Leadership Message

Getting Involved

One of the most frequent questions I am asked as Committee Chair (after when and where is the next meeting), is how do I get involved in the Committee. My answer is the same one I received more than twenty years ago - come to the meetings, get to know the subcommittee leadership, and volunteer! The leadership is always looking for help with materials for programs, speakers for programs, suggestions for program topics, articles for the newsletter, etc, etc. You get the picture. The reason our Committee has been so successful over the years, I believe, is because of the quality of the programming, both CLE and non-CLE. The only way this happens is with the hard work of the leadership and your help.

So, what if you were the social chairman of your sorority in college (like me) and really would prefer to plan parties? Well, there's a place for that, too. We can always use help with planning the extracurricular activities for each of the meetings.

Or, what if you have an idea for a new subcommittee, or initiative for our Committee? We are working in a dynamic area of the law which lends (pardon the pun) itself to innovative ideas. Contact me and let's discuss your passion.

As always, please encourage others in your firm, agency, institution, or company, as well as your colleagues across the aisle, to join our Committee, join the subcommittees which interest them, and, most importantly, get involved.

Terry Franzén
Chair, CFSC

Meeting Promos/Postcards

Please join us January 7-10, 2012 for the CFSC Winter Meeting at the beautiful Canyons Resort in Park City, Utah. Our meeting will start with the Young Lawyers Subcommittee's Beer and Basics program on Saturday, January 7th at 4:00 p.m., followed by an evening reception at the Park Meadows Country Club, at 7 p.m. Please thank the folks at Van Cott, Bagley, Cornwall & McCarthy, PC for graciously sponsoring this reception. Then, rise and shine early Sunday morning to attend excellent programs, packed with great information and CLE credits. Yes, the morning meetings do start early (7 am!) Sunday, Monday, and Tuesday mornings, but that gives you plenty of free time in the afternoon and evening hours to enjoy winter sports with family and friends, take a stroll along Park City's historic Main Street, or have a casual lunch or dinner with CFSC friends and colleagues. Don't forget to sign up for the CFSC dinner at the Red Pine Lodge on Sunday, January 8th at 7:00 p.m.

Hotel Accommodations:
The Canyons is currently accepting reservations. Click here to make reservations online or call the hotel at (888) CANYONS or (888) 226-9667 and reference the ABA 2012 Consumer Financial Services Winter Meeting.

SEE YOU THERE!

CFSC Pro Bono/Community Service

Junior Achievement/Business Law Section Pro Bono Partnership
By John Ropiequet

CFSC Constituents

Meet the CFSC Ambassadors and Fellows
By Carolyn Hann and Lynette Hotchkiss
At the Business Law Section's Spring Meeting in April 2011, a Pro Bono Partnership was announced between the Section and Junior Achievement Worldwide. JA provides a wide variety of course enrichment to schools in all parts of the country. Under the Partnership, Business Law Section members are encouraged to volunteer with their local JA chapters to provide financial literacy education in schools in their own communities.

The Partnership came into being under the leadership of the Consumer Financial Services Committee's Chair, Terry Franzen. Always on the lookout for more opportunities for the CFS Committee to carry out its pro bono theme of offering financial literacy education to consumers, Terry contacted her local JA chapter and then the Business Law Section leadership to promote the idea of a Partnership between the two.

Read Full Article...▶

A Short History of Safeborrowing.com
By Scott Johnson and John Ropiequet

The Consumer Financial Services Committee's website for consumers, Safeborrowing.com, provides vital financial literacy information for consumers about a number of types of credit products. Written in a manner designed to be easily understood by consumers, the website breaks down the "legalese" barrier, helping consumers make informed decisions about borrowing safely. The website also provides numerous links to other financial literacy resources so consumers can continue learning.

Safeborrowing.com was first published in 2001. At the request of Committee Chair Lynne Barr, committee members Jim Brown, Margie Corwin, Don Lampe, Jackie Parker, Nina Simon and Steve Zeisel put together information designed to assist consumers in making informed choices about home mortgages.

Read Full Article...▶

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The program assigns each FAD to at least one substantive Committee. In past years, several FADs, including Richik Sarkar, Jonathan Cole, Sherwin Simmons, Stephanie Cohen, Ducie Le, and Carolyn Hann, joined CFSC. Many of these alumni hold, or have held, leadership positions in CFSC. CFSC also boasts four current FADs: Arielle Harry-Bess, Erika Brown-Lee, Danielle Gipson Reyes, and Grace Powers.

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Tom Hudson -- Master Storyteller
By Lynette Hotchkiss

Many of us know Tom Hudson as one of the most knowledgeable and experienced consumer finance lawyers in the business. Tom, (aka the "CARLAW" Guy) began practicing consumer finance law in the early 1970s, when laws like the Truth In Lending Act and the Uniform Consumer Credit Code were in their infancy. A recognized leader in the field, Tom has received the Proxmire Lifetime Achievement Award from the American College of Consumer Financial Services Lawyers and the Distinguished Service Award from the American Financial Services Association. He also is a noted author, having penned several books and hundreds of articles on consumer finance law, presenting this complex legal area in a common sense style that both lawyers and non-lawyers can understand.

