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The Current State of Arbitration Clauses Within Native American Tribal Contracts: An Examination of Binding Arbitration Contracts in Native American Payday Lending

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THE CURRENT STATE OF ARBITRATION CLAUSES WITHIN NATIVE AMERICAN TRIBAL CONTRACTS: AN EXAMINATION OF BINDING ARBITRATION CONTRACTS IN NATIVE AMERICAN PAYDAY LENDING

Liliana Burnett

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INTRODUCTION

In the past fifty years, Native American tribal reservations have emerged as enticing locations and partnership opportunities for outside businesses. As tribes are sovereign nations, not subject to many of the regulations and taxes that are found off-reservation, has led to an explosion of business and a potential for investors. However, this unique status that provides an opportunity for great wealth also comes with the issue of enforceability of contracts; two prevalent issues are the enforcement of mandatory arbitration clauses and the collection of awards. Although reservations were not historically viewed as desirable business locations, some businesses, particularly those involved in payday lending, have now begun to utilize the jurisdictional complications

for their benefits. It is important to understand that the arbitration and forum selection clause issues within contracts between Native American tribes and non-Native American businesses or individuals have not been settled by the courts and are ongoing, as demonstrated by the pending appeal in *Jackson v. Payday Financial Inc.*¹ and *Inetianbor v. CashCall, Inc.*² and the recent reversal and remand by the U.S. Court of Appeals for the Seventh Circuit in *Jackson v. Payday Financial, LLC.*³

Part II will explore the historical approach to the use of arbitration clauses in contracts between Native American tribes and non-Native Americans, including the unique nature of Native American tribal sovereignty and sovereign immunity. Part III will discuss the Supreme Court cases of *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*⁴ and *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*⁵ Additionally, Part III will examine the following developments: how tribes and tribal courts are currently addressing disputes, awards, jurisdiction, and the appeals process; the use of clauses such as forum selection clauses invoking tribal jurisdiction today; and the recent involvement of arbitration clauses within contracts between Native American tribes and non-Native Americans. Finally, Part IV will address policy recommendations.

¹ 2012 U.S. Dist. LEXIS 94095 (N.D. Ill. July 9, 2012), *appeal docketed*, No. 12-2617 (7th Cir., Sept. 21, 2012).

² 2013 WL 4494125 (S.D.Fla. 2013), *appeal docketed*, No. 13-13822 (11th Cir., Oct. 30, 2013).

³ No. 12-2617, 2014 U.S. App. LEXIS 16257 (7th Cir., Aug. 22, 2014).

⁴ 532 U.S. 411 (2011).

⁵ 523 U.S. 751 (1998).

I. Rise of Arbitration, Native American Tribal Sovereign Immunity & Jurisdiction

a. History of Arbitration

Although modern arbitration in the United States was not common until the early 1920s,⁶ it existed before the time of Alexander the Great⁷ and is even mentioned in George Washington's will.⁸ As with many of our legal procedures, the United States inherited arbitration from England, where the agreement to arbitrate commercial disputes was first referred to in 1224.⁹ Massachusetts became the first colony to adopt laws supporting arbitration in 1632.¹⁰ Modern arbitration in the United States was born in 1925 with the adoption of the Federal Arbitration Act, which "shaped modern arbitration" and changed the way business would be conducted.¹¹ However, prior to the arrival of Europeans in the Americas, Native American tribes used arbitration to settle both disputes within and between tribes.¹²

Within business contracts, mandatory arbitration clauses are very common and are utilized as a tool to keep disputes out of court and, in many cases, minimize potential losses.¹³ Between 1990 and 2001,

⁶ See Richard A. Bales, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT 5* (1997) (CITING FRANCES KELLOR, *ARBITRATION AND THE LEGAL PROFESSION: A REPORT PREPARED FOR THE SURVEY OF THE LEGAL PROFESSION* (1952)).

⁷ *Id.*; see Robin Lane Fox, *The Search for Alexander* 113-14 (1980) (noting that Philip II of Macedonia, Alexander the Great's father, specified the use of arbitration in disputes that may arise under his peace treaty with city-states in southern Greece in 337 B.C.).

⁸ See Bales, *supra* note 5, at 5 (The first President of the United States' will provided that any disputes regarding his intention would be resolved by a panel of three arbitrators and that the decision of the arbitrators would be "as binding on the Parties as if it had been given in the Supreme Court of the United States") (citing Am. Arbitration Ass'n, *Arbitration News* 2 (1963)).

⁹ See Marvin F. Hill, Jr. & Anthony V. Sinicropi, *Improving the Arbitration Process: A Primer for Advocates*, 27 WILLAMETTE L. REV. 463, 465 (1991).

¹⁰ See Steven A. Certilman, *A Brief History of Arbitration in the United States*, 3 N.Y. Dispute Resolution Lawyer 10, 10 (2010).

¹¹ See Byron Allyn Rice, Comment, *Enforceable or Not?: Class Action Waivers in Mandatory Arbitration Clauses and the Need for a Judicial Standard*, 45 Hous. L. Rev. 215, 221 (2008-09).

¹² See Certilman, *supra* note 9, at 10; see Robert V. Massey, Jr., *History of Arbitration and Grievance Arbitration in the United States*, <http://www.laborstudiesandresearch.ext.wvu.edu/r/download/32003> (last visited Dec. 1, 2013).

¹³ See Comment, *Enforceable or Not?*, *supra* note 10, at 217-18.

over one million cases were filed with the American Arbitration Association—this exceeded the total number that had been filed in the sixty-five years since its formation.¹⁴ Although arbitration clauses have been prevalent for some time, within the past few years the clauses themselves, and criticisms about them, have been highlighted more in both the public media and in the judicial sphere, particularly those which involve financial services.¹⁵ Arbitration is criticized as being a “pay-for-justice phenomenon” due to the fact that the purportedly neutral decisionmaker is dependent on those who pay for the service.¹⁶ It is thought to be relatively unregulated, as cases are decided “out of public view, leaving no record or legal precedent.”¹⁷

Although there has been an increase in criticisms, there has been a trend among the courts to be more accepting of arbitration agreements, especially those with class action waivers or mandatory arbitration. Most recently, in 2013, the U.S. Supreme Court held that a class action waiver contained in an arbitration agreement was enforceable, even though the plaintiffs showed the waiver effectively prevented them from bringing a federal antitrust claim, since the litigation of the claim would be prohibitively expensive.¹⁸ In most domestic cases, the Federal Arbitration Act (“FAA”), which provides for judicial facilitation of private dispute resolution through arbitration, controls contracts executed under federal and state law.¹⁹ However, due to the sovereign nature of Native American tribes in the United States, the enforcement of arbitration clauses has not been a smooth road.

¹⁴ *Id.* at 221; see Am. Arbitration Ass’n, *Fair Play: Perspectives From AAA On Consumer and Employment Arbitration* 7 n.2 (2002).

¹⁵ In April of 2012, the Consumer Finance Protection Bureau launched a public inquiry into arbitration clauses and how consumers and financial services companies are affected by them. See *CFPB Launches Public Inquiry into Arbitration Clauses*, Consumer Financial Protection Bureau (Apr. 24, 2012), <http://www.consumerfinance.gov/newsroom/consumer-financial-protection-bureau-launches-public-inquiry-into-arbitration-clauses/>.

¹⁶ See Comment, *Enforceable or Not?*, *supra* note 10, at 222 (citing Eric Berkowitz, *Is Justice Served?*, L.A. Times, Oct. 22, 2006, at 20).

¹⁷ *Id.*

¹⁸ See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); see also *Class Actions—Class Arbitration Waivers—American Express Co. v. Italian Colors Restaurant*, 127 Harv. L. Rev. 278 (2013).

¹⁹ See 9 U.S.C.A. § 1 (2014); see also *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding that the Federal Arbitration Act applied to contracts executed under state law).

Under the FAA, arbitration agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”²⁰ This provision “permits agreements to arbitration to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability,” provided those defenses do not “apply only to arbitration or . . . derive their meaning from the fact that an agreement to arbitration is at issue.”²¹ Unconscionability may be procedural or substantive:

Procedural unconscionability consists of some impropriety during the process of forming the contract depriving a party of meaningful choice. . . . Factors to be considered in determining whether an agreement is procedurally unconscionable include whether each party had the opportunity to understand the terms of the contract, whether important terms were hidden in a maze of fine print, and all of the circumstances surrounding the formation of the contract. . . . Substantive unconscionability concerns the actual terms of the contract and examines the relative fairness of the obligations assumed, asking whether the terms are so onesided as to oppress or unfairly surprise an innocent party.²²

Concern over unconscionability remains one of the most significant arguments against binding arbitration clauses; in particular forum selection clauses in which the chosen “forum” is distant and the legal proceedings would be foreign. This concern has become more prevalent in financial services contracts, specifically payday lending, as will be further discussed below.

b. Sovereign Immunity of Tribes

One of the main roadblocks to arbitration is sovereign immunity; since if it is left intact through the lack of a waiver, a federal or state court lacks the power to hear or decide the litigation. Tribal sovereign immunity is a judicially created doctrine which first came to light in 1940, when the U.S. Supreme Court, in *United States v. United States Fidelity & Guarantee Co.*, held that Native American tribes retain an

²⁰ 9 U.S.C. § 2.

²¹ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011).

²² *Phoenix Ins. Co. v. Rosen*, 949 N.E.2d 639, 647 (Ill. 2011).

inherent right to claim tribal sovereign immunity,²³ including suit from states.²⁴ In the past seventy years, the Court has continued to expand and hold that suits against tribes are barred “absent a clear waiver by the tribe or congressional abrogation” and that the waiver of tribal immunity “cannot be implied but must be unequivocally expressed.”²⁵ In *Santa Clara Pueblo v. Martinez*, the Court explicitly stated “Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.”²⁶

Although the federal government, foreign nations, and states have sovereign immunity in principle, tribal sovereign immunity is unique since many states have waived immunity when the government is involved in a proprietary or commercial activity.²⁷ The federal government’s immunity is similar because the immunity is not limited to the tribe’s governmental functions, but it also applies to commercial and proprietary tribal government functions.²⁸ Tribal immunity’s roots can be found in *Cherokee Nation v. Georgia*, where the U.S. Supreme Court held that Native American tribes within the United States are “not foreign state[s] in the sense of the Constitution” but are “domestic dependent nations.”²⁹

Given the unique nature of tribal sovereign immunity, there are two main reasons it exists: (1) the need to protect the economic viability of

²³ See 309 U.S. 506, 512-13 (1940); see also Brian C. Lake, *The Unlimited Sovereign Immunity of Indian Businesses Operating Outside the Reservation: An Idea Whose Time Has Gone*, 1996 COLUM. BUS. L. REV. 87, 89 (1996).

²⁴ See *Three Affiliated Tribes v. World Eng’g*, 476 U.S. 877, 890 (1986) (holding that states may not infringe upon the sovereign immunity of Native American tribes).

²⁵ See *Okla. Tax Comm. v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991).

²⁶ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

²⁷ See William V. Vetter, *Doing Business with Indians and the Three “S”es: Secretarial Approval, Sovereign Immunity, and Subject Matter Jurisdiction*, 36 ARIZ. L. REV. 169, 173 (1994) (noting that tribal immunity is broader than state immunity since many states do not recognize or waive immunity in situations when the government is involved in a proprietary or commercial activity).

²⁸ *Id.* The United States is immune from suits unless it has waived immunity, through the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2674, and the Tucker Act, 27 U.S.C. §§ 1346(a), 1491, or has consented to the suit.

