking to organize under tribal law further evidences the existence of the "rent-a-tribe" model. Payday loan consultants[149] acknowledge a recent boom in the tribal payday lending business model;[150] one consultant claims that "more than 1,000 payday lenders have expressed interest in cloning the strategy."[151] Additionally, various web-based payday loan consultants on the Internet offer instructions to payday lenders, advising them how to organize with Indian tribes to evade state regulation efforts.[152] One website, Consultants4Tribes.com, even brags about its success, claiming, "At the current time, we have linked six PDLs with three federally recognized tribes."[153] These sites highlight the absurdity of the practice and make a mockery of regulators' enforcement efforts.

Notwithstanding the abundant evidence, state regulators face extreme difficulty in proving that these companies are not tribal entities, but rather fronts for existing payday lending companies. The difficulty for regulators originates from tribal companies moving to dismiss regulatory actions by claiming lack of jurisdiction based on tribal immunity. Once these actions are dismissed, regulators no

144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. Payday lending consultants offer advice for starting businesses, running businesses, and maximizing profit. *See, e.g.*, RGMI CONSULTING, http://www.rgmiconsulting.com/ (last visited Nov. 15, 2012).
150. *See id.*
151. Silver-Greenberg, *supra* note 4.
152. *See, e.g.*, CONSULTANTS4TRIBES.COM (last visited Nov. 15, 2012); RGMI CONSULTING, *supra* note 149.
153. *Courts Debate Validity of Indian-owned Payday Lenders*, CONSULTANTS4TRIBES.COM (Dec. 21, 2011), http://www.consultants4tribes.com/courts-debate-validity-of-indian-owned-payday-lenders/.

longer have access to information that could be gathered through discovery, which would help states prove their cases. When a tribal company files a motion to dismiss, "the state bears the burden of proving, by a preponderance of the evidence, that [the companies] are not entitled to tribal sovereign immunity."[154] However, this burden is typically extremely difficult for states to overcome because discovery is limited, which makes it difficult to determine if a company is an "arm of the tribe."[155] Courts allow a conservative amount of discovery due to the recognition that immunity protects immune parties from bearing the burden of even pretrial matters.[156] Adding to the complication, many regulators believe that these businesses manipulate documents to falsely convey that the business has the requisite connection to the tribe.[157] Without further discovery, regulators cannot prove the inconsistencies in the documents that convey the true nature of these businesses. Based on the Cash Advance discovery information above, it appears that the Colorado Attorney General was able to conduct extensive discovery; however, this case goes far beyond the typical discovery allowed in immunity cases due to Cash Advance's voluntary waiver of discovery immunity.[158]

The information available about corporations organized under tribal law is even more limited than other corporations owned by tribes because these corporations are not subject to the same disclosure requirements as corporations organized under state law.[159] Even if courts decide to acquire information concerning its jurisdiction, the inquiry will likely be minimal.[160] Once a court is satisfied that the corporation is a tribal entity on its face, it will likely determine that it has no jurisdiction.[161] Technically, then, all tribes have to do is hide incriminating documents well enough at the outset to escape regulation. As these loopholes continue to become

154. Cash Advance & Preferred Cash Loans v. Colorado, 242 P.3d 1099, 1113 (Colo. 2010).

155. *Id.* at 1114 (citing Puyallup Tribe v. Dep't of Game, 433 U.S. 165, 173 (1977)). This limitation is a function of the fact that discovery requests may be "directed solely to matters affecting the trial court's subject matter jurisdiction." *See* Ameriloan v. Superior Court, 86 Cal. Rptr. 3d 572, 586 (Ct. App. 2008).

156. *Cash Advance*, 242 P.3d at 1114 (citing *Puyallup Tribe*, 433 U.S. at 173).

157. *See* Heath, *supra* note 100.

158. See *supra* Part II.

159. *See generally* ATKINSON & NILLES, *supra* note 80, at III-1 (contrasting the procedures tribes must comply with in order to incorporate a business based on tribal law with the procedures required for chartering a tribal business under federal law).

160. *See id.* at A-1.

161. *Id.* ("In some jurisdictions, if the answers are 'no,' the inquiry ends.").

apparent to payday lenders, it is obvious why observers predict an escalation in the number of tribally affiliated companies.