But you probably already know all that. To get the real back-story behind the man he is today, I encourage you to pick up a copy of Tom's latest book, Tales from Acworth. In this delightful book, you will meet "Tommy" Hudson, the young man who grew up in the small town of Acworth, Georgia, and follow the path that ultimately brought him "up North" to attend law school.

Read Full Article...▶
Subcommittee Spotlight

Calling All Subcommittee Chairs!

Dear Subcommittee Chairs,

This section of the CFSC Newsletter is designed as a forum for you to tout your Subcommittee and the role it plays in serving the full Committee. Tell us about your vision for the future, what you hope your Subcommittee accomplishes during your tenure as Chair, promote upcoming programs that feature your Subcommittee -- or say whatever else you wish to help folks understand your Subcommittee. We hope to feature two or three Subcommittees in each quarterly newsletter. Please contact me to learn more and to get your Subcommittee on the schedule for the next newsletter.

Thanks!

Lynette Hotchkiss
lhotchkiss@ftc.gov

CFSC Legal Feature

Tribal Loans to State Residents - The Next Test of Sovereign Immunity
By Blake Sims and Justin Hosie

Throughout American history, the relationship between Native American tribes, states, and the federal government has been contentious to say the least, resulting in violence and litigation, most of which is far beyond the scope of this article. This article provides a glimpse into this struggle, by briefly outlining some recent actions involving tribal lending to consumers.

In short, federal and state agencies have recently taken action to try and curtail tribal loans to off-reservation consumers, presenting numerous legal issues to state and federal courts. Many of the issues in those cases resemble the issues in older cases involving tribal gambling. In other ways, the legal issues in these cases resemble the issues presented in cases involving cross-border loans from consumer lenders, federally chartered financial institutions, and state chartered financial institutions.

Read Full Article...
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The Partnership came into being under the leadership of the Consumer Financial Services Committee’s Chair, Terry Franzen. Always on the lookout for more opportunities for the CFS Committee to carry out its pro bono theme of offering financial literacy education to consumers, Terry contacted her local JA chapter and then the Business Law Section leadership to promote the idea of a Partnership between the two. Under the leadership of CFS Pro Bono Directors John Ropiequet and Scott Johnson, contact was made with the Section’s Pro Bono Committee, which enthusiastically endorsed the concept. The Section’s pro bono staff counsel, Allyn O’Connor, also worked to guide the concept through the necessary levels of approval at the Section and the ABA Board of Governors, which issued its final approval in February 2011. Committee member Len Bernstein joined the team to provide leadership in recruiting law firms to participate in the Partnership on a pilot basis.

To date, the following firms have obtained the necessary internal approvals for their members to participate in the Partnership:

Arnstein & Lehr LLP (Chicago)
Carlton Fields (Tampa)
Chambliss, Bahner & Stophel, P.C. (Chattanooga)
Goodwin Procter LLP (Boston)
McGlinchey Stafford (New Orleans)
Reed Smith LLP (Philadelphia)
Troutman Sanders LLP (Atlanta)

Additional firms, financial institutions and individual attorneys continue to volunteer to participate in the Partnership. The CFS Committee encourages all of its members and their clients to participate in the Partnership as well.

<hyperlink to something/someone to sign up?>
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In 2004, under the leadership of Committee Chair Jeff Langer and Pro Bono Liaison John Ropiequet, committee members Nathan Bowden, Terry Franzen, David Melcer and Trish Obara expanded the existing information about home mortgage products by adding links to other websites. This was designed to give consumers additional useful information about financial services prepared by government agencies, trade associations, educational groups and others, to help the Committee achieve its goal of promoting financial literacy among consumers.

When the website was rebuilt by the Committee in 2004, there was a consensus that the Committee should provide more information to consumers than what was then provided, which was limited to information about home mortgages. The next area targeted was auto finance. As discussions continued, the perception grew that the website should also cover credit cards and student loans.
This led to a complete revision of Safeborrowing.com which was rolled out in April 2008 under the leadership of Committee Chair Don Lampe and Pro Bono Liaison John Ropiequet, who drew on the expertise of numerous committee members. With the help of Business Law Section IT staff member Frank Hillis, the home mortgage section of the website was completely rewritten, redesigned and updated by Terry Franzen, Bob Jaworski and Nina Simon. An auto finance section was prepared by Liz Huber and Scott Johnson, and Scott and Ducie Le prepared a section on credit cards. A section on student loans was assembled by Amy Bizar, Rick Hackett, Matt McIntyre, Laura Rogers, Arthur Rotatori and Steven Scott.

In 2011, a section on identity theft was added, providing information to consumers and practitioners. Prepared by Joanna Crane and Lisa Schifferle, the section also provides a linked to an FTC-prepared guide for practitioners who represent clients faced with identity theft issues.