²⁹ 30 U.S. 1, 2 (1831).

the tribes and (2) recognition of their status as separate sovereigns.³⁰ Regarding the first factor, the Eighth Circuit wisely stated that “[a]s rich as the . . . Nation is to be in lands and money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which parties chose to prefer against it.”³¹ The recognition of sovereignty is vital and, since the arrival of the Europeans and the creation of the United States, the United States has treated and recognized Native American tribes as sovereigns and negotiated with their representatives.³² The Eighth Circuit also stated that “[i]t has been the policy of the United States to place and maintain the . . . Nation and other civilized Indian Nations in the Indian Territory, so far as relates to suits against them, on the plane of independent states.”³³

Another difficulty with tribal sovereign immunity is determining if a commercial entity is separate from the Native American tribe. An entity that “ha[s] a distinct, nongovernmental character” is not immune, but an entity that is “merely an administrative convenience, i.e., a ‘subordinate [tribal] economic organization’” is immune.³⁴ Lower courts have looked to numerous factors to determine if an entity is subordinate to the tribal government, including: (1) if the entity is organized under tribal constitution or laws (rather than federal law); (2) if the organization’s purpose(s) are similar to a tribal government’s (e.g., promoting tribal welfare, alleviating unemployment, providing money for tribal programs); (3) if the organization’s managing body is necessarily composed primarily of tribal officials (e.g., organization’s board is, by law, controlled by tribal council members); (4) if the tribe’s governing body has the unrestricted power to dismiss members of the organization’s governing body; (5) if the organization (and/or its governing body) “acts for the tribe” in managing organization’s activities; (6) if the tribe is the legal owner of property used by the organization, with title held in

³⁰ See Alexander Hogan, *Protecting Native American Communities by Preserving Sovereign Immunity and Determining the Place of Tribal Businesses in the Federal Bankruptcy Code*, 43 Colum. Hum. Rts. L. Rev. 569, 572 (2011-12) (discussing the historical reasoning for tribal sovereign immunity).

³¹ *Id.*; *Thebo v. Choctaw Tribe of Indians*, 66 F. 372, 376 (8th Cir. 1895).

³² See David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr., & Matthew L.M. Fletcher, *Introduction: Indians and Indian Law*, Cases & Materials on Federal Indian Law 2 (2011).

³³ See Hogan, *supra* note 29, at 572; *Thebo*, 66 F. at 375.

³⁴ See Vetter, *supra* note 26, at 176 (discussing the difficulty of determining if an entity is separate or connected to a Native American tribe).

the tribe's name; (7) if the organization's administrative and/or accounting activities are controlled or exercised by tribal officials; and (8) if the organization's activities take place primarily on the reservation.³⁵ It is important to note that these are simply the factors that the courts examine, but not all are necessary to find an entity subordinate of the tribal government.³⁶

The final issue lies in determining if the activity took place in "Indian country." Although 18 U.S.C. § 1151 is a criminal statute, it "generally applies to questions of civil jurisdiction."³⁷ 18 U.S.C. § 1151 defines "Indian country" as:

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country," as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.³⁸

In the early 1990s, the Court held that "dependent Indian communities" include any "area . . . validly set apart for the use of Indians as such, under the superintendence of the Government,"³⁹ and recognized

³⁵ Vetter, *supra* note 26, at 177 (citing *Dixon v. Picopa Const. Co.*, 772 P.2d 1104 (Ariz. 1989); *Smith Plumbing Co. v. Aetna Cas. & Sur. Co.*, 720 P.2d 499 (Ariz.), *cert. denied*, 479 U.S. 987 (1986); *White Mountain Apache Tribe v. Indus. Comm'n of Ariz.*, 696 P.2d 223 (Ariz. Ct. App. 1985); *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Cmty.*, 674 P.2d 1376 (Ariz. Ct. App. 1984), *review denied* (1984); *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654 (Ariz. 1971); *Morgan v. Colo. River Indian Tribe*, 443 P.2d 421 (Ariz. 1968)).

³⁶ Vetter, *supra* note 26, at 177.

³⁷ *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998) ("Although [the statute] by its terms relates only to . . . criminal jurisdiction, . . . it also generally applies to questions of civil jurisdiction . . ."); *see also* William Wood, *It Wasn't an Accident: The Tribal Sovereign Immunity Story*, 62 AM. U. L. REV. 1587, 1589 n.4 (2013) (discussing the distinction between what is "Indian country" and what is not).

³⁸ 18 U.S.C. § 1151 (2013).

³⁹ *See Okla. Tax Comm. v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 511.

that Congress intended to eschew technical distinctions in land tenure and “defined Indian country broadly, . . . [intending] to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments.”⁴⁰ Furthermore, the Eighth Circuit determined a tribal housing project was a “dependent Indian community,” and articulated a test to determine if a particular area is a “dependent Indian community.”⁴¹

Under *Santa Clara Pueblo v. Martinez*, “a waiver of sovereign immunity ‘cannot be implied, but must be unequivocally expressed.’”⁴² The U.S. Supreme Court has recognized a special mode of statutory construction when a statute affects Native American interests, and in *Montana v. Blackfeet Tribe of Indians* the Court held that “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.”⁴³ Courts use this method of statutory interpretation to determine whether a statute has waived a tribe’s sovereign immunity, and courts have only found a waiver when Congress has explicitly stated that the statute is meant to remove tribal immunity.⁴⁴

Although the concept of tribal sovereign immunity is similar to that of the immunity afforded to the federal government, to state

⁴⁰ *Oklahoma Tax Comm. v. Sac and Fox Nation*, 508 U.S. 114, 125 (1993) (citing Felix Cohen, *Handbook of Federal Indian Law* 34 (1982 ed.)).

⁴¹ See *United States v. South Dakota*, 665 F.2d 837 (8th Cir. 1981), cert. denied 459 U.S. 823 (1982). The test articulated by the Eighth Circuit includes looking at several factors: (1) whether the U.S. has retained “title to the lands which it permits the Indians to occupy” and “authority to enact regulations and protective laws respecting this territory”; (2) “the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies towards the area”; (3) whether there is “an element of cohesiveness . . . manifested either by economic pursuits in the area, common interest, or needs of the inhabitants as supplied by that locality”; and (4) “whether such lands have been set apart for the use, occupancy, and protection of dependent Indian peoples.” *Id.* at 839.

⁴² See *Santa Clara Pueblo*, 436 U.S. at 58 (holding that suits against a tribe under the Indian Civil Rights Act of 1968 are barred by the tribe’s sovereign immunity since nothing on the face of ICRA purported to subject tribes to the jurisdiction of the federal courts).

⁴³ 471 U.S. 759, 766 (1985).

⁴⁴ See *Santa Clara Pueblo*, 436 U.S. at 60 (“Although Congress clearly has power to authorize civil actions against tribal officers . . . a proper respect both for tribal sovereignty and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indication of legislative intent”).

governments, and to foreign nations, tribal sovereign immunity is much broader. Under the Tucker Act and the Federal Tort Claims Act, the federal government has waived immunity from tort liability and from liability arising out of its commercial activities.⁴⁵ Although the federal government cannot limit state sovereign immunity,⁴⁶ many states have waived immunity in a manner similar to the federal government in the Federal Tort Claims Act,⁴⁷ and states are subject to suit by both the federal government and by other states. Furthermore, foreign states no longer have immunity for commercial activities in the United States due to the 1976 Foreign Sovereign Immunities Act.⁴⁸ However, tribal sovereign immunity still remains in most circumstances,⁴⁹ but there are some indications of limitations to come under the strong dissents of Justices

⁴⁵ See 28 U.S.C.A. §§ 1346(a)(2), 1491(Tucker Act of 1887) (2014) (providing federal jurisdiction for a variety of non-tort claims against the United States); 28 U.S.C.A. §§ 1346(b), 2674 (Federal Tort Claims Act of 1947) (West 2014) (provides government damage liability for acts by the United States or its employees for any “negligent or wrongful acts or omissions . . . in the same manner and to the same extent as a private individual under like circumstances.”).

⁴⁶ See *Hans v. Louisiana*, 134 U.S. 1 (1890) (holding that the Eleventh Amendment re-affirms that states possess sovereign immunity and, thus, are generally immune from being sued in federal court without waiving that immunity); *Alden v. Maine*, 527 U.S. 706 (1999) (holding that Article 1 of the U.S. Constitution does not provide Congress with the ability to subject a state, without their consent, to private suits for damages in state court); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (holding that the Eleventh Amendment precludes Congress from abrogating state sovereign immunity in the federal courts pursuant to any of its Article I powers); see also *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 684-86 (1999) (declining to limit state sovereign immunity to non-commercial activities and suggesting that Congress might also lack the authority to do so).

⁴⁷ See *State Sovereign Immunity and Tort Liability*, National Conference of State Legislatures (Sept. 8, 2010), <http://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx> (providing a table of statutes and constitutional provisions for all 50 states and the District of Columbia related to sovereign immunity and tort claims against the state); see generally Jonathan R. Siegel, *Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment*, 52 Duke L.J. 1167 (2003) (discussing waivers of sovereign immunity by states).

⁴⁸ 28 U.S.C. § 1605(a)(2) (2011).

⁴⁹ See *Kiowa*, 523 U.S. at 757-59 (noting the restrictions on tribal immunity “in limited circumstances” by Congress, including mandatory liability insurance under the Indian Self-Determination and Education Assistance Act, 25 U.S.C.S. § 450f(c)(3) (2011), gaming activities under the Indian Gaming Regulatory Act, § 2710(d)(7)(A) (ii) (2011), etc.).

Ginsburg, Thomas, and Ginsburg in the recent decision of *Michigan v. Bay Mills Indian Community*.⁵⁰

c. Jurisdiction

In addition to the concern about sovereign immunity, there is a question as to whether the tribal arbitration tribunals/courts are the proper jurisdiction. The first Supreme Court case to deal with civil jurisdiction by tribal courts against non-tribal members was *Williams v. Lee* in 1959.⁵¹ The Court held that a state court did not have jurisdiction to try a civil case between a non-Native American who was doing business on the reservation with tribal members who reside on the reservation, and that the tribal court would be the proper tribunal.⁵² The Court noted that “absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Native Americans to make their own laws and be ruled by them,”⁵³ and that prior Supreme Court decisions “have consistently guarded the authority of Indian governments over their reservations If this power is to be taken from them, it is for Congress to do it.”⁵⁴ Although the court made

⁵⁰ See 132 S. Ct. 2024, 2045, 2054 (2014) (Thomas, J., dissenting) (arguing that the *Kiowa* decision, which extended tribal sovereign immunity to bar suits “arising out of an Indian tribe’s commercial activities conducted outside its territory,” was an “error” and should be overturned. “That decision, wrong to beginning with, has only worsened with the passage of time. In the 16 years since *Kiowa*, tribal commerce has proliferated and the inequalities engendered by unwarranted tribal immunity have multiplied.” Furthermore, Justice Thomas notes that “[i]n *Kiowa*, this Court adopted a rule without a reason: a sweeping immunity from suit untethered from commercial realities and the usual justifications for immunity, premised on the misguided notion that only Congress can place sensible limits on a doctrine we created. The decision was mistaken then, and the Court’s decision to reaffirm it in the face of the unfairness and conflict it has endangered it doubly so.”); 132 S. Ct. 2024, 2054 (2014) (Ginsburg, J., dissenting) (reaffirming her decision to join in Justice Steven’s dissenting opinion in *Kiowa* and stating that “this Court’s declaration of an immunity thus absolute was and remains exorbitant.”); 132 S. Ct. 2024, 2045 (2014) (Scalia, J., dissenting) (“I am now convinced that *Kiowa* was wrongly decided; that, in the intervening 16 years, its error has grown more glaringly obvious”).

