

## PERSPECTIVE

## Caldwell: Hiding behind a tribe

Payday lenders are able to get around state regulations by claiming sovereign immunity.

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A curious situation came to the attention of regulators some five years ago as they were looking into complaints about online payday lenders.

The folks who were doing the lending claimed to be arms of Indian tribes based in other states, and as such, their tribal sovereign immunity gave them protection against state regulators.

The Colorado Attorney General's office was unconvinced, and the drama has since played out quietly in the state court system, with a Colorado Supreme Court decision issued in November that leaves a central question yet to be definitively answered:

Are these operations legitimate arms of Native American tribes or are they, as one consumer advocate asserted in court documents, "fringe lenders" who are using a "rent-a-tribe" scheme to escape regulation?

Lawyers for the tribes — the Miami Nation of Oklahoma and the Santee Sioux Nation — strenuously object to such characterizations.

They contend the state has engaged in a "protracted, caustic assault" on the tribes and their business entities. Those entities, they say, have done everything necessary to prove their affiliation with the tribes, including providing more than 3,300 pages of documents to the state.

The details will be explored at the trial court level, where the case has been sent for additional action.

The court's decision is important, says Colorado Attorney General John Suthers, because a ruling against the state could lead to "lots of businesses using tribal sovereignty to get them out from under state regulation."

And even worse, all that that wrangling at the Capitol over the last few years to pass stricter payday lending regulations could be undermined by this case.

"What you have is payday lenders, shall we say, associating with Indian tribes," Suthers said. "We suspect the payday lenders are paying tribes to give them regulatory cover."

In late 2003 through 2005, the state AG's office began getting complaints about online payday lenders Cash Advance and Preferred Cash Loans, said Deputy Attorney General Jan

Zavislan.

Payday lenders issue typically small, short-term loans that command high interest rates. Colorado has laws that spell out payday lending interest rates and other terms, though online lenders often violate those rules, Zavislan said. "They flout it. They think they're untouchable."

The AG's office issued subpoenas as part of the investigation into online lenders Cash Advance and Preferred Cash. One of the aims was to get a gauge on the scope of their operations in Colorado.

During the investigation, the AG's office obtained documents showing two Carson City, Nev., companies did business as Cash Advance and Preferred Cash.

The AG's office subpoenaed the companies' executive officer, James Fontano, who responded by saying he and his companies weren't connected with the payday lenders.

That's when the tribes stepped in. Even though they had not been served with any legal papers, they intervened to say the payday lenders were immune from enforcement action because they were arms of businesses enterprises run by the Miami Nation of Oklahoma and the Santee Sioux Nation.

It is at this point the key issue of tribal sovereign immunity was introduced into the mix.

Tribal sovereign immunity is a common law doctrine recognizing Indian tribes as distinct, independent political communities that are immune from lawsuits or quasi-judicial proceedings without congressional waiver or tribal consent.

Prior U.S. Supreme Court decisions make clear that tribal sovereign immunity applies to state law enforcement actions, which includes the AG's investigation.

The AG's office waged a pitched battle on a more fundamental question. In one court document, the AG's office asked whether the lenders were "non-tribal, non-immune entities using the tribal corporations as 'fronts' to shield their illegal payday lending behind the wall of tribal immunity."

The pleading elicited a spirited reply from lawyers for the tribes, who called the statement "speculation and reckless rhetoric."

The legal fight in Colorado hasn't been the only front in the battle state regulators are waging against high-interest payday lenders who say they are tribal enterprises.

Such skirmishes have been fought in California, New Mexico and West Virginia as well. Some state authorities are concerned the tribal enterprises arrangement could spread to other Internet-based businesses.

"It's certainly possible that other industries could use tribal sovereign immunity to get around the laws of the states," said Norman Googel, a West Virginia assistant attorney general who led the state's pursuit of tribal-affiliated payday lenders.

Others steeped in Indian law and the doctrine of tribal sovereign immunity see the issue differently.

Troy Eid, former U.S. attorney for Colorado who now specializes in Indian law in private practice, said state attorneys general have to defer to federal law that defines the relationship between government and the tribes.

Only on rare occasions has Congress authorized states "intruding," as he put it, into tribal sovereign immunity. Those include a 1953 law concerning criminal and civil jurisdiction in selected states and mineral leasing tax collections as defined in a 1982 law.

"It is always possible for Congress to pass a law regulating payday lending on tribal land," Eid said. "It is emphatically not a role for John Suthers or state attorneys general."

If it is to be resolved, Congress very well may be where this matter ends up.

The Colorado Supreme Court ruling is not particularly favorable to the state, since Colorado was given the burden of proving a negative — that the tribal business entities are not entitled to sovereign immunity.

The decision has left state officials concerned about their enforcement abilities going forward.

"That court opinion may prevent us from conducting investigations into similar arrangements and entities," said Zavislan, the Colorado deputy attorney general.

At the end of the day, federal regulation may be the only route to reining in rogue payday lenders associated with Indian tribes.

Said Colorado AG Suthers: "This has been a long, hard battle and we're not making the kind of progress we'd like."

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