B. *Ploys to Conceal Ownership*

Even if these discovery obstacles were nonexistent and easily discoverable information existed, it is not clear that regulators could prove that these rent-a-tribe organizations exist. Companies have further complicated matters for regulators by using various schemes to conceal their true ownership. The Better Business Bureau has observed lenders causing substantial damage by regularly changing office locations—describing these abandoned locations as "ghost companies."[162] Other lenders employ outside call centers, many times in other states, which often cater to payday lenders by completely running the business.[163]

However, the most complicated and elaborate ploy to conceal ownership happens when lenders create shell companies. This occurs when one person creates a business and claims to be the chief executive officer, but in actuality has no affiliation with the business.[164] The Colorado Attorney General's office discovered an alarming example of this practice during its investigation into Cash Advance.[165] Joseph Fontano, a witness examined by the Attorney General's office, admitted to accepting a small fee from Cash Advance in exchange for creating and acting as the CEO of a "shell company."[166] Fontana admitted to providing similar services to many companies that attempted to hide their businesses from regulators.[167] Given the elaborate systems set up to conceal the identity of these companies, it is no wonder that state regulators are reluctant, if not unwilling, to invest their limited time and resources into these companies—knowing that it is likely a losing battle.

C. *Failure to Reveal Tribal Ownership*

Considering that most tribally owned payday lenders are internet-based, the ultimate owner of these websites is often

162. Tim Leeds, *Online Payday Lending Practices Spark Nationwide Concerns*, HAVRE DAILY NEWS (Nov. 20, 2009), http://www.havredailynews.com/cms/news/story-165439.html.

163. *See* Silver-Greenberg, *supra* note 4.

164. *See* Heath, *supra* note 100.

165. *Id.*

166. *Id.*

167. *Id.*

unclear.[168] Many of these websites go by trade names and do not reveal ownership information.[169] Most of the trade names used by companies—such as Cash Advance, Western Sky, and Preferred Cash Loans—offer no indication of tribal ownership. Given these trade names, it therefore seems illogical to assume that the typical consumer would have any idea that tribes own these companies. While the Better Business Bureau recommends that consumers research lenders to protect themselves before entering into contracts, it also acknowledges that this can be extremely difficult with internet lenders, noting that "some payday lenders work under a variety of different business names and websites."[170] To further complicate matters, several lenders may operate under the same company name.[171]

While some companies, such as Western Sky,[172] make it known that they are tribally affiliated, even when the company discloses or borrowers discover the connection, many consumers have no idea how this relationship affects the transaction—either because the consumer does not inquire about the effect or the tribe is unwilling to disclose certain information. Regulators report that tribally owned companies conceal information concerning fees and interest rates, default rates, the location from which money is borrowed, and even the company's business address.[173]

D. No Balancing of Interests

Tribal lending can be extremely harmful to consumers who enter into contracts believing that the law protects them against abusive lending and are unaware that a lender's affiliation with a tribe makes it immune from suit.[174] States have argued that "the equities weigh

168. Hudson & Heath, *supra* note 115.

169. *Id.* (noting that many payday lending websites "reveal nothing about who owns them").

170. Leeds, *supra* note 162.

171. *Id.*

172. *See* WESTERN SKY FINANCIAL, http://www.westernsky.com/ (last visited Nov. 15, 2012) ("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.").

173. Heath, *supra* note 100.

174. *See* Ameriloan v. Superior Court, 86 Cal. Rptr. 3d 572, 582 (Ct. App. 2008) (quoting Kiowa Tribe v. Mfg. Techs., 523 U.S. 751, 758 (1997)) (noting that "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").

against applying tribal sovereign immunity in a state's action to enforce its consumer protection laws" because consumer harms will go unregulated.[175] Payday lenders intentionally prey on a particularly vulnerable group of consumers who are unable to acquire credit and believe they have nowhere else to turn.[176] Regulators note that some tribally owned companies use unfair practices that exceed those used by the typical payday lender, including: continually harassing borrowers in default through phone calls and mailings; disclosing default information to employers and co-workers; claiming that they are authorized to garnish wages; and hiding terms in contracts by making them extremely difficult to understand.[177] Although courts have been sympathetic to this argument, they are without authority to rule in favor of states' equity interests because " 'sovereign immunity is not a discretionary doctrine that may be applied as a remedy depending on the equities of a given situation . . . .' Rather it presents a pure jurisdictional question."[178] Consequently, this is a question for the legislature and not for the courts.[179] Accordingly, courts continue to stress that federal regulations to protect consumers against tribal predatory lending practices are necessary.

IV. FEDERAL REGULATORY ACTION

A. *Congressional Abrogation of Tribal Immunity*

The Constitution does not guarantee tribal immunity from suit; however, the Supreme Court has made clear that tribes are "domestic dependent nations," and states may not intrude on their

175. *Id.* at 581.

176. *Id.*

177. 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), http://www.ftc.gov/opa/2011/09/payday.shtm. Recently, the FTC has filed a complaint against various payday lenders accused of breaking general federal lending laws in the District of Nevada. *See* Plaintiff's Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction and Other Equitable Relief at 1, Fed. Trade Comm'n v. AMG Servs., Inc., No. 2:12-cv-00536 (D. Nev. Apr. 2, 2012). While this may address some of these concerns if the complaint proceeds past the pleading stage, the action will only affect those practices which breach federal law and will have no effect on state law. Additionally, this suit would only affect a few of the many companies using these unfair practices. *Id.* at 3–12. Further, if successful this action would be brought by a federal agency and would not affect the ability of states to bring actions for the same practices.