⁵¹ 358 U.S. 217 (1959).

⁵² *Id.*

⁵³ *Id.* at 220.

⁵⁴ *Id.* at 223 (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-66 (1903)); see *Fisher v. District Court*, 424 U.S. 382, 387 (1976) (stating that state court jurisdiction “plainly would interfere with the powers of self-government exercised by the tribe through its own tribal courts”).

it very clear that tribal courts had civil jurisdiction in cases involving tribal members, it was not until the 1980's that the court began to clearly address the civil jurisdiction question for suits against non-Native Americans.⁵⁵

It was not until the end of the twentieth century and into the twenty-first century that the Court addressed cases involving non-Native Americans that took place "off-reservation." In *Strate v. A-1 Contractors*, the Court addressed the adjudicatory authority of tribal courts over personal injury actions against non-Native Americans, and it held that there was no jurisdiction due to the lack of a consensual relationship⁵⁶ and the fact that the incident did not occur on tribal lands.⁵⁷ The general rule is that, absent congressional action, tribes lack civil authority over the conduct of non-members on non-Indian land within a reservation.⁵⁸ Furthermore, in 2001, in *Nevada v. Hicks*, the Court held that tribal

⁵⁵ See *Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 417 U.S. 845 (1985) (distinguishing civil cases from *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), which held that tribal courts didn't have inherent criminal jurisdiction to try and punish non-Native Americans (even if the criminal acts took place on the reservation) unless Congress authorized it, and required that each assertion of tribal civil jurisdiction should be reviewed, in the first instance, by the tribal court itself, and that the parties must exhaust all tribal courts before appealing to the federal courts.); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (extending *Nat'l Farmers* to cases involving federal jurisdiction based on diversity of citizenship). However, if the reservation is located within one of the six states (Minnesota, Wisconsin, Oregon, California, Nevada, and Alaska) that has received congressional authority to assume state criminal and civil jurisdiction over tribal members under Public Law 280, 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1121-1326, and there is consent by the tribe, the state law will apply, unless it is "regulatory," which many consumer protection laws are. See *McClanahan v. Ariz. State Tax Comm.*, 411 U.S. 164, 177 (1973); see also *Cal. v. Carbazon Band of Mission Indians*, 480 U.S. 202 (1987).

⁵⁶ See *Montana v. United States*, 544, 565-66 (1981) (holding that tribes only had the power to regulate non-Native American on "Indian land" in two circumstances: (1) regulatory authority over "taxation, licensing, or other means, and the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"; and (2) when the conduct of the non-Native Americans on the reservation "threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe.").

⁵⁷ See 520 U.S. 438, 460 (1997); see also *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316 (2008) (holding that a tribal court didn't have jurisdiction to adjudicate a discrimination claim concerning the non-Native American bank's sale of fee-land (on a reservation) owned by the bank).

⁵⁸ *Id.*

courts do not have jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against tribal members suspected of having violated state law off of the reservation, since it was not “essential to tribal self-government or internal relations,” and thus not an intrusion on the sovereignty of the Native American tribe.⁵⁹

II. Current Status of Tribal Sovereign Immunity, Use of Arbitration Clauses, Business Concerns, and Recent Litigation involving Payday Loans and Native Americans

In the past fifteen years, the Supreme Court has decided two major cases involving sovereign immunity, arbitration clauses, and Native American tribes: *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* and *C & L Enterprises v. Citizen Band, Potawatomi Indian Tribe of Oklahoma*.

In 1998, the U.S. Supreme Court in *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* upheld a sovereign immunity defense by a Native American tribe for breach of contract involving a business located off of the reservation.⁶⁰ In this case, a tribal entity (the Kiowa Industrial Development Commission) agreed to purchase stock from Manufacturing Technologies, Inc., and the then-chairman of the Kiowa’s business committee signed a promissory note in the name of the Tribe to Manufacturing Technologies Inc.⁶¹ The note did not specify governing law, but was signed on land held in trust for the tribe.⁶² It was delivered outside of tribal land and obligated the Tribe to make payments in Oklahoma City.⁶³ The note specifically stated that “[n]othing in this Note subjects or limits the sovereign rights of the Kiowa Tribe . . . ,”⁶⁴ which clearly was not a waiver of sovereign immunity.⁶⁵ The Tribe defaulted and Manufacturing Technologies sued on the note in state court, but the Tribe invoked sovereign immunity.⁶⁶

⁵⁹ See 533 U.S. 353, 364 (2001).

⁶⁰ *Kiowa Tribe*, 523 U.S. at 753.

⁶¹ *Id.*

⁶² *Id.* at 754.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Robert J. Miller, RESERVATION “CAPITALISM”: ECONOMIC DEVELOPMENT IN INDIAN COUNTRY 99 (2012) (discussing the implications of *Kiowa Tribe’s* holding).

⁶⁶ *Kiowa Tribe*, 523 U.S. at 754.

When the case reached the Supreme Court, the Court held that “an Indian tribe is not subject to suit in a state court—even for breach of contract involving off-reservation commercial conduct—unless “Congress has authorized the suit or the tribe has waived its immunity.”⁶⁷ The Court stated that “[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.”⁶⁸ The Court noted that precedent has not made the distinction based on where the tribal activity occurred (on or off the reservation),⁶⁹ or a distinction between governmental and commercial activities of the tribe.⁷⁰ Although the Court has recognized that a state may have authority to tax or regulate tribal activities occurring within the state but outside Indian country,⁷¹ “to say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit.”⁷² The Court held that Native American tribes have sovereign immunity from civil lawsuits on contracts, regardless if they involved governmental or commercial activities, and whether or not they are signed in “Indian country.”⁷³ Justices Stevens, Thomas, and Ginsburg dissented, arguing since tribal immunity arose by “accident” and was unjust,⁷⁴ it should be limited to on-reservation activities with a “meaningful nexus” to a tribe’s “sovereign function.”⁷⁵ Although the Court noted the doctrine of sovereign immunity for Native American tribes

⁶⁷ *Id.* at 754.

⁶⁸ *Id.* at 754; *see, e.g., Three Affiliated Tribes of Fort Berthold Reservation*, 476 U.S. at 890; *Santa Clara Pueblo*, 436 U.S. at 58; *U.S. Fid. & Guar. Co.*, 309 U.S. at 512.

⁶⁹ *See Puyallup Tribe, Inc. v. Dep’t of Game of Wash.*, 433 U.S. 165, 167, 168, 172 (1977) (holding that the Tribe’s claim of immunity was “well founded,” and did not discuss the relevance of if the fishing had taken place on or off the reservation).

⁷⁰ *See, e.g., Puyallup Tribe, Inc.*, 433 U.S. 165 (recognizing tribal immunity for fishing, which may well be a commercial activity); *U.S. Fid. & Guar. Co.*, 309 U.S. 506 (recognizing tribal immunity for coal-mining lease).

⁷¹ *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973).

⁷² *Kiowa Tribe*, 523 U.S. at 755.

⁷³ *Id.* at 753; *see also* Miller, *supra* note 64, at 99.

⁷⁴ *Kiowa Tribe*, 523 U.S. at 761, 766 (Stevens, J., dissenting).

⁷⁵ *Id.* at 764 (Stevens, J., dissenting).

arose “almost by accident”⁷⁶ and had been adopted “with little analysis” and “without extensive reasoning” in its earlier cases, it still remains the law today, and outside investors must “protect themselves” by utilizing due diligence in negotiation by demanding immunity waiver clauses.⁷⁷

Contrary to the “pro-Native American” decision in *Kiowa Tribe*, in 2001 the Court held that a tribe had waived its sovereign immunity from suit when it “expressly agreed” to arbitrate suits with the contractor, to the governance of state law, and to the enforcement of arbitral awards.⁷⁸ The case arose after the Citizen Band, Potawatomi Indian Tribe of Oklahoma, a federally recognized tribe, solicited and retained a different roofing company after deciding to change the roofing material for a contract on a building which was owned by the tribe, but not located on the reservation, nor was it trust land.⁷⁹ The initial contractor had the tribe sign a standard form contract which contained an arbitration clause that provided that disputes would be decided by arbitration, decisions by the arbitrator would be final, and judgment would be enforceable; and a choice of law clause providing that the contract would be governed by the law of the place where the project was located, which would be Oklahoma state law, not tribal law.⁸⁰

The question presented to the Court was “whether the Tribe waived its immunity from suit in state court when it expressly agreed to arbitrate disputes with C & L relating to the contract, to the governance of Oklahoma law, and to the enforcement of arbitral awards ‘in any court

⁷⁶ *Id.* at 756, 763 (Stevens, J., dissenting) (concurring with the majority on this point); see Wood, *supra* note 36, at 1593 (discussing the Court’s use, and misunderstanding, of *Turner v. United States*, 248 U.S. 354 (1919), in *Kiowa*, particular the statement describing *Turner* as “a slender reed for supporting the principle of tribal sovereign immunity” since the *Turner* Court assumed tribal immunity for the sake of argument rather than as a “reasoned statement of doctrine.”).

⁷⁷ *Id.* at 756, 753, 757; see Wood, *supra* note 36, at 1589, 1593-94 (arguing that the Court misunderstood and mischaracterized the history of sovereign immunity in respect to Native American tribes; in particular the *Kiowa* Court ignored two Eighth Circuit cases used in *U.S. Fid. & Guar. Co.*, 309 U.S. 506, of *Adams v. Murphy*, 165 F. 304, 308-09 (8th Cir. 1908) and *Thebo*, 66 F. 372, and the 1850 Supreme Court case of *Parks v. Ross*, 52 U.S. 362, 374 (1850), which applied sovereign immunity principles to uphold dismissal of a suit against the Principal Chief of the Cherokee Nation.); Miller, *supra* note 64, at 99.

⁷⁸ *C & L Enters.*, 532 U.S. at 414.

⁷⁹ *Id.* at 414-15.

⁸⁰ *Id.* at 415.

having jurisdiction thereof.”⁸¹ The Court first noted that for a tribe to relinquish its immunity, its renouncement must be “clear.”⁸² In this case, the waiver—an agreement to submit disputes to arbitration, to be bound by the arbitration award, and to have the award enforced in any court of law—was unambiguous and explicit.⁸³ The arbitration clause in this case had three elements: an agreement to arbitrate all disputes, an agreement to be bound by any arbitration award, and an agreement that any award could be enforced in any state or federal court with jurisdiction.⁸⁴ The Tribe argued that that since the contract did not specify a specific judicial forum in which to enforce the decision of the arbitrator, sovereign immunity was not waived.⁸⁵ However, the Court rejected this argument, holding that the consent to arbitration via the contract, “memorialize[d] the Tribe’s commitment to adhere to the contract’s dispute resolution regime,” and thus was a waiver of sovereign immunity.⁸⁶ Therefore, “[a]ny deviation from this language in *C & L Enterprises* could engender an argument that the case is distinguishable.”⁸⁷ Furthermore, the “Court expressly noted that attempting to hide behind sovereign immunity principles under the circumstances equated to a ‘game lacking practical consequences.’”⁸⁸ The Court held that “by the clear import of the arbitration clause, the Tribe is amenable to a state-court suit to enforce an arbitral award in favor of contractor C & L.”⁸⁹

Prior to the Supreme Court cases, there were numerous state and circuit court cases involving arbitration clauses and Native American tribes. In *Calvello v. Yankton Sioux Tribe*, the South Dakota Supreme Court held that the tribe’s participation in arbitration did not amount

⁸¹ *Id.*

⁸² *Id.* at 418.

⁸³ *Id.* at 420.

⁸⁴ *Id.* at 415.