Today, under the leadership of Committee Chair Terry Franzen and Co-Pro Bono Director Scott Johnson, the website is being reviewed on regular basis to make sure that it takes into account significant legal and regulatory developments that may affect each of the four main areas covered by the website. The Committee's goal is to make sure that the information provided is accurate, up-to-date and user friendly for all consumers who want to know more about financial transactions. Any Committee members are welcome to participate in the review and update of the website. Interested members should contact Scott Johnson at sjohnson@selectmgmt.com.
Meet the CFSC Ambassadors and Fellows
By Carolyn Hann and Lynette Hotchkiss

Since 1998, the Section of Business Law has promoted diversity in the Section’s substantive work. Specifically, the Section’s Fellows, Ambassadors, and Diplomat (FAD) program actively recruits younger attorneys (Fellows), attorneys of color (Ambassadors), and attorneys with disabilities (Diplomats). Each year, the Section selects up to five Fellows and up to five Ambassadors to participate in a two-year program. Every other year, the Section selects one Diplomat to participate in the same two-year program. The program provides funding for FADs to attend the Annual, Spring, and a standalone Committee meeting each year of the program.

The program assigns each FAD to at least one substantive Committee. In past years, several FADs, including Richik Sarkar, Jonathan Cole, Sherwin Simmons, Stephanie Cohen, Ducie Le, and Carolyn Hann, joined CFSC. Many of these alumni hold, or have held, leadership positions in CFSC. CFSC also boasts four current FADs: Arielle Harry-Bess, Erika Brown-Lee, Danielle Gipson Reyes, and Grace Powers.

**Arielle Harry-Bess** comes to CFSC as part of the 2010-2012 Class of Business Law Fellows. Her CFSC mentor is Deborah Robertson. Arielle holds the title of Counsel at Transamerica (an Aegon company) in Baltimore, MD, where she handles transactional and regulatory matters and manages litigation. Prior to attending law school, Arielle spent several years working in the Financial Services industry.

Arielle has an impressive record of professional achievements and participation in diversity issues. She served as the 2007-2008 President of the Alliance of Black Women Attorneys of Maryland (ABWA) and is also a former Chair of the Maryland State Bar Association’s Special Committee for Minorities in the Legal Profession. She also was a 2006 Maryland State Bar Association Leadership Academy Fellow and a 2008 Maryland Bar Foundation Fellow. Currently, she serves on the Alumni Association Board of Directors for the University of Maryland School of Law.

Arielle’s ABA involvement started while she was still in law school, when she served as her school’s ABA Student Representative. Since then, she has served as an ABA YLD Minorities in the Profession Scholar and an ABA YLD Liaison to the ABA’s Commission on Ethnic and Racial Diversity in the Profession. Ever on the look-out for more ways to participate in the ABA as a young lawyer, Arielle applied to the Section’s Fellows Program, wanting to become involved in something specific to her practice area. She chose CFSC not only because of the timeliness of the subject matter addressed by the Committee, but also because these issues intersect with her day-to-day work, particularly as they relate to such things as privacy and electronic delivery. One thing she particularly likes about CFSC is the structure and substantive nature of the programming at the meetings. Arielle hopes that through her Fellowship she can gain more knowledge of how the Committee and the Section works, preparing her for continued involvement in the future.

**Erika Brown Lee,** a member of the 2010-2012 Class of Business Law Ambassadors, is one of three Ambassadors who have become a part of the CFSC family. Erika is Senior Counsel in
FULBRIGHT & Jaworski L.L.P.’s litigation group, where she works on consumer protection and anti-trust issues. Erika was well prepared for this work, having spent the previous 10 years working as an attorney for the Federal Trade Commission. She had a very active career at the FTC, working in several different merger groups within the Commission’s Bureau of Competition, acting as Counsel to the Director for the Bureau of Competition, serving as an Attorney Advisor to Commissioner Mozelle Thompson, and finally working in the Division of Privacy and Identity Protection on privacy matters, internet advertising concerns, and issues related to the Fair Credit Reporting Act.

Erika has been actively involved in the ABA for several years, and currently serves on the ABA’s Commission on Racial and Ethnic Diversity in the Profession. She also is the current Chair of the ABA Anti-Trust Section’s Privacy and Information Security Committee. When her work branched into the consumer protection arena, she decided to look for ABA opportunities to complement that work. While attending a Business Law Section conference, she heard about the FAD Ambassador program, applied, and was accepted. Erika asked to be appointed to CFSC because of its focus on a cross-section of privacy and consumer protection issues. She enjoys being involved with CFSC because it provides exposure to experts in the consumer financial services field and permits her to push the boundaries of her current knowledge and experience while staying connected to things that are still somewhat familiar. Erika also gives high marks to the members of CFSC who have helped her become involved in Committee activities and functions. In particular, she wants to thank Carolyn Hann, who was very helpful in introducing her to CFSC.

Erika is a big fan of the FAD program. She believes that the two year term is a good time frame to allow a person to become involved and to form relationships that will continue to grow over the years. She strongly encourages everyone to seek out leadership opportunities and to become active participants in the ABA.

Danielle Gipson Reyes also is a member of the 2010-2012 Class of Business Law Ambassadors. Danielle became involved in consumer financial services when she joined the Washington, D.C. office of Goodwin Procter in 2006. She was an associate in the firm’s Business Law Department where she was a member of the Financial Services Group. Prior to joining Goodwin Procter, Danielle was an associate with Paul, Hastings, Janofsky & Walker LLP in Washington, D.C. She currently is in the Bank Counsel group at USAA in San Antonio, TX.