178. *Ameriloan*, 86 Cal. Rptr. 3d at 582 (quoting Warburton/Buttner v. Superior Court, 127 Cal. Rptr. 2d 706, 715 (Ct. App. 2002)).

179. *Id.*

sovereignty.[180] The Court, however, recognized that, because Congress has plenary power over Indian affairs, it may eliminate or limit tribal sovereign immunity through legislation.[181]

Federal regulatory action is an important part of preventing consumer harm, and the abrogation of sovereign immunity is one way that this could be achieved. In order for sovereign immunity to be waived by legislation, Congress must unequivocally express this purpose.[182] Courts strictly apply this standard and require a clear finding that Congress manifested a legislative intent to abrogate immunity.[183] To exhibit the requisite clarity, the regulation must not only specifically apply to tribes, but it must also definitely mention that tribes are subject to enforcement actions.[184] Courts have refused to enforce congressional regulations against tribes, even when they have specifically noted that a law applies to tribes, if the law does not clarify that tribes will also be subject to enforcement actions for violating the law.[185] Courts have ruled, however, that the language of other statutes meets the requisite clarity needed for courts to consider a waiver unequivocal.[186] Accordingly, as long as Congress's legislation reflects Court precedent, it is clear that Congress has the ability to pass laws that would subject tribal lenders to regulation. However, it is unclear whether Congress will be willing to impose such regulations on payday lenders.

1. Likelihood of Congressional Regulation

Although Congress has the ability to regulate tribal payday lenders, it is unlikely that it will actually do so for two reasons. First, Congress seems to be largely unaware of the problem. Second, Congress has been unwilling to regulate the payday lending industry as a whole, leaving regulation to the states.

Congress's lack of knowledge about tribal payday lenders originates from the minimal case law on the subject and the

180. CANBY, *supra* note 7, at 74–75.

181. Kiowa Tribe v. Mfg. Techs., 523 U.S. 751, 754 (1998) (stating that tribes are "subject to suit only where Congress has authorized the suit or the tribe has waived its immunity").

182. *See* CANBY, *supra* note 7, at 74–75; CONFERENCE OF W. ATT'YS GEN., *supra* note 21, at 296.

183. *See* CONFERENCE OF W. ATT'YS GEN., *supra* note 21, at 296.

184. *See* CANBY, *supra* note 7, at 100.

185. The Americans with Disabilities Act is an example of such a statute. *See id.*

186. *See* COHEN, *supra* note 77, at § 7.05[1][b] (finding that Congress has abrogated the immunity of tribes through various acts such as the Indian Civil Rights Act, the Indian Gaming Regulatory Act, and the Clean Water Act).

regulation of payday lending at the state, rather than the federal level. As stated earlier, because tribal immunity is a purely jurisdictional question, actions against payday lenders rarely proceed further than the pleading stage, despite the fact that most states claim to be aware of tribal lenders' harmful practices.[187] Based on the jurisdictional nature of the inquiry, courts often dismiss these cases before they hear any of the substantive issues in the complaint, which makes this an inadequate avenue for bringing these matters to Congress's attention.[188]

Though Congress is largely unaware of the issues presented by tribal payday lenders, it is clear that Congress is aware of payday lending industry practices as a whole. Members of Congress have introduced various pieces of legislation targeting these companies, beginning as far back as 2005; however, these attempts have been largely unsuccessful.[189] Most of these attempts have languished in committee, with the exception of the Military Lending Act of 2006, which protects military personnel from predatory lending practices.[190]

Commentators contend that the failure to pass effective legislation is largely due to the intense lobbying efforts of many payday lenders.[191] Payday lenders spend lavishly to create relationships with members of Congress, targeting legislators on both sides of the aisle to "beat back all attempts at consumer protection."[192] Research conducted by the Citizens for Responsibility and Ethics in Washington found that the amounts spent on lobbying efforts have doubled since 2004, with campaign contributions from these groups surpassing $1.5 million in 2008.[193] Lobbyists for the payday lending industry have notoriously targeted legislators,

187. *See, e.g.*, Ameriloan v. Superior Court, 86 Cal. Rptr. 3d 572, 582 (Ct. App. 2008).

188. *See, e.g.*, *id.*

189. *See, e.g.*, Predatory Payday Loan Prohibition Act of 2005, S. 1878, 109th Cong. (2005) (containing legislation that was introduced and referred to the Committee on Banking, Housing, and Urban Affairs, but never became law).