⁸⁵ *Id.* at 421; see also *Oneida Indian Nation of N.Y. State v. Cnty. of Oneida*, 802 F. Supp. 2d 395, 417 (N.D.N.Y. 2011) (distinguishing *C & L Enters.* from the case presented).

⁸⁶ *C & L Enters.*, 532 U.S. at 422.

⁸⁷ See Edward Rubacha, *Contract Forms and Contract Drafting: Construction Contracts with Indian Tribes or on Tribal Lands*, CONSTRUCTION L. 12, 13 (2006) (discussing the Court’s holding in *C & L Enters.*).

⁸⁸ See Heidi McNeil Staudenmaier & Metchi Palaniappan, *Intersection of Corporate America and Indian Country: Negotiating Successful Business Alliances*, 22 T. M. COOLEY L. REV. 566, 577 (2005) (discussing the trend by courts to erode sovereign immunity for tribes); *C & L Enters.*, 532 U.S. at 422.

⁸⁹ *C & L Enters.*, 532 U.S. at 414.

to a waiver of its sovereign immunity in a contract dispute with one of its non-tribal employees.⁹⁰ Similarly, in *Tamiami Partners, Limited v. Miccosukee Tribe of Indians of Florida*, the Eleventh Circuit upheld sovereign immunity to protect the tribe from litigation.⁹¹ The Eighth Circuit, in *Rosebud Sioux Tribe v. Val-U Construction Co.*, held that the tribe expressly waived its sovereign immunity with respect to an arbitration provision in a construction contract.⁹² Furthermore, in *Val/Del. Inc. v. Pascua Yaqui Tribe*, an Arizona Appellate Court held that an arbitration provision, in a contract with a management company to finance and operate the Tribe's bingo operation, constituted a clear indication that sovereign immunity had been waived, thus jurisdiction was concurrent in the state court and in the tribal court.⁹³

For an arbitration clause to be enforceable, the tribe must have relinquished its sovereign immunity by executing a waiver.⁹⁴ A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed,"⁹⁵ but the use of talismanic words, such as "sovereign immunity," is not needed for a waiver to be valid.⁹⁶ Courts, in determining whether a tribe has relinquished its protection with sufficient clarity, have inquired "whether the language of [the operative agreement or clause] might have hoodwinked an unsophisticated Indian negotiator into giving up the tribe's immunity from suit without realizing that he was doing so."⁹⁷ To determine whether an agreement is sufficiently

⁹⁰ See 584 N.W.2d 108 (S.D. 1998); see also Heath Oberloch, *Calvello v. Yankton Sioux Tribe: Shoring Up Tribal Sovereign Immunity Against the Flood of Commercial Transactions Involving Tribally Owned Businesses*, 44 S.D. L. REV. 746, 746 (1999) (examining the holding of *Calvello*).

⁹¹ 177 F.3d 1212, 1225-26 (11th Cir. 1999); see also David D. Haddock & Robert J. Miller, *Sovereignty Can be a Liability: How Tribes Can Mitigate the Sovereign's Paradox*, in SELF-DETERMINATION: THE OTHER PATH FOR NATIVE AMERICANS 194, 205-06 (Terry L. Anderson, Bruce L. Benson, & Thomas E. Flanagan, eds., 2006).

⁹² *Rosebud Sioux Tribe v. Val-U Const. Co.*, 50 F.3d 560 (8th Cir. 1995).

⁹³ 145 Ariz. 558, 565 (Ariz. Ct. App. 1985).

⁹⁴ *Kiowa Tribe*, 523 U.S. at 754.

⁹⁵ *Santa Clara Pueblo*, 436 U.S. at 458.

⁹⁶ *C & L Enters.*, 532 U.S. at 420; see also *Rosebud Sioux Tribe*, 50 F.3d at 563 ("[W]hile the Supreme Court has expressed its protectiveness of tribal sovereign immunity by requiring that any waiver be explicit, it has never required the invocation of magic words stating that the tribe hereby waives its sovereign immunity.").

⁹⁷ *Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 660 (7th Cir. 1996); see Rubacha, *supra* note 86, at 12 (discussing the issue in determining if a tribe has relinquished its sovereign immunity protection).

“clear” requires courts to take “a practical, commonsense approach in attempting to separate words that fairly can be construed as compromising a waiver of tribal sovereign immunity from words that fall short.”⁹⁸ Basically, “the cases require that waiver be found when expressed in a way that could not unfairly surprise a tribe.”⁹⁹ Therefore, for a tribe to be subject to mandatory arbitration clauses, the waiver of sovereign immunity must be so obvious that the tribe could not be surprised. However, unlike the waiver of sovereign immunity, a tribe, as a commercial entity, does not have to make the mandatory arbitration clause obvious to the public.

a. Use of Arbitration Clauses and Forum-Selection Clauses Today

Arbitration clauses are standard within American consumer agreements: from cell phones, to credit cards, to mortgages, all include, in the small print, the waiver of the right to litigation and the agreement to mandatory and binding arbitration.¹⁰⁰ The percentage of arbitration clause in consumer product contracts appears to be increasing, with one study finding that 76.9% of consumer contracts studied included arbitration clauses, and “every consumer contract with an arbitration clause

⁹⁸ *Ninigret Dev. Corp. v. Narragansett Indian Wetuomuch Hous. Auth.*, 207 F.3d 21, 31 (1st Cir. 2000).

⁹⁹ Rubacha, *supra* note 86, at 12.

¹⁰⁰ See Theodore Eisenberg, Geoffrey P. Miller, & Emily Sherwin, *Arbitrations' Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. Mich. J.L. Reform 871 (2007-2008) (discussing the rise in arbitration clauses in consumer contracts); see, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (permitting contracts that exclude class action arbitration in a cell phone contract), *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (holding that class action waivers in arbitration agreements (for credit cards) will be strictly enforced under the Federal Arbitration Act, even when it is not economically feasible for individual plaintiffs to arbitrate their claims); see also *Nitro-Lift Tech., L.L.C. v. Howard*, 133 S. Ct. 500 (2012) (reversing Oklahoma's Supreme Court decision that prevented arbitration of a dispute over a non-competition agreement in employment contracts), *Marmet Health Care Ctr., Inc. v. Brown*, 131 S. Ct. 1740 (2011) (holding that West Virginia's categorical prohibition of pre-dispute agreements to arbitrate personal-injury or wrongful death claims against nursing homes is contrary to the terms and coverage of the Federal Arbitration Act).

also included a waiver of class-wide arbitration.”¹⁰¹ In the past few years there has been an increase in media attention and criticism regarding mandatory arbitration clauses, in particular those which are related to financial services products, and it is very likely that the Consumer Financial Protection Bureau will begin to crack down on arbitration clauses.¹⁰² As with many things, there are both positive aspects and criticisms regarding the use of arbitration clauses. On a positive note, they allow companies to save money while reducing the cost of products to consumers due to the decrease likelihood of litigation.¹⁰³ However, there are far more criticisms regarding the use of mandatory arbitration clauses, including the unfairness imposed by economically powerful corporations on the unsophisticated consumers who must unwillingly consent, the deprivation of jury trials, and the lower damage awards, even though this has not been proven.¹⁰⁴ Critics also argue that mandatory arbitration is detrimental to the public interest, which supports

¹⁰¹ See Eisenberg et al., *supra* note 99, at 883 table 2, 881, 884 (sample consisted of twenty-six consumer agreements drafted by twenty-one companies, including three commercial banks (five consumer agreements), two credit card issuers (two consumer agreements), and one financial credit company (one consumer agreement)); see also Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 LAW & CONTEMP. PROBS. 55, 64 (2004) (this study found that 69.2% of the consumer financial contracts in their sample included arbitration clauses and included tax preparation and investment contracts, in addition to credit card and banking contracts, as consumer financial contracts, and if limited to credit card and banking contracts, twelve of seventeen, or 70.6%, included arbitration clauses).

¹⁰² See Rachel Witkowski, *CFPB Likely to Crack Down on Arbitration Clauses*, AMERICAN BANKER (Dec. 12, 2013), http://www.americanbanker.com/issues/178_237/cfbp-likely-to-crack-down-on-arbitration-clauses-1064229-1.html.

¹⁰³ Eisenberg et al., *supra* note 99, at 872; see Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 90 (2001) (noting a variety of ways in which arbitration reduces the cost of dispute resolution for companies, including: (1) high damages are less likely due to the lack of juries, (2) defendant companies avoid bad publicity, (3) procedures are nationally uniform, (4) the finality of arbitration saves companies the potential cost of appeal, (5) eliminates the possibility of class action, (6) deters claims against business by requiring consumer-plaintiffs to pay arbitrator fees, as well as filing fees that exceed the filing fees in litigation, and (7) discovery and appeals are limited).

¹⁰⁴ Eisenberg et al., *supra* note 99, at 872-83; see Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J. 44 (Nov. 2003-Jan. 2004) (determining that there is no significant difference between arbitration and litigation awards).

transparency in legal resolutions, and that the prohibition on class actions which are put forward by many contracts preventing the necessary appraisal by consumers of corporate malfeasance, make litigating small claims economically viable, and to hold companies accountable for wrongdoing.¹⁰⁵

Most recently, there has been an increase in criticism and concern regarding mandatory arbitration clauses in financial services contracts with Native Americans and non-Native Americans. On December 12, 2013, the Consumer Finance Protection Bureau (“CFPB”)¹⁰⁶ released the preliminary results of the much-anticipated study of pre-dispute arbitration contract provisions in financial products/services.¹⁰⁷ Not surprisingly, the CFPB’s study of the American Arbitration Association (AAA) filings about credit cards, checking accounts, payday loans, and prepaid cards between 2010 and 2012 found less than 1,250 consumer arbitrations (most concerned with debt collection). Approximately 900 consumer arbitrations were filed by consumers, compared to over 3,000 cases involving credit card issues alone filed in federal court, with more than 400 filed as class action.¹⁰⁸

Although the CFPB study examined credit cards, checking accounts, payday loans, and prepaid cards, the recent litigation concerning Native Americans involves only payday lending. Payday lending is rampant in the United States, with two million households, and up to twelve million

¹⁰⁵ Eisenberg et al., *supra* note 99, at 874.

¹⁰⁶ *See About Us*, CONSUMER FIN. PROT. BUREAU (Oct. 1, 2013), <http://www.consumerfinance.gov/the-bureau/> (The CFPB is an independent federal agency, created in 2011 under the Dodd-Frank Wall Street Reform and Consumer Protection Act, which is responsible for regulating consumer protection for financial services and products in the United States.).

¹⁰⁷ *See Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date*, Consumer Fin. Prot. Bureau (Dec. 12, 2013), available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

¹⁰⁸ *Id.*; *see CFPB Finds Few Consumer File Arbitration Cases*, Consumer Fin. Prot. Bureau (Dec. 12, 2013), <http://www.consumerfinance.gov/newsroom/the-cfpb-finds-few-consumers-file-arbitration-cases/> (Indicating large banks prefer arbitration clauses over class actions.).

individuals in 2010 using them annually.¹⁰⁹ An average of eight loans in the amount of \$375 are taken annually, resulting in a \$520 interest payment.¹¹⁰ It is important to remember that legitimate short-term consumer loans, such as payday loans, are the most attractive credit option for the unbanked and underbanked.¹¹¹ The CFPB study determined that, unlike for credit cards, there was an annual average of forty-six payday loan arbitration filings, with forty-four filed by consumers, and only one involving debt collection.¹¹² Most of the arbitration claims invoked state statutory claims (90%), contract claims (83%), fraud claims (75%), and tort claims (61%), but also included federal statutory claims (28%), Credit Repair Organization Act¹¹³ (14%), Truth in Lending Act¹¹⁴ (7%),

¹⁰⁹ See *Addendum to the 2011 FDIC National Survey of Unbanked and Underbanked Households Use of Alternative Financial Services*, FED. DEPOSIT INS. CORP. 48 (2013) available at http://www.fdic.gov/householdsurvey/2013_AFSAddendum_web.pdf; see also *Who Borrows, Where They Borrow, and Why: Payday Lending in America*, PEW CHARITABLE TRUSTS 4 (2012), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Safe_Small_Dollar_Loans/LOANS_Payday%20Lending%20Report%20Final_web.pdf (finding that 5.5% of adults in the United States have used a payday loan in the past five years, with three-quarters using storefront lenders and approximately one-quarter using the internet)

¹¹⁰ See *Who Borrows, Where They Borrow, and Why*, *supra* note 108, at 4.