Danielle learned about the Ambassador Program from Lynne Barr, who encouraged her to apply. She applied to the Program because she thought it would be a great way to get more involved in the ABA and to meet more people in the financial services field. She believes her participation also will help her keep pace with, and possibly influence, the significant regulatory reform the financial services industry is experiencing currently. Danielle asked to be appointed to CFSC because it was a perfect fit for her area of practice. She looks forward to getting involved with Section and Committee projects relating to the Dodd-Frank Act and resulting regulations. In addition, she hopes to participate in ABA pro bono activities, particularly those related to consumer financial services. Danielle says she looks forward to a productive term.
Grace Powers was appointed to CFSC as part of the 2010-2012 Class of Business Law Ambassadors, but she is not a newcomer to CFSC or to the consumer financial services arena.

Grace started her legal career doing bankruptcy work, focusing on creditor’s rights. In 1998, Grace joined the legal team at CFI ProServices Inc. (now Harland Financial Solutions), where she helped build compliance products for the consumer finance industry. Her participation in CFSC began while she was at CFI, where she worked with several other CFSC veterans, including former CFSC Chair Bob Chamness. In 2004, Grace began working for Countrywide Financial Corporation and stayed on in the legal department when Bank of America acquired Countrywide in 2008. At Bank of America, her focus is on E-Commerce, including such things as Electronic Financial Services, Mobile Banking, Online Banking, Privacy, and Data Security. As Grace puts it, “If it’s online, and a consumer transaction, I deal with it.” She also serves on the Bank of America Legal Department’s Diversity and Inclusion Business Council.

Grace became familiar with the Ambassador Program through her involvement with the Section’s Diversity Committee. She worked with Frances Gauthier to put together a CLE program for the 2010 Spring Meeting, entitled “What is Diversity and is it Still Relevant in Today’s Economy?” Frances encouraged Grace to apply to be an Ambassador. When selected as an Ambassador, she requested appointment to CFSC because of its great people and because of its relevance to her practice. She looks forward to being even more actively involved in Section and Committee activities and appreciates the opportunities for professional development provided by involvement in the Section and in CFSC.

Additional FAD Facts

Since the program’s inception, the Section has sponsored 56 Fellows, 51 Ambassadors, and four Diplomats. To date, 75% of former FADs remain active Section members. In addition, 35% of former FADs currently hold leadership positions in the Section. Given the program’s proven record of success, CFSC can rest assured that FADs – former, current, and future – will continue to make great contributions to the Section, and to this Committee.

For more information about the FAD program:
Applications for the 2012-2014 class of FADs are due on April 27, 2012. You may download applications on the Fellows, Ambassadors and Diplomat websites:
Fellows: [http://www.abanet.org/buslaw/committees/CL715000pub/fellows.shtml](http://www.abanet.org/buslaw/committees/CL715000pub/fellows.shtml)
Tom Hudson – Master Storyteller
By Lynette Hotchkiss

Many of us know Tom Hudson as one of the most knowledgeable and experienced consumer finance lawyers in the business. Tom, (aka the “CARLAW Guy”) began practicing consumer finance law in the early 1970s, when laws like the Truth In Lending Act and the Uniform Consumer Credit Code were in their infancy. A recognized leader in the field, Tom has received the Proxmire Lifetime Achievement Award from the American College of Consumer Financial Services Lawyers and the Distinguished Service Award from the American Financial Services Association. He also is a noted author, having penned several books and hundreds of articles on consumer finance law, presenting this complex legal area in a common sense style that both lawyers and non-lawyers can understand.

But you probably already know all that. To get the real back-story behind the man he is today, I encourage you to pick up a copy of Tom’s latest book, Tales from Acworth. In this delightful book, you will meet “Tommy” Hudson, the young man who grew up in the small town of Acworth, Georgia, and follow the path that ultimately brought him “up North” to attend law school.

I sat down with Tom recently and asked him about this latest venture. He says it all began when he decided he wanted to tell his three grandchildren, Alexis, Mitchell, and Ethan, about his parents, Cecil and Mary Ed. As he was developing these stories for the grandkids, he started sharing them with other folks as well, many of whom are within our own CFSC family.

People started asking him to share more stories and suggesting that he turn the stories into a book. Tom had no such intention. But then, at a reunion, he ran into Sue Wilson, who had been Tom’s classmate going all the way back to 1st grade. He added Sue to his story distribution list, and she repeatedly insisted that he write a book. Finally, Tom agreed.

The timing was just right. The year the book was published, the city of Acworth celebrated its 150th anniversary, and held several special commemorative celebrations. Tom’s friend, Marian Williams, who works at City Hall, asked to use some of Tom’s stories on the city’s website as one way to share a bit of Acworth’s history. Marian also arranged to have Tom do a book signing on October 16, 2010 as part of that weekend’s special events. Tales from Acworth also is being sold in bookstores and gift shops in Acworth.

