

12-15-2017

By Any Means: How One Federal Agency is Turning Tribal Sovereignty on its Head

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Recommended Citation

Cottrell, Clifton (2017) "By Any Means: How One Federal Agency is Turning Tribal Sovereignty on its Head," *American Indian Law Journal*: Vol. 6 : Iss. 1 , Article 1.

Available at: <https://digitalcommons.law.seattleu.edu/ailj/vol6/iss1/1>

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CONTENTS

I.	INTRODUCTION.....	1
II.	FROM THE BLOODY ISLAND MASSACRE TO THE MORTGAGE CRISIS OF 2008: UNDERSTANDING THE ORIGINS OF UPPER LAKE AND THE CFPB	3
III.	A COMPLAINT NEVER BEFORE SEEN IN INDIAN COUNTRY	12
	A. <i>Abusive</i>	15
	B. <i>Unfairness</i>	16
	C. <i>Deception</i>	20
IV.	A NEW WRINKLE IN THE DEBATE OVER TRIBAL SOVEREIGNTY	21
V.	CONCLUSION.....	33

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*Clifton Cottrell**

The federal trust responsibility to Indian tribes underlies both the “government-to-government relationship” with Indian tribes and the imperative that federal agencies not actively impede the economic development and self-determination of Indian tribes, and that they engage in meaningful consultation when any federal undertaking might impact tribes in a significant way.

The Honorable Sherry Treppa, Chairperson, Habematolel Pomo of Upper Lake, 2016¹

I. INTRODUCTION

In 2016, the chairperson and leader of the Habematolel Pomo of Upper Lake (Upper Lake), Sherry Treppa, testified before the United States House of Representatives at a hearing titled *Short-Term, Small Dollar Lending: The CFPB’s Assault on Access to Credit and Trampling of State and Tribal Sovereignty*.² She spoke ardently about the economic opportunity afforded to her tribe after a lending entity created by the tribal government began issuing small-dollar installment loans online. In a few short years, Upper Lake managed to expand their lending operations, creating desperately needed jobs in the community and funding significant social programs critical to the preservation of tribal culture, promotion of education, and development of further economic

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¹*Short-Term, Small Dollar Lending: The CFPB’s Assault on Access to Credit and Trampling of State and Tribal Sovereignty: Hearing Before the Subcomm. on Fin. Inst. and Consumer Credit of the H. Comm. on Fin. Servs.*, 114th Cong. (2016) (statement of Honorable Sherry Treppa, Chairperson, Habematolel Pomo of Upper Lake) [hereinafter *Short-Term, Small Dollar Lending*].

²*Id.*

opportunity. For a tribe located hours away from the nearest major economic center, e-commerce was just the industry to restore prosperity to the community.

On April 27, 2017, the Consumer Financial Protection Bureau³ (CFPB or Bureau), an independent federal agency tasked with policing financial markets, initiated a lawsuit against four tribal lending entities (TLEs) owned and operated by Upper Lake, styled *CFPB v. Golden Valley Lending, Inc., Silver Cloud Financial, Inc., Mountain Summit Financial, Inc., and Majestic Lake Financial, Inc.*⁴ The complaint alleges violations of the federal Truth in Lending Act (TILA) and the Consumer Financial Protection Act (CFP Act) for unfair, deceptive, and abusive acts and practices (UDAAP).⁵ While federal regulators like the Federal Trade Commission have relied on TILA and UDAAP (including UDAAP's previous form under section 5 of the Federal Trade Commission Act) for decades, the CFPB's lawsuit against Upper Lake's TLEs is monumental; the Bureau seeks to impose state usury and licensing laws on a sovereign tribal enterprise via a dubious enforcement statute.

Now the tribe's lending operations are embroiled in litigation against the CFPB while the agency possibly operates outside the traditional checks and balances of the United States Constitution. The unique and potentially unaccountable structure of the CFPB, combined with the Bureau's narrow directive, created an agency agenda with little oversight and a dangerous interpretation of its mission. Even in an area in which Congress expressly forbids the agency from rulemaking, the CFPB is now seeking to circumvent legislative intent through the use of a subjective administrative tool called UDAAP. The result is a truly

³ The CFPB is an agency charged with supervising and developing rules for consumer financial markets. The Bureau is housed under the Federal Reserve in the Department of the Treasury. The CFPB enforces nineteen different consumer finance laws.