¹¹¹ See Robert Rosette & Saba Bazzazieh, *Arizona's Win-Win Short-Term Credit Solution: Assisting Arizona's Unbanked and Underbanked While Supporting Tribal Self-Determination*, 45 ARIZ. ST. L.J. 781, 784 (2013).

¹¹² See *Arbitration Study Preliminary Results*, *supra* note 106, at 12, 13 n. 25.

¹¹³ 15 U.S.C. § 1679 et seq. (2011). The Credit Repair Organizations Act (“CROA”), which is part of Title IV of the Consumer Protection Act, was enacted to “ensure that prospective buyers of the services of credit repair organizations are provided with the information necessary to make an informed decision regarding the purchase of such services” and to “protect the public from unfair or deceptive advertising and business practices by credit repair organizations.” *Id.* at § 1679(b).

¹¹⁴ 15 U.S.C. § 1601 et seq. (2011). The Truth in Lending Act (“TILA”), which was enacted on May 29, 1968, was created to promote informed use of consumer credit, in particular, by requiring disclosures about its terms and costs to standardize the manner in which costs associated with borrowing are calculated and disclosed. See generally *CFPB Consumer Laws and Regulations: Truth in Lending*, CONSUMER FINANCE PROTECTION BUREAU (June 2013), available at http://files.consumerfinance.gov/f/201306_cfpb_laws-and-regulations_tila-combined-june-2013.pdf.

refutation of alleged debt (7%), and Fair Debt Collection Practices Act¹¹⁵ (6%).¹¹⁶ Furthermore, the study found that nine out of ten arbitration clauses expressly bar consumers from filing class arbitration, consumers prefer arbitration over class action settlements, arbitrations are not filed by consumers for small-dollar disputes, and few consumers file small claims court actions.¹¹⁷

Like many business contracts today, Native American tribes and tribal entities¹¹⁸ utilize mandatory arbitration contracts within the contracts they write, and sometimes must waive sovereign immunity and are subject to arbitration. However, unlike the federal government and states, most tribes do not waive sovereign immunity in such a sweeping nature.¹¹⁹ Despite financial pressure, most tribes have chosen not to waive their sovereign immunity in commercial dealings.¹²⁰ One reason for this is the existence of informational imbalances between tribes and their business partners. If a business partner is unaware that a tribe or a commercial entity established by a tribe has immunity, then the

¹¹⁵ 15 U.S.C. § 1692 (2011). The Fair Debt Collection Practices Act, which was approved in September 1977, established the legal protection from abuse debt collection practices and its purpose is to: (1) eliminate abusive debt collection practices by debt collectors, (2) to ensure that those debt collectors who refrain from using abusive debt collection practices are not completely disadvantaged, and (3) to promote consistent State action to protect consumers against debt collection abuses. *Id.* at § 1692(e).

¹¹⁶ See *Arbitration Study Preliminary Results*, Consumer Financial Protection Bureau, *supra* note 106, at 87 figure 21.

¹¹⁷ See *CFPB Finds Few Consumer File Arbitration Cases*, Consumer Financial Protection Bureau, *supra* note 107.

¹¹⁸ Sovereign immunity extends to the activities of tribal entities since they are the “economic arms” of the tribe itself and thus should be entitled to the same protections. See Staudenmaier & Palaniappan, *supra* note 87, at 574-55; see also *Weeks Constr., Inc. v. Oglala Sioux Hous. Auth.*, 797 F.2d 668, 670-71 (8th Cir. 1986) (holding that, as an arm of the tribal government, the tribal housing authority is extended the “attributed of tribal sovereignty” [citing *Dubray v. Rosebud Hous. Auth.*, 565 F. Supp. 462, 465-66 (D.S.D. 1983)], therefore, “suits against an agency . . . [are] barred absent a waiver of sovereign immunity” [citing *Wilson v. Turtle Mountain Band of Chippewa Indians*, 459 F. Supp. 366, 368-69 (D.N.D. 1978)]; *Gayle v. Little Six, Inc.*, 555 N.W.2d 284, 287 (Min. 1996) (extending tribal sovereign immunity to tribal casinos); *Sanchez v. Santa Ana Golf Club, Inc.*, 104 P.3d 548, 554 (N.M. Ct. App. 2004) (extending tribal immunity to a tribally-owned golf course); *DeFeo v. Ski Apache Resort*, 904 P.2d 1065, 1069 (N.M. Ct. App. 1995) (applying tribal immunity to ski resort owned by tribe).

¹¹⁹ See *Hogan*, *supra* note 29, at 576 (discussing the difference between tribal and state sovereign immunity); see also *Miller*, *supra* note 64, at 97.

¹²⁰ *Lake*, *supra* note 22, at 101.

tribe can negotiate without informing the other party of the immunity and retain the benefit of the immunity without sacrificing anything in negotiations.¹²¹ However, if tribes waive their immunity, and thus are subjected to arbitration, they do so on a case-by-case basis in contract provisions.¹²²

b. How Tribes/Tribal Courts Address Disputes, Awards & the Appeals Process for Mandatory Arbitration Clauses

In the past century, Native American tribal courts have grown exponentially in number. Approximately 250 of the 563 federally recognized tribes in the United States have a tribal court system.¹²³ Unfortunately, these tribal courts vary in their complexity and workload. For example, the Navajo Nation's judicial system decides thousands of cases a year compared to other tribes with only part-time judges who hear only a few cases a year.¹²⁴ Furthermore, the different use of customary and "American" law in these courts, in addition to the lack of separation of powers,¹²⁵ can make these tribal courts very difficult for outsiders to understand both in procedure and in language used. Contrary to popular belief, tribal courts have been found to be quite fair to non-Native Americans.¹²⁶

Like American courts, many tribal courts have created their own judicial system with extensive rules and procedures, such as the

¹²¹ Hogan, *supra* note 29, at 576; Lake, *supra* note 22, at 101-02 (arguing that tribes have not waived their immunity in order to maintain information imbalances when negotiating).

¹²² See Miller, *supra* note 64, at 97.

¹²³ *Id.* at 106; see also Harvard Project on American Indian Economic Development, *Choctaw Tribal Court System*, TRIBAL GOVERNANCE SUCCESS STORIES: HONORING NATIONS 2005 (2006), <http://hpaied.org/images/resources/publibrary/Choctaw%20Tribal%20Court%20System.pdf> (discussing the success of the Choctaw tribal court system).

¹²⁴ See Miller, *supra* note 64, at 106.

¹²⁵ See generally Stephen Cornell, *Sovereignty, Prosperity and Policy in Indian Country Today*, 5 CMTY. REINVESTMENT 5, 5-7, 9-13 (1997)

¹²⁶ See Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM INDIAN L. REV. 285, 285-87, 351-52 (1998) (finding that, after analyzing 85 cases in tribal courts, there is fairness towards non-Native American litigants).

Mashantucket Pequot Tribe and the Navajo Nation.¹²⁷ One major difference between tribal courts and the traditional American court is the variety of qualifications required to be a judge; unlike American courts, some tribal courts do not require law degrees while others do.¹²⁸ Additionally, tribal laws, unlike American laws, may include traditional practices that are through oral history, and are not codified.¹²⁹ However, similar to American courts, tribal courts follow procedural rules which outline the adjudicatory authority and limitations of tribal jurisdiction.¹³⁰ Furthermore, most tribal courts do follow precedent, sometimes from other tribal courts, and frequently view federal and state court decisions as persuasive authority, particularly in commercial litigation.¹³¹

Due to the independence of each tribe, it is difficult to generalize how tribes address disputes, awards, and the appeals process.¹³² However, if tribal law governs, which many of the new arbitration clauses state (and are currently subject to litigation), prior to court proceedings, or engaging in dispute resolution, it is vital to undertake sufficient due diligence in understanding the process and structure of the tribal courts. This is usually done by reviewing the tribe's constitution or other governance documents, the tribal entity's organizational or other governance documents, applicable tribal council resolutions, and other applicable and relevant tribal laws, codes, and regulations.¹³³ This is similar to the due diligence that any attorney should conduct when working in a new jurisdiction. Overall, the individual nature of tribal courts makes it nearly

¹²⁷ See Staudenmaier & Palaniappan, *supra* note 87, at 590; see also Mashantucket Pequot Tribal Laws (2008), available at [HTTP://WWW.MPTNLAW.COM/LAWS/TITLES%2024%20-%20END.PDF](http://www.mptnlaw.com/laws/titles%2024%20-%20end.pdf) and 7 NAVAJO NATION CODE TIT. 7 (1977) (EXPLAINING DIFFERENT JUDICIAL SYSTEMS).

¹²⁸ See Staudenmaier & Palaniappan, *supra* note 87, at 591; see Gordon K. Wright, *Recognition of Tribal Decisions in State Courts*, 37 STAN. L. REV. 1397, 1401-02 (1985).

¹²⁹ See Staudenmaier & Palaniappan, *supra* note 87, at 591.

¹³⁰ *Id.*

¹³¹ *Id.* at 591-92; see *Mamiye v. Mashantucket Pequot Gaming Enter.*, 1 Mash. 245, 247-49 (1996) (citing federal and Connecticut cases as persuasive authority). Most state courts extend full faith and credit to tribal court orders, as do federal courts, who generally grant comity to tribal judges' rulings. See *Venetie I.R.A. Council v. Alaska*, 944 F.2d 548, 555 (9th Cir. 1991) (noting the use of precedent by tribal courts).

¹³² See Staudenmaier & Palaniappan, *supra* note 87, at 592 (discussing the unique nature of each tribes judicial and enforcement procedures).

¹³³ *Id.*

impossible to generalize, but a case-by-case analysis of each tribe is possible and highly suggested prior to entering the tribal court.

c. Business Concerns

Native American businesses have untapped potential for economic growth with the Native American gaming industry making over \$26.2 billion in gross revenue in 2009 alone, along with \$3.2 billion in related hospitality and entertainment services.¹³⁴ Native American gaming is the most publicly seen aspect of tribal economic development, but due to the fact that many reservations are not located near metropolitan areas or otherwise unable to participate in gaming, many tribes have been forced to diversity their economic development, most often through the internet.¹³⁵ Native American tribes have moved into offering legitimate short-term consumer loans through tribally-regulated and tribally-owned online short-term lending companies.¹³⁶ There are numerous business concerns regarding the use of mandatory arbitration clauses, forum-selection clauses, and waivers of sovereign immunity, when doing business with Native American tribes today. However, the most prevalent concern, which must be settled prior to arbitration agreements, is the sovereign immunity of tribes and tribal entities.