For those of you who don’t plan to travel through Acworth any time soon, don’t worry. You can get your own copy of Tales from Acworth online at www.talesfromacworth.com. Through reading chapters entitled “Cecil and Mary Ed,” “North Cobb High School,” “Cars,” “Lily Grace” (my personal favorite), “Bulldog Country,” “Yankee Land,” and “Southern Cooking,” you will get to know the real
Tommy Hudson. It will give you greater insight into how Tom became the smart, engaging, kind, and generous man we know today – a true Southern Gentleman.
Throughout American history, the relationship between Native American tribes, states, and the federal government has been contentious to say the least, resulting in violence and litigation, most of which is far beyond the scope of this article. This article provides a glimpse into this struggle, by briefly outlining some recent actions involving tribal lending to consumers.

In short, federal and state agencies have recently taken action to try and curtail tribal loans to off-reservation consumers, presenting numerous legal issues to state and federal courts. Many of the issues in those cases resemble the issues in older cases involving tribal gambling. In other ways, the legal issues in these cases resemble the issues presented in cases involving cross-border loans from consumer lenders, federally chartered financial institutions, and state chartered financial institutions.

Ultimately, the outcome of these cases will impact tribal sovereignty, and whether non-tribal service providers will be subject to civil and criminal penalties. If the history of tribal gambling is any indication, legal issues surrounding tribal lending may ultimately be resolved by federal legislation negotiated between the tribes, states, and the federal government.

**Tribal Sovereignty.**

The concept of true sovereignty is somewhat elusive in the American federal system, which constitutionally delegates certain powers and reserves other powers "to the States respectively, or to the people."\(^1\)

While tribes and states at times lay claim to serve as sovereign entities, they are better understood as "subordinate sovereigns." Pure "sovereignty" claims supreme dominion, subject to no overriding power. But, states and tribes are subordinated political powers. States and tribes are "subject to control"\(^2\) by a "constitutional power," which allows the federal government to "prevent, restrict, direct, or annul" their respective operations.\(^3\)

The Commerce Clause of the U.S. Constitution provides Congress the power to "regulate Commerce with foreign Nations, and among the several States, and with the tribes."\(^4\) This constitutional provision provides the basis for a great deal of the legislation and litigation involving tribes, states, and the federal government.

Through various treaties, and also via legislation (primarily codified as Title 25 of the U.S. Code, called "Indians"), Congress has exercised a great deal of authority over tribes, creating the Bureau of Indian Affairs, creating the Indian Claims Commission, and legislating requirements for treaties and contracts.\(^5\) In addition, the United States Supreme Court has decided numerous cases addressing Native Americans and tribes.

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1 U.S. Const. amend. X.
2 POLITICAL POWER, Black's Law Dictionary (9th ed. 2009), political power.
3 Id.
4 U.S. Const. art. I, § 8, cl. 3.
5 Title 25 exercises authority over property, marriage, records, conveyances, traffic in intoxicating liquors, education, promotion of social and economic welfare, rights-of-way through tribal land, allotment of tribal land, intestacy, irrigation, constitutional rights, judgments, economic development, health care, college scholarships, child welfare, minerals, law enforcement, language preservation, grave protection, heritage, forest management, energy, legal assistance, dams, housing, gaming, and other areas.
As subordinate sovereigns, tribal governments maintain a type of sovereign immunity, somewhat like state governments. But, "tribal sovereign immunity is not absolute." The "doctrine of tribal sovereign immunity precludes a suit against" a tribe except when Congress has abrogated that immunity or the tribe has foregone it. This doctrine serves to "exempt tribes from state laws that would otherwise infringe upon this sovereignty." States are generally prevented from enforcing state laws against tribes, except in limited circumstances where Congress explicitly delegated such ability. So, states can rarely sue tribes. Questions concerning federal agencies and their authority to regulate tribes also remain unresolved. Issues concerning whether and how Congress must express "clear and plain congressional intent" for a federal law and its regulations to apply to tribes, remain unresolved.

Tribal Law History.

The complete history of tribal law will not be addressed in this article. However, a few aspects are helpful to understand tribal lending issues.

Three early United States Supreme Court Cases set the basic principles of tribal sovereign immunity that still apply today. Based on these cases, unless otherwise provided by Congress, states have no authority over tribes. State courts lack jurisdiction over lawsuits brought against tribes, tribal entities, and tribal members with respect to transactions arising on reservations. Whether a tribe, state or the federal government has jurisdiction largely depends on whether Congress expressly granted authority to sovereigns.

In 1953 Congress passed PL 280. As a result of PL 280, six states, known as the "Mandatory States," received Congressional authority to assume state criminal and civil jurisdiction over tribal members. Under PL 280 Congress also authorized all other states, at their option, to assume civil jurisdiction. Ten states, known as "Optional States" elected to assume civil jurisdiction. Several tribes were excluded.

While PL 280 authorized certain state courts to assert civil and criminal jurisdiction over certain tribes, it did not authorize the application of state "regulatory" law. If a state law permits conduct, subject to regulation (for example, the sale of tobacco), then the law must be classified as "regulatory" and PL 280 does not authorize state regulatory enforcement on a reservation. So if a state law permits sale of a substance when regulated, such as tobacco, then the state cannot enforce such laws against the tribe, barring a federal law to the contrary. This "regulatory" law distinction is important in the context of the tribal lending issue.