190. John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006); *see also* CENTER FOR RESPONSIBLE LENDING, POLICY & LEGISLATION (2006), http://www.responsiblelending.org/payday-lending/research-analysis/Summary-of-MLA.pdf.

191. *See, e.g.*, *Dan Rather Reports, The Best Congress Money Can Buy* (CBS television broadcast 2007).

192. *Id.*

193. *See* Sewell Chan, *A Consumer Bill Gives Exemption on Payday Loans*, N.Y. TIMES (Mar. 9, 2010), http://www.nytimes.com/2010/03/10/business/10regulate.html; Ryan J. Reilly, *Payday Loan Industry Doubles Lobbying Expenditures*, TPM MUCKRAKER (Mar. 15, 2011, 1:40 PM), http://tpmmuckraker.talkingpointsmemo.com/2011/03/payday_loan_industry_doubled_lobbying_expenditures.php.

attempting to halt legislation each time Congress introduces a bill,[194] and it seems likely that these efforts will persist.

Moreover, Native Americans also use intense lobbying efforts when Congress considers abrogating their immunity.[195] If evidence of the tribal lobbying efforts used to protect Indian casinos is any indication of what is to come if Congress moves to eliminate tribal lending,[196] both tribal and payday lending lobbyists will likely join in the fight to halt legislation.

It has long been a tenet of the Indian self-governance model that one of the most important aspects of self-determination is the promotion of the economic interests of the tribe[197]—which tribes advance in support of allowing tribal businesses to remain unregulated. Due to widely held tribal beliefs that the government continues to erode tribal rights, there is a consistent lobbying presence in Congress representing tribal interests.[198] Commentators report that tribes spend at least $50,000 annually in expenditures for lobbying connected to tribal interests.[199] Accordingly, those seeking to reform the payday lending industry should respond with their own lobbying efforts. There is a clear need for federal regulation of tribal lenders, but with no sign of a decrease in lobbying efforts, reformers may have to find another way to regulate these lenders. Because Congress explicitly issued authority to the Consumer Financial Protection Bureau ("CFPB") to regulate payday lending, consumer advocates are pushing this new agency to take action to regulate lenders.[200]

B. Consumer Financial Protection Bureau Regulation

Congress delegated the authority to the CFPB to regulate payday lenders through the Dodd-Frank Act.[201] Knowing that the chances of Congress passing legislation regulating the payday lending

194. Johnson, *supra* note 51, at 132–33.

195. *See* Donald L. Barlett & James B. Steele, *How Indian Casino Interests Have Learned the Art of Burying Influence in Washington*, TIME, Dec. 23, 2003, at 52.

196. *See id.*

197. Lake, *supra* note 27, at 92.

198. Aaron F. W. Meck, Comment, *The Conflict Between State Tests of Tribal Entity Immunity and the Congressional Policy of Indian Self-Determination*, 35 AM. INDIAN L. REV. 141, 142–44 (2011).

199. *Native American Resource Partners, Influence & Lobbying*, OPENSECRETS.ORG, http://www.opensecrets.org/lobby/clientsum.php?id=D000054378&cycle=2011 (last visited Nov. 15, 2012).

200. *See* Chan, *supra* note 193.

201. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010); *see also* Hudson & Heath, *supra* note 115.

industry are unlikely, states have reached out to the newly formed CFPB to move toward regulation. The CFPB is the right agency to tackle the problem based on the Agency's purpose—Congress created the Agency to provide an additional layer of oversight to address issues that have escaped regulation.[202] In fact, the CFPB's newly appointed director, Richard Cordray, has promised to make regulation of payday lending an Agency priority,[203] saying that "the agency will move aggressively to halt illegal practices . . . by . . . payday lenders."[204] The "field hearing" held on the payday lending industry sought to gain information on industry practices and provided evidence that Cordray is moving forward with this promise.[205] Supporters of the industry, however, have expressed concerns that, by eliminating all payday lenders, the CFPB will eliminate all options for consumers seeking to obtain emergency credit.[206] The CFPB has responded by stating that it "recognize[s] the need for emergency credit" and that its objective is to help consumers by targeting illegal and abusive practices, while not eliminating the industry completely.[207] At the very least, the CFPB will likely conduct investigations into the practices of payday lenders—moving in the direction of increased enforcement.[208]

Based on a payday lending field guide released to CFPB industry examiners, the CFPB is only scrutinizing payday lenders based on the federal laws already in place.[209] While regulating breaches of federal law is important, the guide mentions nothing about state law practices or Indian tribe affiliations.[210] Additionally, even if the CFPB

202. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, § 1011, 124 Stat. 1376, 1964 (2010); *see also* Maya Jackson Randall, *CFPB Chief Addresses Payday Lenders*, WALL ST. J. (Jan. 19, 2012), http://online.wsj.com/article/SB10001424052970203750404577171292004242930.html.