As discussed above, tribes enjoy sovereign immunity from suit. Tribal sovereign immunity exists for two reasons: the need to protect the economic viability of the tribes, and to recognize their status as separate sovereigns.¹³⁷ However, there is an argument for eliminating tribal immunity in that “immunity can actually harm tribal economies if commercial partners are reluctant to deal with Indian entities whose

¹³⁴ See NAT’L INDIAN GAMING ASS’N, THE ECONOMIC IMPACT OF INDIAN GAMING IN 2009 (2010), http://www.indiangaming.org/info/NIGA_2009_Economic_Impact_Report.pdf (stating that the 237 Native American tribes, in 28 states, that are involved in the gaming industry, provided \$9.4 billion in federal taxes and revenue savings, in addition to \$2.4 billion in state taxes, revenue sharing, and regulatory payments). See also R. Lance Boldrey & Jason Hanselman, *Proceed with Prudence: Advising Clients Doing Business in Indian Country*, MICH. BAR. J. 34, 24 (Feb. 2010) (noting that with the twelve federally recognized Native American tribes in Michigan there was an expected \$1.5 billion in revenue in 2010 alone).

¹³⁵ See Rosette & Bazzazieh, *supra* note 110, at 800 (establishing the growth of the tribal gaming industry).

¹³⁶ *Id.* at 784.

¹³⁷ Hogan, *supra* note 29, at 572 (explaining that many tribes depend on Indian gaming revenues).

status under the immunity doctrine may be unclear.”¹³⁸ Furthermore, the “primary threat immunity poses to tribal enterprises is the uncertainty it creates between these enterprises and their business partners, particularly lenders.”¹³⁹ This is due to the fact that if a court determines that tribal sovereign immunity applies, then lenders cannot revert to their typical means of recourse against defaulting borrows, i.e., creditors cannot enforce judgments in their favor because courts have no authority to order the seizure of assets on tribal land for a creditor’s sale.¹⁴⁰

Obstacles between business partners and tribes harm the economic prospects of the tribe since as transaction costs increase, immunity-related obstacles cause businesses to negotiate with and treat tribes differently than other entities,¹⁴¹ and many potential business partners are reluctant to deal with Native American tribes at all.¹⁴² There have been numerous “horror stories” about tribes hiding behind sovereign immunity in business disputes, including that of *C & L Enterprises*.¹⁴³ Although these horror stories do exist, there are many examples of successful business negotiations and partnerships between Native American tribes and non-Native Americans.¹⁴⁴ It is important to remember that tribes are not free from regulation when they conduct economic

¹³⁸ *Id.* at 574.

¹³⁹ *Id.* at 575.

¹⁴⁰ *Id.*; Rubacha, *supra* note 86, at 16.

¹⁴¹ See David B. Jordan, *Federal Indian Law: Tribal Sovereign Immunity: Why Oklahoma Businesses Should Revamp Legal Relationships with Indian Tribes After Kiowa Tribe v. Manufacturing Technologies, Inc.*, 52 OKLA. L. REV. 489, 504 (1999) (arguing that immunity has hindered the economic interests of tribes and that immunity results in resentment and missed opportunities for tribes).

¹⁴² See Hogan, *supra* note 29, at 575-76 (discussing the obstacles faced by business partners and tribes).

¹⁴³ See *C & L Enter.*, 532 U.S. 411.

¹⁴⁴ See Miller, *supra* note 64, at 98 (noting that, as of 2002, the Confederated Tribes of the Siletz Indian Reservation in Oregon had approximate 275 contracts with various business entities, and only 35 of them required waivers of sovereign immunity).

activities off of the reservation.¹⁴⁵ Additionally, even when tribal sovereign immunity is found to apply to a tribal entity, “tribal sovereign is not absolute autonomy,” and tribes are not permitted “to operate in a commercial capacity without legal constraints.”¹⁴⁶

It is vital, both to the ability of tribes to conduct business and for the protection of business interests by non-Native Americans, that both parties conduct due diligence and carefully protect themselves by obtaining adequate waivers of tribal sovereign immunity.¹⁴⁷ Absent a consensual waiver by the tribe, the only other way to obtain a waiver of sovereign immunity is through Congress since the sovereignty of Native American tribes “exists only at the sufferance of Congress,” which has

¹⁴⁵ See *Mescalero Apache Tribe*, *supra* note 70, at 148-49 (noting that “[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.”); see, e.g., *Puyallup Tribe v. Dep’t of Game of Wash*, 391 U.S. 392, 398 (1968) (holding that a treaty provision did not preclude the state from regulating the manner of fishing and restricting commercial fishing in the interest of conservation as long as the regulation was reasonable and a necessary exercise of the state’s police power and did not discriminate against the Native Americans); *Org. Vill. of Kake v. Egan*, 369 U.S. 60, 75-76 (1962) (holding that the state has the power to regulate off-reservation fishing by Native Americans); *Tulee v. Washington*, 315 U.S. 681, 683 (1942) (holding that a state statute prescribing licensing fees for fishing is invalid as applied to a Native American convicted of fishing without a license since the treaty secured the exclusive right to take all fish in the water boarding the reservation); *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U.S. 575 (1928) (holding that the Secretary of the Interior did not have the power, when the land was purchased for a Native American with trust funds, to exempt it from state taxation); *Ward v. Race Horse*, 163 U.S. 504 (1896) (holding that a state had a right to regulate hunting off-reservation).

¹⁴⁶ See, e.g., *San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306, 1314-15 (D.C. Cir. 2007) (upholding the NLRB’s decision that National Labor Relations Act applied to a Native American casino and that federal Indian law did not preclude this since the operation of a casino is not a traditional attribute of self-government and most of the employees and customers were not tribal members, nor did they live on the reservation).

¹⁴⁷ *Miller*, *supra* note 64, at 98.

the power to modify or limit a tribes' authority.¹⁴⁸ "All aspects of Indian sovereignty are subject to defeasance by Congress,"¹⁴⁹ thus, Congress has the power to waive tribes' sovereign immunity rights. It is also very important for outside businesses to include a clear forum selection clause with an obvious forum selected.¹⁵⁰ However, if there is a properly constructed waiver of sovereign immunity and the arbitration clause is fair to both parties, there is nothing for outside business to be concerned about.

d. Recent Litigation Involving Payday Lending and Native American Tribes

Recently there has been an increase of cases and enforcement actions against tribes regarding payday lending. In *State of Colorado v. Cash Advance*, the Colorado Supreme Court held that: (i) tribal immunity applies to administrative subpoenas directed at tribal commercial activities conducted off of tribal lands; (ii) such immunity depends on whether the entity is an "arm of the tribe"; (iii) officers of tribal entities are immune for acts within the scope of their tribal authority; and (iv) the state has the burden of proving by a preponderance of the

¹⁴⁸ See Staudenmaier & Palaniappan, *supra* note 87, at 578 (discussing congressional waivers in regards to tribal sovereign immunity); *United States v. Wheeler*, 435 U.S. 313, 323 (1978) (holding that Double Jeopardy Clause of the 5th Amendment did not bar the prosecution of a Native American in federal district court under the Major Crimes Act, when he had previously been convicted in a tribal court of a lesser included offense, since the power of a tribal court to punish a tribal offender is part of the inherent tribal sovereignty, and not part of the federal government); see John F. Petoskey, *Doing Business with Michigan Indian Tribes*, 76 Mich. B.J. 440, 442 (1997).

¹⁴⁹ *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 788 n.30 (1984).

¹⁵⁰ See Boldrey & Hanselman, *supra* note 133, at 35.

evidence that the tribal entities are not immune.¹⁵¹ Then in *Missouri v. Webb*, the Missouri Attorney General brought suit against Payday Financial, LLC, Western Sky Financial, LLC, and others in state court, claiming that their Internet-based lending businesses violated Missouri law.¹⁵² On March 27, 2012, after the defendants removed the case to federal court, the district court remanded the case back to state court.¹⁵³ The district court held that (1) sovereign immunity assertions do not create a federal question for jurisdiction purposes; (2) forum selection clauses provide no basis for federal jurisdiction; and (3) the individual defendant's tribal membership did not confer sovereign immunity on him or on the defendant South Dakota LLC.¹⁵⁴ Finally, in *Maryland Commissioner of Financial Regulation v. Western Sky Financial LLC*, the court held that it should abstain from interfering in Maryland's enforcement of its lending laws and rejected a dismissal request by the payday lending company.¹⁵⁵

In August of 2014, the U.S. Court of Appeals for the Seventh Circuit reversed and remanded the class action suit of *Jackson v. Payday*

¹⁵¹ *Cash Advance & Preferred Cash Loans v. State ex rel. Suthers*, 242 P.3d 1099, 1102 (Colo. 2010). Previously, the court of appeals adopted an 11-part common law test to determine when tribal business entities are considered arms of the tribe." This includes: (1) whether the entity is organized under the Tribes' laws or constitutions; (2) whether the purposes of the entity is similar to the Tribes' purposes; (3) whether the governing bodies the entity is composed predominantly of tribal officials; (4) whether the Tribes have legal title to or own the property used by the entity; (5) whether tribal officials exercise control over the entity's administration and accounting; (6) whether the Tribes' governing bodies have the authority to dismiss members of the governing bodies of the entity; (7) whether the entity generate their own revenues; (8) whether a suit against the entity will affect the Tribes' finances and bind or obligate tribal funds; (9) the announced purposes of the entity; (10) whether the entity manage or exploit tribal resources; and (11) whether protection of tribal assets and autonomy will be furthered by extending immunity to the entity. *Colorado ex rel. Suthers v. Cash Advance & Preferred Cash Loans*, 205 P.3d 389, 406 (Colo. App. 2008).

¹⁵² *Missouri v. Webb*, No. 11SL-CC01680 (St. Louis Cnty. Cir. Ct. Apr. 25, 2011); http://www.narf.org/nill/bulletins/dct/documents/missouri_v_webb.html.

¹⁵³ *Missouri v. Webb*, 2012 U.S. Dist. LEXIS 41702 (E.D. Mo. Mar. 27, 2012).

¹⁵⁴ *Id.* at *10-*11; see *Puyallup Tribe*, 433 U.S. at 171-72 (noting that the "doctrine of sovereign immunity . . . does not immunize individual members of [a] Tribe.").

¹⁵⁵ *Md. Comm'r of Fin. Regulation v. W. Sky Fin., LLC*, 2011 U.S. Dist. LEXIS 117665, at *2 (D. Md. Oct. 12, 2011); *W. Sky Fin., LLC v. Md. Comm'r of Fin. Regulation*, 2012 U.S. Dist. LEXIS 107016, at 17 (D. Md. July 27, 2012).

Financial, LLC.¹⁵⁶ The case involves a forum-selection clause requiring borrowers to submit to arbitration at a Native American reservation,¹⁵⁷ which the plaintiffs contend cannot legitimately adjudicate such suits or issue valid judgments.¹⁵⁸ The lower court upheld the forum selection clause, but the plaintiffs appealed and gained support from the Federal Trade Commission (“FTC”) who recently settled an enforcement action against Payday Financial,¹⁵⁹ and filed an *amicus brief* in support of the plaintiffs on September 26, 2013.¹⁶⁰ This is a fascinating case because it

¹⁵⁶ Jackson v. Payday Fin., LLC, No. 12-2617, 2014 U.S. App. LEXIS 16257 (7th Cir., Aug. 22, 2014).

¹⁵⁷ *Id.*

¹⁵⁸ Brief for the FTC as amicus curiae, Jackson v. Payday Fin., LLC, 2012 U.S. Dist. LEXIS 94095 (2012) (No. 11-09288), 4, available at <http://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-files-amicus-brief-supporting-class-action-suit-challenges-payday-lenders-arbitration-practices/130913paydayfinancialbrief.pdf>.