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8 Id. citing U.S. Aroostook Band of Micmacs v. Ryan, 404 F.3d 48 (1st Cir. 2005) (overruled on other grounds by, Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16 (1st Cir. 2006)).
9 See for example: Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985); E.E.O.C. v. Fond du Lac Heavy Equip. & Const. Co., Inc., 986 F.2d 246, 249 (8th Cir. 1993); N.L.R.B. v. Fortune Bay Resort Casino, 688 F. Supp. 2d 858, 866 (D. Minn. 2010).
11 The basic principles enunciated include; (1) Tribes have virtually unlimited authority over internal tribal affairs; (2) Congress will have full power over the Indian tribes. Indian policy is generally in the federal jurisdiction; (3) Tribes are presumptively immune from enforcement by the state of state law; (4) Tribes will retain all sovereignty that is not expressly taken away by the Congress, unless the tribe expressly consents or waives such immunity; and (5) such immunity does not extend to individual tribe members except to the extent tribal officials act within the scope of their official capacities.
12 Minnesota, Wisconsin, Oregon, California, Nebraska, and Alaska.
13 In 1968, Congress amended PL280 to restrict further states from assuming civil jurisdiction without tribal approval.
14 Arizona; Florida; Idaho; Iowa; Montana; Nevada; North Dakota; South Dakota; Utah and Washington.
Cases emerged under PL 280, many involving tribes pursuing bingo and other gaming operations. California first litigated tribal bingo issues in a case called Cabazon. The tribes won, with the U.S. Supreme Court deciding that since California did not totally prohibit gaming, the tribes could offer gaming, without a license or permission from the state. The court noted that "California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery." The California statute at issue "allowed the underlying activity" and was civil in nature, although it had a criminal penalty for failure to comply. Therefore, California "regulated" the activity rather than totally prohibiting such activity as a criminal matter. While this case provided a general rule, the distinction between "prohibitory" and "regulatory" laws is not always a bright line distinction.

Given the legal uncertainty regarding state gambling laws and tribal gambling, in 1988 Congress passed PL 100-497, called the Indian Gaming Regulatory Act or "IGRA," recognizing that state gaming laws and federal tribal policy were unclear.

Tribes retained authority over traditional tribal games, and games largely unregulated by the states. The federal government obtained authority over smaller games, and states obtained some involvement, as negotiated, in other gaming. Due to this federal law, states and tribes now regularly negotiate to define tribal gaming parameters. However, disputes persist.

One case relevant to tribal Internet loans to state residents, called Coeur D'Alene involved gaming made available off-reservation through telephone and Internet services. The courts indicated that states could pursue actions when significant aspects of the transaction, such as the ticket purchase and gambling activities, occurred off reservation. The Eighth Circuit Court of Appeals remanded and instructed the trial court to "determine whether the Tribe's internet lottery is a gaming activity on Indian lands of the Tribe." The court decided that if the lottery was being conducted on the tribe’s lands, then IGRA completely preempted state law, but if it was conducted off-reservation, then IGRA would not preempt state law claims.

Ultimately, the Internet tribal gambling cases determined that the IGRA did not give tribes the authority to operate gambling activities off of the reservation, and highlight the significant differences that arise when an activity is undertaken by a tribe "on-reservation" as opposed to "off-reservation."

Tribal Lending – State Court Decisions.

Two cases Ameriloan and Suthers, replay some of the tribal gambling litigation history. States brought suits against two tribes lending money over the Internet to consumers residing in California and Colorado. The Attorneys General in California and Colorado sued the tribes for failing to comply with state laws regulating consumer lending.

16 Id.
17 The primary case that discusses what is regulatory and what is criminal prohibitory is California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).
18 Congress compromised by dividing tribal gaming into three different classes: (1) Class I, which is of nominal amounts or games of tribal tradition, which remains the exclusive province of tribes; (2) Class II, which is mainly bingo, some card games, and other smaller games, which is regulated by the National Indian Gaming Commission ("NIGC"); and (3) Class III, everything else, which is now regulated by a compact that must be agreed upon by both the tribes and the applicable state.
20 State ex rel. Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102 (8th Cir. 1999).
21 Id.
22 Ameriloan v. Superior Court of Los Angeles County, 86 Cal.Rptr.3d 572 (Cal. Ct. App. 2008).
In Ameriloan, the tribes claimed immunity from suit. The appeals court held that tribal sovereignty “is not limited to government-related activity occurring on tribal lands, but also protects the tribe's off-reservation, for-profit commercial conduct.” The appeals court also directed the trial court to determine whether certain third party service providers were acting on behalf of tribes.

In Suthers, the tribes moved to dismiss, and two tribally formed corporations claiming to own the lending businesses asserted tribal sovereign immunity. The trial court denied the motion and the tribes appealed. The appeals court held that the tribal lending constituted off-reservation conduct and immunity did not prevent enforcing the Attorney General’s subpoenas.