203. Ben Hallman, *Richard Cordray, CFPB Chief, Promises New Scrutiny Of Banks That Make Payday Loans*, HUFFINGTON POST (Jan. 20, 2012), http://www.huffingtonpost.com/2012/01/19/richard-cordray-cfpb-bank-payday-loans_n_1216265.html.

204. Randall, *supra* note 202.

205. *Consumer Financial Protection Bureau Examines Payday Lending*, CONSUMER FIN. PROTECTION BUREAU (Jan. 19, 2012), http://www.consumerfinance.gov/pressrelease/consumer-financial-protection-bureau-examines-payday-lending/.

206. *See id.*

207. *Id.*

208. *See generally* CONSUMER FIN. PROTECTION BUREAU, EXAMINATION PROCEDURES, SHORT-TERM, SMALL-DOLLAR LENDING (2012), http://www.consumerfinance.gov/wp-content/uploads/2012/01/Short-Term-Small-Dollar-Lending-Examination-Manual.pdf (explaining that the objective of the examination is to determine whether practices of lenders breach federal consumer laws).

209. *See id.*

210. *Id.*

recognizes a company's tribal affiliation, many experts believe that any attack on tribal entities will lead to long court battles concerning tribal immunity standards.[211] This sheds light on a few unanswered questions about the CFPB's ability to regulate tribal lenders: whether a regulatory agency has the authority to waive tribal immunity; whether the CFPB will become aware of the problem; and whether a CFPB regulation will address state laws.

1. Ability of CFPB to Regulate Tribes

Courts consider Congress's plenary power to regulate tribal immunity a vague standard, which will likely require the Supreme Court's interpretation of the standard's precise meaning. The CFPB will probably argue that Congress's plenary power extends to federal agencies based on administrative law principles.[212] Consequently, tribes will likely contest the CFPB's ability to abrogate immunity based on the delegation of authority given to the agency through the Dodd-Frank Act.

Based on the limited case law addressing whether Congress's authority to abrogate tribal immunity extends to agencies, it is difficult to determine whether a court would uphold enforcement actions or rules created by the CFPB directed at payday lenders. Cases have shown that, when an agency issues a regulation, "its validity depends upon its being within the statutory authority Congress conferred upon the regulating agency."[213] Accordingly, a court will have to determine what authority Congress conferred on the CFPB.

Based on the statutory language in the Dodd-Frank Act, the purpose of the CFPB is to "seek to implement and . . . enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets . . . and that markets for consumer financial products and services are fair, transparent, and competitive."[214] The objective of ensuring that "consumers are protected from unfair, deceptive, or abusive acts and practices and from discrimination" is particularly applicable to payday lenders.[215] Congress granted the CFPB rulemaking authority

211. Hudson & Heath, *supra* note 115.

212. Based on the non-delegation doctrine, it is clear that Congress may delegate its power to an agency as long as it is pursuant to some "intelligible principle." *See* Mistretta v. United States, 488 U.S. 361, 372 (1989).

213. CANBY, *supra* note 7, at 285.

214. 12 U.S.C. § 5511(a) (Supp. 2011).

215. *Id.* § 5511(b)(2).

to "prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws."[216] Further, the Act gives the CFPB authority to prohibit unfair, deceptive, or abusive practices under federal law.[217] The CFPB "may prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service,"[218] which suggests that the CFPB has the authority to pass regulations further restricting payday lending practices.

It is difficult, however, to determine whether the Dodd-Frank Act and any payday lending regulations created under the Act will apply to tribes. Jurisdictions vary in interpreting how statutes apply to tribes, as well as their requirements for when a statute has waived immunity.[219] The Dodd-Frank Act is a federal statute of general applicability based on tests formulated by courts to determine when a statute has abrogated immunity.[220] Tests applied by courts finding abrogation based on federal statutes of general applicability, such as the Dodd-Frank Act, vary depending on the statute's clarity in its application to tribes.[221] Where statutes clearly encompass tribes and impose a method of judicial enforcement, "courts appear uniform in finding congressional abrogation of tribal sovereign immunity."[222] Conversely, courts are less likely to find abrogation where a statute's scope does not clearly encompass tribes.[223] Without any case squarely in line with the wording of the Dodd-Frank Act, it is necessary to determine the Act's appropriate place within these two categories. While the statute's wording arguably places the Dodd-Frank Act within the former category, there is also an argument that the statute should be included among the latter.[224] Although jurisdictions vary in determining these issues, it is probable that the Dodd-Frank Act

216. *Id.* § 5512(b)(1).
217. *Id.* § 5531(a).
218. *Id.* § 5531(b).
219. CONFERENCE OF W. ATTORNEYS GEN., *supra* note 21, at 296–97.
220. *Id.*
221. *Id.* at 297.
222. *Id.*
223. *Id.*
224. Blake Sims & Justine Hosie, *Tribal Loans to State Residents—The Next Test of Sovereign Immunity*, CONSUMER FIN. SERVICES NEWSL. (Am. Bar Ass'n), Winter 2011, http://apps.americanbar.org/buslaw/committees/CL230000pub/newsletter/201112/sims_hosie.pdf.

constitutes abrogation of immunity regardless of the category chosen for this particular statute.