¹⁵⁹ See *FTC v. Payday Fin., LLC*, 2013 U.S. Dist. LEXIS 141891 (D.S.D. Sept. 30, 2013) (granting in part and denying in part plaintiff’s (FTC) motion for summary judgment). Regarding the allegedly unfair practice of bringing suit in tribal court, the district court stated that it was “skeptical” that a South Dakota limited liability company merely licensed with the Cheyenne River Sioux Tribe become tribal members and “thereby can invoke tribal court jurisdiction over the consumers under the language of the consumer loan agreements,” but was not prepared to rule, so stated it will consider further testimony on whether Payday Financial constitute a common enterprise and whether Webb is personally liable for the violations by Payday Financial. *Id.* at *44. Previously, the district court had denied the FTC’s motion for partial summary judgment regarding the unfair practice to bring suit in the tribal jurisdiction. *FTC v. Payday Fin., LLC*, 935 F. Supp. 2d 926, 926 (D.S.D. Mar. 28, 2013). In that opinion, the court addressed the “thorny question of tribal court jurisdiction” over borrowers by using typical language of Payday Financials loan agreements, but denied the motion holding that the “record lacks information establishing that the Defendants are in fact ‘members’ of the tribe for purposes of the first *Montana* [450 U.S. at 565] exceptions;” and “an ambiguity in the contract exists as to under what circumstances the non-Indian is consenting to tribal court jurisdiction in addition to binding arbitration.” See *FTC*, 2013 U.S. Dist. LEXIS 141891 at 40. *But see J.L. Ward Assocs., Inc. v. Great Palins Tribal Chairmen’s Health Bd.*, 842 F. Supp. 2d 1163, 1171-77 (D.S.D. 2012) (evaluating circumstances where an entity created under state law, rather than incorporated under tribal law, by various tribes to represent the tribe possesses tribal sovereign immunity). *Id.*

¹⁶⁰ See *FTC Files Amicus Brief Supporting Class Action Suit that Challenges Payday Lender’s Arbitration Practices*, Fed. Trade Comm.’n (Sept. 26, 2013), <http://www.ftc.gov/news-events/press-releases/2013/09/ftc-files-amicus-brief-supporting-class-action-suit-challenges>.

combines two “hot topics” in law: payday lending regulation and arbitration clauses.

The appeal addressed the question of whether, pursuant to an arbitration provision in the loan contract, the defendants can require borrowers’ claims against them be resolved by arbitration on the Reservation conducted by representatives of the Tribe.¹⁶¹ The court determined that the lower court wrongly dismissed the case and that the arbitral mechanism specified in the agreement was “illusory.”¹⁶² Interestingly, Payday Financial, which is one of the many entities owned by Martin A. Webb,¹⁶³ claimed tribal immunity, but is incorporated in South Dakota.¹⁶⁴ In addition, only its operator, Webb, is a member of the Cheyenne River Sioux Tribe.¹⁶⁵ The entity has not lent, nor targeted, tribal members or residents of South Dakota, but claim Montana’s exemption applies.¹⁶⁶ Under *Montana v. United States*, a tribe only has the power to regulate non-Native Americans on “Indian land” in two circumstances: (1) regulatory authority over “taxation, licensing, or other means, and the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements”; and (2) when the conduct of the non-Native Americans on the reservation “threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe.”¹⁶⁷ However, under the loan documents, the agreement is “subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation,” and contains a clause

¹⁶¹ 2014 U.S. App. LEXIS 16257, *6; *see also* Brief for the FTC as amicus curiae, *Jackson v. Payday Fin., LLC*, at 5.

¹⁶² *Id.* at *13. Webb also owns Western Sky Financial, LLC. *Id.*

¹⁶³ 2014 U.S. App. LEXIS 16527, *1.

¹⁶⁴ *Id.* at *13. Webb also owns Western Sky Financial, LLC. *Id.*

¹⁶⁵ *Id.* at 8. Interestingly, one of Mr. Webb’s other entities, Western Sky Financial LLC, states on its website, as a disclaimer on the main page, that “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.” *See* WESTERN SKY FINANCIAL, <http://www.westernsky.com/> (last visited Dec. 10, 2013).

¹⁶⁶ *See Montana*, 450 U.S. at 565 (a tribe has the authority to regulate “the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealings [or] contracts”).

¹⁶⁷ *Id.* at 565-66.

stating “no other state or federal law or regulation shall apply to this . . . [a]greement, its enforcement or interpretation.”¹⁶⁸ The arbitration clause in this contract mandates the forum is the Cheyenne River Sioux Tribe Nation.¹⁶⁹ The arbitrators are, by the plaintiff’s choice, “either (i) a Tribal Elder, or (ii) a panel of three (3) members of the Tribal Counsel”; and the arbitration “shall be conducted in accordance with the Cheyenne River Sioux Tribal Nation’s consumer dispute rules and the terms of this Agreement.”¹⁷⁰

On May 22, 2013, the Seventh Circuit issued a “limited” remand to the district court, requesting a finding of fact on whether (1) applicable tribal law is readily available to the public and, if so, under what conditions; and (2) the arbitrator and method of arbitration required under the parties’ contracts are actually available.¹⁷¹ In August, the district court responded in the affirmative to the first question, finding that the law of the tribe “can be acquired by reasonable means,” even though the plaintiffs were only able to secure a copy after numerous failed attempts and at a greater cost than the defendants.¹⁷² However, regarding the availability of tribal arbitration, the court answered with “a resounding no.”¹⁷³ Based on the New Hampshire Banking Department’s investigation, the court concluded there was no “methodized” tribal arbitration process and the defendants “promise of a meaningful and fairly conducted arbitration

¹⁶⁸ 2014 U.S. App. LEXIS 16527, *5.

¹⁶⁹ *Id.* at 9.

¹⁷⁰ *Id.* at *23; Opening Brief of Appellants Jackson at 6, *Jackson v. Payday Fin., LLC*, 2012 U.S. Dist. LEXIS 94095 (N.D. Ill. July 9, 2012), *appeal docketed*, No. 12-2617 (7th Cir., Sept. 21, 2012). The agreement also stated that “YOU HEREBY AGREE THAT YOU ARE WAIVING YOUR RIGHT TO A JURY TRIAL, TO HAVE A COURT DECIDE YOUR DISPUTE, TO PARTICIPATE IN A CLASS ACTION LAWSUIT, AND TO HAVE CERTAIN DISCOVERY AND OTHER PROCEDURES THAT ARE AVAILABLE IN A LAWSUIT [The] parties agree that the arbitrator has no authority to conduct class-wide proceedings The validity, effect and enforceability of this waiver of class action lawsuit and class-wide Arbitration is to be determined solely by a court of competent jurisdiction located within the Cheyenne [River] Sioux Tribal Nation, and not by the arbitrator” *Id.*

¹⁷¹ Order, *Jackson v. Payday Fin., LLC*, No. 12-2617 (7th Cir. May 22, 2013), 1-2.

¹⁷² District Court’s Response to Court of Appeals Remand for Finding of Fact at 2; *Jackson v. Payday Fin., LLC*, (No. 11-09288). (N.D. Ill. Aug. 29, 2013), 2.

¹⁷³ *Id.* at 6.

is a sham and an illusion.”¹⁷⁴ Recently, the Seventh Circuit determined that the district court should not have dismissed the plaintiff’s actions since the “mechanism specified in the agreement is illusory,” and dismissed the argument that the loan documents require any litigation to be conducted under tribal law, not federal law, thus “exhaustion in tribal courts is not required.”¹⁷⁵ This case should serve as a strong warning for those private, non-tribal entities, who engage in payday lending off-reservation, but claim tribal immunity and tribal forum selection, to adhere to federal regulatory laws and not hide behind the legitimate shield of tribal sovereign immunity.

Additionally, the United States Court of Appeals for the Eleventh Circuit has an appeal pending in *Inetianbor v. CashCall, Inc.*¹⁷⁶ Unlike *Jackson v. Payday Financial*, the lower court found the arbitration agreement to be void.¹⁷⁷ This case also involves Western Sky Financial, LLC, and Webb. The plaintiff, Inetianbor, was loaned \$2,525, with an annual interest rate of 135%, by Western Sky Financial, but CashCall, Inc. was the servicer, handler, and collector of the loan.¹⁷⁸ Inetianbor claimed that he had paid the loan off in full, but CashCall has continued to report to credit bureaus that Inetianbor has upcoming or late payments.¹⁷⁹ Thus, the claim was for defamation of Inetianbor’s character through the misrepresentation of his creditworthiness to credit reporting agencies.¹⁸⁰ Like *Jackson v. Payday Financial*, the loan agreement required

¹⁷⁴ *Id.* at 4, 6; see also 2014 U.S. App. LEXIS 16527, *24-25 (the 7th Circuit noted that the arbitration forum required by Payday Financial “does not exist: The Cheyenne River Sioux Tribe ‘does not authorize arbitration,’ it ‘does not involve itself in the hiring of . . . arbitrator[s],’ and it does not have consumer dispute rules.”).

¹⁷⁵ 2014 U.S. App. LEXIS 16527, *1.

¹⁷⁶ See *Inetianbor v. CashCall, Inc.*, 2013 WL 4494125, 1 (S.D.Fla. 2013), *appeal docketed*, No. 13-13822 (11th Cir., Oct. 30, 2013).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 2.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

all disputes be arbitrated under the Cheyenne River Sioux Tribal Nation, and the terms appear to be identical.¹⁸¹

After Inetianbor brought suit in state court and CashCall removed to district court, CashCall filed a motion to compel arbitration, which was granted on February 13, 2013.¹⁸² However, in March of 2013, Inetianbor filed a Motion to Reopen Case due to the fact that when he attempted to submit the case for arbitration to the Cheyenne River Sioux Tribe Nation, he received a letter from a tribal judge stating that tribe “does not authorize Arbitration as defined by the American Arbitration Association . . . on the [reservation].”¹⁸³ CashCall responded that the arbitration could be conducted by a tribal member, but failed to clarify the contention with the letter.¹⁸⁴ However, the court determined that the arbitral forum was unavailable, and given the fact the choice of forum was “integral to the agreement to arbitrate,” the agreement failed.¹⁸⁵ In spite of the court’s granting of reopening the case, CashCall requested arbitration before a tribal elder.¹⁸⁶ CashCall explained, through the use of a letter from the same tribal judge, that the tribal court does not have arbitration, but, through contractual agreement, arbitration is permissible on the reservation, and if there is an award, the parties may seek confirmation in Tribal Court.¹⁸⁷ Due to this evidence, the court deter-

¹⁸¹ See *id.* The agreement all disputes arising out of the agreement “be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement.” The agreement further provides that

Arbitration shall be conducted in the Cheyenne River Sioux Tribal Nation by your choice of either (i) a Tribal Elder, or (ii) a panel of three (3) members of the Tribal Council, and shall be conducted in accordance with the Cheyenne River Sioux Tribal Nation’s consumer dispute rules and the terms of this Agreement The party receiving notice of Arbitration will respond in writing by certified mail return receipt requested within twenty (20) days. You understand that if you demand Arbitration, you must inform us of your demand of the Arbitrator you have selected. You also understand that if you fail to notify us, then we have the right to select the Arbitrator.

Id. at 2-3.

¹⁸² *Id.* at 3.; see *Inetianbor v. CashCall, Inc.*, 923 F.Supp.2d 1358, 1363-64 (S.D.Fla. 2013).

¹⁸³ *Inetianbor*, 2013 WL 4494125 at 3.

¹⁸⁴ Order Granting Plaintiff’s Motion to Reopen Case, *Inetianbor v. CashCall, Inc.*, 2013 WL 1325327 (S.D.Fla., Apr. 1, 2013).

¹⁸⁵ *Id.*

¹⁸⁶ *Inetianbor*, 2013 WL 4494125 at 2.