The appeals court in Suthers also listed factors to determine whether an activity was conducted off reservation. As noted in the Coeur D’Alene case, while on-reservation activity is typically the sole domain of tribal law, off-reservation activity may instead fall under state law regardless of any claim of sovereign immunity. Ultimately, the Internet gambling cases determined that the IGRA did not give tribes the authority to operate gambling activities off the reservation, and highlight the significant differences that arise when an activity is undertaken by a tribe “on-reservation” as opposed to “off-reservation.” In Suthers the appeals court interestingly indicated the loans were made "off reservation," but such assessment did not change the sovereign immunity analysis. Rather, the Suthers appeals court noted that the doctrine of sovereign immunity prevented the tribes from being sued in state court and noted that this was true whether the commercial contracts "were made on or off a reservation."

For the Suthers case, ultimately, the Colorado Supreme Court reviewed the matter and held that “tribal sovereign immunity applies to state investigatory enforcement actions.” The Supreme Court directed the trial court, on remand, to determine whether certain entities were acting “as arms” of the tribes, “such that their activities are properly deemed to be those of the tribes.” The Colorado Supreme Court specifically directed the trial court to consider: "(1) whether the tribes created the entities pursuant to tribal law; (2) whether the tribes own and operate the entities; and (3) whether the entities’ immunity protects the tribes' sovereignty.”

When a tribe uses a corporation formed under tribal law, compared to a tribe owned corporation formed under state law, the analysis varies. Likewise, if the tribe uses a third-party to perform many of the functions, the law may not provide any immunity to such third-party. The Ameriloan court noted that tribal "sovereign immunity extends not only to the tribes, but also to those for-profit commercial entities that function as "arms of the tribes." Immunity "does not cover tribally chartered corporations that are completely independent of the tribe." The court recognized "[i]t is possible to imagine situations in which a tribal entity may engage in activities which are so far removed from tribal interests that it no longer can legitimately be seen as an extension of the tribe itself. Such an entity arguably should not be immune; notwithstanding the fact it is organized and owned by the tribe."

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25 The court looked to where (1) the contract was entered into; (2) the contract was negotiated; (3) performance is to occur; (4) the subject matter of the contract is located; and (5) the parties reside.
26 Cash Advance & Preferred Cash Loans v. State, 242 P.3d 1099, 1102-03 (Colo. 2010).
27 Id.
28 Id.
29 In 2006, the Washington Supreme Court had previously ruled in Wright v. Colville Tribal Enter. Corp. that tribal corporations owned by tribal governments, and created under tribal law are immune from suit, absent express waiver of that immunity by the tribe or U.S. Congress. The Court held that tribal corporations have tribal immunity, and thus, the Court does not have jurisdiction over such entities.
Likewise, the sovereign immunity rights of an entity that is not 100% owned by the tribe may be different. Thus, if a non-tribal entity and the tribe engaged in a joint venture by forming a corporation, such corporation may not be able to successfully assert the sovereign immunity.

In addition, the extending of tribal immunity to the leaders—officers and directors of the tribe or tribal entity—must be carefully considered. As the appeals court in Suthers noted, while tribal sovereign immunity generally bars claims against tribal officers, "the tribe’s immunity did not protect tribal officials from suit when acting outside of their authority," while also pointing out that "[t]he individual members of tribes who are not tribal officials are not covered by sovereign tribal immunity for conduct beyond the reservation’s borders."

The decisions in Ameriloan and Suthers have reaffirmed general tribal "sovereign immunity law."30 In both cases, the courts ordered state agencies to engage in additional discovery to determine whether the corporations were tribal entities. In Ameriloan, the court remanded the case, and instructed the trial court to "conduct a new evidentiary hearing to determine whether" the entities involved were "sufficiently related to federally recognized Indian tribes to be entitled to the benefit of the doctrine of tribal sovereign immunity."31 These cases don’t "authorize" tribal loans to non-tribal consumers. Rather, these cases note that some states can’t successfully enforce certain state laws against tribes. Both decisions support the concept specifically expressed in Suthers that "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them."

Tribal Immunity and Third Parties.

In the Ameriloan and Suthers cases, the tribes may have benefitted from non-tribal assistance. In both decisions, the appellate courts noted the need for more discovery to determine whether another entity was involved. As noted above, a tribe’s immunity merely prevents certain actions against the tribes. Unlike bank preemption, tribal immunity may not necessarily operate as Congressional authorization to legalize any activity by an immune party. Rather, such activity may in fact be deemed unlawful by a state, but the immune tribal actors are simply beyond the reach of state prosecution.

The scope of immunity for third parties, who are not members of a tribe and not otherwise immune, remains unclear. The Model Penal Code Section 5.04 notes that "it is immaterial to the liability of a person who conspires with another to commit a crime" that "the person with whom he or she conspires" has "immunity to prosecution or conviction."32 The Model Penal Code also indicates that an "accomplice may be convicted though "the person claimed to have committed the offense" has "an immunity to prosecution or conviction."33 Thus, non-tribal service providers should be cautious.

However, in limited circumstances, courts have sometimes found that a "tribe’s sovereign immunity extends to its agencies."34 While those cited cases suggest tribal sovereign immunity can be extended to certain entities, it is not always clear when courts will extend the immunity, and when they will not. In short,

30 Various issues have been remanded to the lower court in both cases.
32 15A C.J.S. Conspiracy § 137.
33 See § 2.06. Liability for Conduct of Another; Complicity., Model Penal Code § 2.06.
various factors are used to determine whether “the relationship between the tribe and the entity is sufficiently close to properly permit the entity to share in the tribe’s immunity.”