Although the Dodd-Frank Act imposes a method of judicial enforcement both at the federal and state level,[225] the Act's applicability to tribes is more ambiguous than statutes in previous judicial opinions. Under the statute, the CFPB has enforcement authority against "covered persons" who provide payday loans.[226] The Act defines a "covered person" as "any person that engages in offering or providing a consumer financial product or service."[227] The Act then defines "person" as "an individual, partnership, company, corporation, [or] association."[228] Thus, a company or corporation providing a payday loan is clearly subject to enforcement under the Act. Although these definitions in themselves do not mention anything about tribal entities, the act defines "State" as including "any federally recognized Indian tribe."[229] Consequently, in relation to this Act, tribes are equivalent to states; accordingly, tribes should be subject to the same legal standards that courts would apply to state-owned corporations. Although this reasoning may appear far-flung, courts have found similar reasoning—namely, linking definitions advanced in the statutes—to clearly encompass tribes in terms of enforcement.[230] If a court accepts this rationale, the correct determination would be to apply the immunity standard used for state businesses in assessing the immunity of tribal payday lenders. The provision giving state regulators authority to bring civil actions under the Act, in the name of a state, "with respect to any entity that is State-chartered,"[231] provides additional support for this reasoning.

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225. *See* 12 U.S.C. § 5514(c) (Supp. 2011) (federal); 12 U.S.C. § 5552 (Supp. 2011) (state).

226. *Id.* § 5514(c)(1).

227. *Id.* § 5481(6).

228. *Id.* § 5481(19).

229. *Id.* § 5481(27).

230. *See* Atlantic States Legal Fund. v. Salt River Pima-Maricopa Indian Cmty., 827 F. Supp. 608, 609 (D. Ariz. 1993).

> Under the RCRA, citizens are permitted to bring compliance suits 'against any person (including (a) the United States and (b) any other governmental instrumentality or agency . . .) who is alleged to be in violation . . . .' 42 U.S.C. § 6972(a)(1)(A). 'Person' is subsequently defined to include municipalities. 42 U.S.C. § 6903(15). Municipalities include 'an Indian tribe or authorized tribal organization. . . .' 42 U.S.C.S. § 6903(13)(A). . . . [t]he text and history of the RCRA clearly indicates congressional intent to abrogate the Tribe's sovereign immunity with respect to violations of the RCRA.

Id.

231. 12 U.S.C. § 5552(a)(1) (Supp. 2011).

Due to the explicit definition of "State" in this title, this would include actions against tribally chartered corporations.

Applying the state immunity standard, states are immune from private suit under the Eleventh Amendment.[232] However, this immunity does not extend to suits against states by other states or the federal government.[233] The waiver of immunity with respect to states and the federal government was a necessary consequence of ratification of the Constitution[234]—tribes did not assume this same consequence, however, because they did not ratify the Constitution.[235] This recognition may stand against a court's acceptance of treating tribes as states under the statute. On the other hand, it is clearly within congressional power to control Indian affairs[236]—this law could merely reflect that plenary power. Thus, if "tribe" is synonymous with "state," then the tribe will be immune from private actions, but not those actions by the federal or state government enforcing the Dodd-Frank Act. This is important because the standard applies equally to state-owned corporations.

There may be a problem, however, with the power of the states to bring enforcement actions. The statute allows the attorney general of the state to bring enforcement actions in the name of the state against a company in violation of this law.[237] The Constitution establishes that states may bring actions against other states in federal courts.[238] However, Congress has further qualified the original jurisdiction of a controversy between two states, requiring that the Supreme Court hear these actions.[239] The provision in the Dodd-Frank Act allowing a state attorney general to bring enforcement actions clearly holds that these actions must be brought in federal district court, not in the Supreme Court.[240] Yet, this should not present an obstacle for states bringing actions in district courts because the requirement of exclusive Supreme Court jurisdiction is

232. U.S. CONST. amend. XI.
233. *See* Alden v. Maine, 527 U.S. 706, 755 (1999).
234. U.S. CONST. amend. XI.
235. *See A History of the Bill of Rights*, AM. C.L. UNION OF FLA., http://www.aclufl.org/take_action/download_resources/info_papers/9.cfm (last visited Nov. 15, 2012).
236. *See supra* Part I.B.
237. 12 U.S.C. § 5552(a)(1) (Supp. 2011).
238. U.S. CONST. art. III, § 2; U.S. CONST. amend. XI.
239. U.S. CONST. art. III, § 2.
240. 12 U.S.C. § 5552.

statutory and not constitutionally guaranteed.[241] Thus, it is within Congress's power to waive this jurisdictional requirement.