¹⁸⁷ *Id.*

mined the forum was available.¹⁸⁸ However, just a few months later, the district court found the arbitration agreement void due to the “integral” nature of the tribe being the arbitral forum.¹⁸⁹ The district court determined the tribal elder selected was not an “authorized representative of the tribe,” nor did CashCall selected an authorized representative of the tribe, therefore the “arbitral forum” was unavailable.¹⁹⁰ Additionally, the court discovered that the tribe had no “consumer dispute rules,” which were indicated in the original arbitration clause.¹⁹¹ CashCall’s appeal argues that the arbitral forum is not “integral” to the arbitration agreement and the conclusion that the arbitral forum was unavailable was incorrect.¹⁹² It is unlikely that CashCall will prevail on these arguments, even though courts tend to construe arbitration agreements liberally as to maintain enforceability.

These are just some of the most recently enforcement actions and suits involving Native American payday lending companies, particularly those who are not actually tribal entities and simply locate themselves on reservations to evade state and federal consumer protection laws.¹⁹³ Although there are legitimate payday lending companies associated with Native American tribes, it is important to note that all of the above cases are all linked to Martin A. Webb and all of the agreements invoke the jurisdiction of the Cheyenne River Sioux Tribal Nation in South Dakota. Although, Western Sky Financial announced in August an end to servicing loans due to heavy regulations,¹⁹⁴ regulatory agencies are still pursuing these entities, including the CFPB who sued CashCall for illegal online loan servicing in December.¹⁹⁵

¹⁸⁸ *Id.*; see Order Denying Reconsideration, *Inetianbor v. CashCall, Inc.*, 2013 WL 2156836 (S.D.Fla., May 17, 2013).

¹⁸⁹ *Inetianbor*, 2013 WL 4494125 at 6.

¹⁹⁰ *Id.* at 5.

¹⁹¹ *Id.* at *6.

¹⁹² Principal Brief of Appellant CashCall, Inc., *Inetianbor v. CashCall, Inc.*, No. 13-13822 at 16. (11th Cir., Oct. 30, 2013).

¹⁹³ See *Payday Lending*, Fed. Trade Comm’n, <http://www.ftc.gov/news-events/media-resources/consumer-finance/payday-lending> (last visited Dec. 20, 2013).

¹⁹⁴ See The Editorial Board, *Cracking Down on Predatory Payday Lenders*, N.Y. TIMES, Aug. 30, 2013, at A18, available at http://www.nytimes.com/2013/08/30/opinion/cracking-down-on-predatory-payday-lenders.html?src=recg&_r=0.

¹⁹⁵ See *CFPB Sues CashCall for Illegal Online Loan Servicing*, CONSUMER FIN. PROT. BUREAU (Dec. 16, 2013), <http://www.consumerfinance.gov/newsroom/cfpb-sues-cashcall-for-illegal-online-loan-servicing/>.

III. Policy Recommendations

The sovereignty of Native American tribes is extremely important and should not be overturned. However, it is time to revisit the expansive nature of this immunity, in particular the ability of tribes to “hide behind” their immunity in order to engage in usury business practices or enable outsiders to utilize tribal immunity beyond the intended nature. Tribes have been able to become economically viable and the reservations have become a source of potential prosperity, with nearly half of all Native American tribes benefiting from casinos and other gaming revenues.¹⁹⁶ Tribes have also been expanding their revenue sources: from owning construction firms, advertising companies, and engaging in online short-term lending.¹⁹⁷ Although prosperity has not touched all tribes, in particular the Oglala Lakota members residing on the Pine River Ridge Reservation,¹⁹⁸ it is time to embrace change, which is reflected in the recent decisions by the courts.

As tribes diversify their economic sources, the business of short-term consumer credit loans, better known as payday loans, has grown enticing. Although most scholars view payday lending as an unscrupulous practice, there is a great need for short-term loans for the underserved and underbanked.¹⁹⁹ Without them people’s lives would be turned upside down.²⁰⁰ There is a way for tribes to take advantage of the economic potential, but not hide behind immunity to engage in usury practices that are being prevented by regulators, such as the CFPB and FTC. In 2011, the Dodd-Frank Wall Street Reform and Consumer Protection Act (“the Dodd-Frank Act”) changed the United States financial industry and Native Americans were not exempt from this change.²⁰¹ The

¹⁹⁶ See Conrad Wilson, *Native American Tribes Venture Out of Casino Business*, NAT’L PUB. RADIO (Feb. 21, 2013), <http://www.npr.org/2013/02/21/172630938/native-american-tribes-venture-out-of-casino-business>.

¹⁹⁷ *Id.* (discussing the Winnebago tribe’s ownership of dozens of businesses in numerous states (reservation is in Nebraska), with revenue in 2011 topping \$250 million).

¹⁹⁸ See Nicholas D. Kristof, *Poverty’s Poster Child*, N.Y. TIMES, May 9, 2012, at A29, available at http://www.nytimes.com/2012/05/10/opinion/kristof-povertys-poster-child.html?_r=0 (discussing the devastating poverty that exists in the Pine Ridge Indian Reservation).

¹⁹⁹ See Rosette & Bazzazieh, *supra* note 110, at 808.

²⁰⁰ *Id.*

²⁰¹ P.L. 111-203, available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/html/PLAW-111publ203.htm>.

Dodd-Frank Act explicitly recognizes tribal regulatory authority over tribally owned online consumer lending businesses.²⁰² The Dodd-Frank Act also requests that the agency and tribes work together to ensure fair regulations.²⁰³

In 2012, the Native American Financial Services Association (“NAFSA”) was formed as a trade association to “protect and advocate for Native American sovereign rights” and to “enable tribes to offer responsible online lending products.”²⁰⁴ The formation of NAFSA was an important step for cooperation between federal and state regulators and legitimate Native American tribal entities engaged in legal payday lending. According to NAFSA, member tribes follow applicable tribal and federal laws and agree to “abide by a strict set of industry-leading best practices²⁰⁵ to ensure that consumers can trust NAFSA members to honor their rights, protect their privacy, treat them fairly, and constantly strive to offer them innovative alternative financial products.”²⁰⁶ NAFSA has vocally demonstrated the distinction between legitimate Native American tribal entities and those who are not actually tribally-owned. Most recently, Barry Brandon, the executive director of NAFSA, applauded the New York Attorney General Eric Schneiderman’s lawsuit against Western Sky Loans,²⁰⁷ stating the distinction “between those

²⁰² See Rosette & Bazzazieh, *supra* note 110, at 802; *contra Tribal Payday Lending*, <http://www.modrall.com/Files/Docs/Tribal%20Payday%20Lending.pdf> (last visited Mar. 18, 2013) (writing “a question remains as to whether the Dodd-Frank Act applies to tribes or tribal entities”); see also 12 U.S.C.A. § 5481 (Lexis 2011); .

²⁰³ *Id.*

²⁰⁴ See *About the Native American Financial Services Association*, Native American Fin. Serv. Ass’n, <http://www.mynafsa.org/about/> (last visited Dec. 10, 2013); see also Barry Brandon, *Understanding legitimate online tribal lending*, The Hill (Oct. 2, 2013), <http://thehill.com/blogs/congress-blog/economy-a-budget/325949-understand-legitimate-online-tribal-lending> (discussing the distinction between legitimate and illegitimate tribal online lenders).

²⁰⁵ See *NAFSA Financial Lending Best Practices to Protect and Inform Consumers*, Native American Fin. Serv. Ass’n (last visited Dec. 10, 2013), <http://www.mynafsa.org/best-practices/> (providing the “best practices” for NAFSA Member lenders to engage in).

²⁰⁶ See Sean Sposito, *Online Lender Western Sky Shuttters Payday Business*, American Banker (Aug. 27, 2013), http://www.americanbanker.com/issues/178_166/online-lender-western-sky-shuttters-payday-business-1061606-1.html.

²⁰⁷ See Christie Smythe, *Online Lender Western Sky Sued by N.Y. Over Rates*, BLOOMBERG (Aug. 12, 2013), <http://www.bloomberg.com/news/2013-08-12/online-lender-western-sky-sued-by-n-y-over-rates.html>.

tribal government-owned businesses who operate legally under federal law, and those who seek to profiteer on the back of hundreds of years of government-to-government relationships.”²⁰⁸ It is important to remember that there are legitimate payday lending companies organized under tribal law, and tribal immunity should not be sacrificed due to the wrongdoings of a few.

In recent years, the need for sovereign immunity and the unenforceability of arbitration clauses has declined, and Native American businesses and their tribal entities are no longer the consistent underdog in which the playing field needs to be leveled. It is likely the Supreme Court will in due time hear a case regarding the use of mandatory arbitration clauses which pick tribal courts and reservations as the governing forum—a forum foreign to most involved. Although there was a concern that the Court, in *Michigan v. Bay Mills Indian Community*, would restrict the blanket immunity enjoyed by the tribes, both on and off the reservation, the Court rejected Michigan’s call to overturn *Kiowa* and limit tribal sovereign immunity to activities conducted only on tribal lands.²⁰⁹ Even though the Court ultimately decided not to restrict tribal sovereign immunity to only on-reservation activities, it was a 5-4 decision, with Justices Scalia, Thomas, and Ginsburg each writing individual dissents.²¹⁰ It may be best for tribes to relinquish some, but not all, of their immunity, especially in regards to commercial activities that take place off-reservation. This would likely preserve some of the immunity, that which is used for its original purpose.

CONCLUSION

Since the formal recognition of tribal sovereign immunity by the United States Supreme Court in 1940,²¹¹ Native American tribes have

²⁰⁸ See Jessica M. Karmasek, *Head of Native American association applauds N.Y. AG’s lawsuit against Western Sky*, Legal Newline (Aug. 13, 2013), <http://legalnewline.com/news/243531-head-of-native-american-association-applauds-n-y-ags-lawsuit-against-western-sky>.

²⁰⁹ 134 S. Ct. 2024, 2027 (2014) (holding that *Bay Mills* is protected by tribal sovereign immunity and the suit against them by Michigan for opening a casino outside Indian land is barred since “Congress has not abrogated tribal sovereign immunity from a State’s suite to enjoin gaming off a reservation or other Indian land.”); *Kiowa Tribe*, 523 U.S. at 758.

²¹⁰ *Id.* at 2038, 2039; see *supra* note 49.

²¹¹ See *U.S. Fid. & Guar. Co.*, 309 U.S. at 512-13.

made significant strides in economic prosperity and have become enticing partners for outside business. This, along with the combination of increasing use of arbitration clauses, has led to some confusion regarding the enforceability of mandatory arbitration clauses in payday lending agreements. The courts have distinguished between those entities which are “arms of the tribal governance,” and thus should be entitled to the same protections of tribal immunity, and those who are not, but there is still not a bright-line rule, nor should there necessarily be one.

This paper has examined the historical status of both arbitration clauses and tribal sovereign immunity, in addition to the unique nature of tribal courts, the use of arbitration clauses today, and the business concerns. Even though each tribal jurisdiction has its own rules and procedures regarding enforceability of contracts, arbitration, and granting of awards, any concerns can be overcome by due diligence. As demonstrated by the recent litigation and the ongoing debate regarding payday lending in general and the sweeping nature of tribal sovereignty, it is likely that the issues of enforceability of arbitration contracts mandating tribal jurisdiction, especially involving lenders who are not true tribal entities, is not going away and the Court will be forced to address the issue once and for all. Although there are those who seek to take advantage of the sovereign immunity provided to Native American tribes and engage in usury practices, they are not the majority, and it is vital to distinguish between legitimate tribal businesses engaged in payday lending and those who are simply hiding behind a false tribal immunity.