Tribal Lending – FTC Action.

On September 6, 2011 the FTC filed a complaint alleging that an entity named Lakota Cash and other defendants violated various federal laws in connection with consumer loans. According to the complaint, the defendant entities are South Dakota LLCs, with principal places of business located within South Dakota. The complaint indicates that one individual, named as registered agent, controlled the operations, and resides within the District in which the case was filed. The FTC alleged that the defendants, in conducting their lending operation, violated the FTC Act, the FTC Credit Practices Rule, the Electronic Funds Transfer Act, and Regulation E.

Six days after filing the complaint, the FTC announced that the defendants had "agreed to stop the challenged conduct pending trial." The FTC’s complaint does not reference tribal sovereignty or immunity. It remains to be seen whether the entities are chartered tribal businesses, arms of tribal governments, or have somehow preserved tribal "immunity, sovereignty and assets," as businesses organized under Section 17 of the Indian Reform Act.

If the defendants successfully assert sovereign immunity, the courts may ultimately decide whether federal consumer credit protection laws can be applied to tribes. As noted above, issues concerning whether, and how Congress must express "clear and plain congressional intent" for a law and its regulations to apply to tribes, remain unresolved. However, it is worth noting that Congress did not explicitly reference Indians, Native Americans, or tribes within the body of the FTC Act or the Electronic Funds Transfer Act.

Tribal Lending – The CFPB.

Another issue concerns whether Congress granted the Consumer Financial Protection Bureau (CFPB”) the authority to regulate tribal lending. Under the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), tribes are mentioned in one provision. Specifically, within the definition of the word "state," various entities, not typically considered states, are listed as within the definition of the word "state," including federally recognized Indian tribes, as defined by the Secretary of the Interior under section 479a-1(a) of Title 25. Thus, the use of the word "state" in Dodd-Frank should be understood to include tribes. Under Dodd-Frank, the "primary functions" of the CFPB do not include regulating such "states."

Rather, the primary purposes include supervising "covered persons" for “compliance with Federal consumer financial law, and taking appropriate enforcement action to address violations of Federal

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39 The Bureau of Indian Affairs notes varying options for corporate entity formation, and different opportunities provided by differing structures. See for example: http://www.bia.gov/WhoWeAre/AS-IA/IED/TBCB/index.htm.
40 See for example: Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985); E.E.O.C. v. Fond du Lac Heavy Equip. & Const. Co., Inc., 986 F.2d 246, 249 (8th Cir. 1993); N.L.R.B. v. Fortune Bay Resort Casino, 688 F. Supp. 2d 858, 866 (D. Minn. 2010).
consumer financial law.\textsuperscript{43} Another "primary function" is to issue "rules, orders, and guidance implementing Federal consumer financial law."\textsuperscript{44} No governing function suggests the CFPB regulates states (and therefore tribes). The CFPB regulates the activity of such "covered persons." According to the statute, the term "covered persons" means "any person that engages in offering or providing a consumer financial product or service" and "any affiliate of a person" if "such affiliate acts as a service provider to such person."\textsuperscript{45}

"States" are not explicitly listed as "covered persons," who would be regulated by the CFPB. Rather references to states (which includes tribes in this case), seem to focus on cooperation with state agencies, preservation of state (and therefore tribal) law, state enforcement authority, etc. Thus, it remains unclear whether the CFPB will attempt to regulate tribal lending and if so whether Congress expressed "clear and plain congressional intent" for the law and CFPB authority to regulate tribes.\textsuperscript{46}

What's Next?

While it is not entirely clear what is next, it appears that the federal courts in South Dakota will review the applicability of federal consumer credit laws, to entities that may have tribal connections. Likewise, cases involving Western Sky Financial, an Internet lender claiming tribal affiliations, are underway in Colorado, Maryland, Missouri, and West Virginia. Most recently, a court in Kanawha County, West Virginia, ruled in favor of the state Attorney General, deciding that the Internet lender must comply with a state subpoena, despite claiming affiliation with the Lakota tribe. Western Sky Financial was formed as a South Dakota organization, not under tribal law.\textsuperscript{47}

Ultimately, this tension between state lending regulations and tribal lending operations mirror the gambling issues present before Congress passed IGRA. As a result, tribes may continue to make loans to non-tribal residents, following only tribal law, until Congress passes federal legislation clarifying the respective rights of the sovereigns involved. What is clear is that tribal lending is yet another test of tribal sovereign immunity.

\textsuperscript{43} 12 USCA § 5511.
\textsuperscript{44} Id.
\textsuperscript{45} 12 USCA § 5481.
\textsuperscript{46} See for example: Donovan v. Coeur d'Alene Tribal Farm, 751 F.2d 1113, 1115 (9th Cir. 1985); E.E.O.C. v. Fond du Lac Heavy Equip. & Const. Co., Inc., 986 F.2d 246, 249 (8th Cir. 1993); N.L.R.B. v. Fortune Bay Resort Casino, 688 F. Supp. 2d 858, 866 (D. Minn. 2010).