If a court does not accept that this statute clearly encompasses tribes, the appropriate standard for determining its applicability to tribes is that used for actions brought by the federal government, including government agencies. A statute of general applicability may apply to Indian tribes, unless it "(1) . . . touches 'exclusive rights of self-governance in purely intramural matters'; (2) the application . . . 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. . . .' "[242] Clearly, this is not a purely intramural matter because the business seeks to provide loans to non-tribal consumers.[243] Additionally, this does not seem to eliminate treaty rights, nor is there anything in the legislative history to show that the Dodd-Frank Act should not apply to tribes. Thus, at least when the CFPB brings an action, tribes should be subject to enforcement.

Enforcement will present a problem, however, if state regulators seek to bring an action pursuant to their enforcement authority under the statute because tribes are immune from state enforcement actions.[244] However, the language that allows the state to bring enforcement actions against "state-chartered" corporations should give more leeway in allowing these actions, which is a question that a court will ultimately need to decide. At a minimum, even if a court does not find that this statute encompasses tribes under the first standard, the CFPB should have enforcement authority to ensure that tribal payday lenders comply with the Act.

Although this does not solve the problem of state law circumvention, at the very least, tribes would have to comply with all federal laws under the Act. As a recent FTC complaint alleges,[245] the FTC has recognized that tribal lenders are known to violate many

241. *See* U.S. CONST. amend. XI.

242. E.E.O.C. v. Karuk Tribe Hous. Auth., 260 F.3d 1071, 1078–79 (9th Cir. 2001) (quoting United States v. Farris, 624 F.2d 890, 893–94 (9th Cir. 1980)).

243. *See id.* at 1079 (quoting Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1116 (9th Cir. 1985) ("[T]he 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.").

244. *See supra* Part IV.B.1.

245. *FTC Action Halts Allegedly Illegal Tactics of Payday Lending Operation that Attempted to Garnish Consumers' Paychecks*, FED. TRADE COMMISSION (Sept. 12, 2011), http://www.ftc.gov/opa/2011/09/payday.shtm.

federal lending laws by using illegal lending tactics.[246] Additionally, it is within the CFPB's rulemaking authority to make rules concerning "unfair, deceptive, or abusive act[s]."[247] Under these provisions, payday lending practices are arguably unfair because they cause substantial injury to consumers and are abusive because they interfere with consumer's ability to understand terms, while taking unreasonable advantage of consumers.[248] One substantial restriction on the CFPB, however, is that it is not given the authority to set usury rates for payday loans.[249] Thus, if this is the ultimate goal in restricting payday lending, the solution will need to rest with Congress. Notwithstanding this fact, there are various measures that states have used to combat payday lending, short of setting interest rate caps—including limits on the number of loans a person can take out, disclosure requirements, fees associated with loans, collection practices, and various other loan terms.[250] Furthermore, although the state laws may not be enforced by bringing actions under the Dodd-Frank Act, regulators would be able to use the discovery found in those proceedings to prove that these are sham businesses and not legitimate arms of the tribe. Because the Act does not alter state laws that provide greater protection to consumers, once states discover information proving that a company is not an arm of the tribe, state regulators can bring actions against companies that are not complying with state consumer protection laws.[251] Additionally, the CFPB has the power to further define "covered persons" subject to the Act and may use that authority to more concretely include tribal lenders, making interpretation issues less ambiguous for courts.[252]

2. Likelihood of CFPB Regulation

If the CFPB has the authority to bring enforcement actions against tribal payday lenders, it remains unclear whether they will take that step. For the same reasons Congress is largely unaware of the problem,[253] it is likely that the CFPB will similarly be unaware of the tribal ownership of many payday lenders. Moreover, if the CFPB

246. While the complaint itself does not allege that tribes own these companies, the named companies in the complaint are tribes that have used the tribal defense in state court actions.

247. 12 U.S.C. § 5531(a) (Supp. 2011).

248. *See id.*

249. *Id.* § 5517(o).

250. *See supra* Part I.A.

251. 12 U.S.C. § 5551(a)(1) (Supp. 2011).

252. *Id.* § 5514(a)(2).

253. *See supra* Part IV.A.1.

becomes vocal about its crackdown on payday lenders, tribal lenders will likely continue to use elaborate ploys to conceal their identities and further evade new consumer protection regulations.[254] On the other hand, Congress created the CFPB as another means to address the failure of federal oversight regarding abuses against consumers; thus, it is more likely that the CFPB will conduct investigations that are more thorough and will recognize the problems associated with tribal lenders.

C. *Issues Confronting Regulation*

Even if Congress or the CFPB decides to regulate payday lending at the federal level, this will fail to address many states' concerns. States currently regulate payday lending, and this regulation greatly differs among states. Some states completely prohibit the practice—as is the case in New York, which has a mandated APR cap of twenty-five percent[255]—while others set additional restrictions, such as capping interest rates, limiting the loan terms, or capping the amount of loans an individual is able to take out.[256] Still others, such as Wyoming, apply no restrictions to the industry.[257] Consumer advocates continue to press for regulations setting an interest rate cap, with most calling for a thirty-six percent APR cap,[258] which is consistent with the "widely accepted benchmark for small loans."[259] Payday lending advocates respond to regulators by arguing that "[a]ll companies that loan to consumers should be under the same rule of law and should have to comply with the same consumer protection requirements so that you have consistent, across-the-board protections to restrain predatory lending and high-cost lending."[260] While the CFPB would be unable to set this cap,[261] if Congress decides to follow this advice and set a thirty-six percent cap,

254. Hudson & Heath, *supra* note 115.

255. *Hearing on Foreclosure, Predatory Lending and Payday Lending in America's Cities: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Domestic Reform*, 110th Cong. 165 (2007) (statement of Jean Ann Fox, Director of Consumer Protection, Consumer Federal of America).

256. *Id.*

257. *Id.* at 7–8.

258. *Policy & Legislation*, *supra* note 190, at 2.

259. LAUREN K. SAUNDERS ET AL., NAT'L CONSUMER LAW CTR., STOPPING THE PAYDAY LOAN TRAP: ALTERNATIVES THAT WORK, ONES THAT DON'T 1 (2010) *available at* http://www.nclc.org/issues/payday-loans.html.

260. Wayne Greene, *Regulators in Dispute Over Internet Payday Loans by Tribes*, TULSA WORLD (Oct. 25, 2011, 4:09 PM), http://www.tulsaworld.com/news/article.aspx?subjectid=336&articleid=20111025_16_A1_Intern472461.

261. *See supra* Part IV.B.1.

this regulation will still be inadequate for many states—namely those who have been successful in passing strict regulations that have eliminated the industry all together. Additionally, a federal regulation would likely be less protective for consumers, based on other types of restrictions, than the laws used in many states.

If Congress or the CFPB takes on the task of regulating the industry, they should consider this problem in the rulemaking stage before loopholes become apparent. One available option is for the CFPB to issue a regulation setting national restrictions while deferring to any state laws that provide greater protection—an approach that Congress used in the Volunteer Protection Act passed in 1997.[262] The language of this law reads that it "shall not preempt any State law that provides additional protection."[263] Additionally, in order to meet the Supreme Court's standards, the regulation would have to unequivocally state that Indian tribes are subject to enforcement actions for violations of the act, at both the state and federal level. In doing so, this regulation would be a clear step toward eliminating the harmful practices characteristic of the tribal payday lending industry.

CONCLUSION

While a reevaluation of tribal immunity standards in the context of today's increasingly integrated economy is necessary, it is unlikely that Congress will address these issues in the near future. Because Congress is unlikely to reform immunity standards, regulators will have to work with the standards already in place to combat this problem. As the above discussion demonstrates, it is evident that there is a dire need for reform to protect against predatory tribal lenders.

Although there is no perfect option for addressing these problems, the CFPB is the agency most able to pass reform that will adequately address state regulation problems. In examining agency rules that have successfully regulated tribal entities, a regulation passed by the CFPB in this area would fall within this unequivocal congressional abrogation standard set by the Supreme Court. Payday lending is within the authority of the CFPB, as delegated to it by Congress. As long as the CFPB follows the proper standards, it could be a significant force in ending tribal lenders' harmful reach.

262. Volunteer Protection Act of 1997, Pub. L. No. 105-19, 111 Stat. 218 (codified at 42 U.S.C. § 14502 (2006)).

263. § 14502.

As these companies continue to grow and gain more attention, if regulators cannot halt these practices, it is likely that the strategy will expand into other product and service markets that are restricted by state regulation. Although it remains unclear what a rule should look like, what is clear is that regulation is necessary. While the importance of protecting Native American rights is evident, federal regulators must weigh those interests against the interests of American consumers to be free from predatory practices. When companies use tribal immunity as a method to circumvent consumer protection laws—rather than as a method to sustain self-governance—regulators should prioritize consumers' rights over tribal rights and take decisive, corrective action to protect the public from harm.

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