⁴ *CFPB Sues Four Online Lenders for Collecting on Debts Consumers Did Not Legally Owe*, CONSUMER FIN. PROT. BUREAU (Apr. 27, 2017), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-four-online-lenders-collecting-debts-consumers-did-not-legally-owe/> [<https://perma.cc/P6RQ-S9NM>].

⁵ Complaint for Permanent Injunction and Other Relief at 1, *CFPB v. Golden Valley Lending, Inc.*, No. 17-cv-3155 (E.D. Ill. Apr. 27, 2017) [hereinafter CFPB Complaint], http://files.consumerfinance.gov/f/documents/201704_cfpb_Golden-Valley_Silver-Cloud_Majestic-Lake_complaint.pdf [<https://perma.cc/9Q68-6Q37>].

unprecedented legal challenge: a federal agency is attempting to impose state laws, laws which it is forbidden from promulgating itself, on sovereign tribal entities via a nebulous enforcement standard. This suit not only threatens vital economic development opportunities for an isolated tribe, but it also endangers the very basis of tribal sovereignty and preemption of state law in Indian affairs. It is a case that must be watched closely, not just by the handful of scattered tribes participating in small-dollar internet lending, but by all of Indian Country. If the courts side with the CFPB's interpretation of sovereign tribal status vis-à-vis state law, sovereignty could lose all effect in tribal economic development. One of the hallmarks of federal Indian policy in the era of self-determination, the extension of sovereignty to tribal commercial activities, would be forever lost.

This article explores the unique set of circumstances that led to the CFPB's lawsuit against Upper Lake. Part I begins by providing background on the Upper Lake Tribe, the CFPB, and the Bureau's authority to bring suit against the TLEs. Part II addresses the complaint, recounts the alleged violations, and discusses the history and previous efforts by federal regulators with UDAAP. Finally, Part III analyzes some of the major tribal concerns with the Bureau's complaint, including preemption, sovereignty, rate exporting, and self-determination. In a time when the majority of tribes still struggle to provide meaningful economic opportunity in their communities, the CFPB must not succeed in eroding the one component of tribal sovereignty that makes e-commerce on reservations possible.

II. FROM THE BLOODY ISLAND MASSACRE TO THE MORTGAGE CRISIS OF 2008: UNDERSTANDING THE ORIGINS OF UPPER LAKE AND THE CFPB

The Habematolel Pomo of Upper Lake, numbering only a few hundred members in rural northern California, have experienced a mixture of fortunes since their ancestors settled in the Clear Lake area thousands of years ago. From near annihilation by United States soldiers in the nineteenth century to a protracted battle to regain federal recognition after their rancheria was terminated in the 1950s, the tribe's existence is a testament to perseverance in the face of incredible adversity. Not content with simple recognition,

Upper Lake now boasts robust lending operations originating millions of dollars in loans and executing over half a million credit inquiries annually.⁶ The revenues generated by Upper Lake's TLEs help fund vital sovereign governmental functions and allow the tribe to provide important educational and social services for its members.

In contrast, the CFPB began its life as a concept by an aspiring politician envisioning a powerful federal agency to oversee the many concerns regarding consumer finance. The need for such an agency accelerated after poor oversight of mortgage lending and the United States banking system led to a massive collapse of American financial institutions and the worst recession in our country since the Great Depression. The passage of the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank) ushered in a new era of consumer financial regulation, shifting an incredible amount of regulatory power and autonomy to the freshly minted CFPB. The unique management structure of the agency with a single independent director ensured neither Congress, the President, nor any special interest groups would have any substantial influence on the Bureau's operations. Further, the broad language found in the CFP Act permitted the CFPB considerable leverage to assert its important function as watchdog over the consumer finance industry.

This section recounts the circumstances surrounding the development of modern tribal government operations at Upper Lake, as well as explains the regulatory structure supporting its lending operations. It continues with a review of the events that led to the formation of the CFPB and an overview of the Bureau's authority regarding consumer finance and tribes.

The Habematolel Pomo of Upper Lake are located on the northern upper reaches of Clear Lake in northern California. The most recent United States census estimates the population of the Upper Lake Rancheria at 143 residents.⁷ The tribe is bordered by Clear Lake to the south and the expansive Mendocino National Forest to the north. The nearest major metropolitan area is Sacramento, more than two hours away by car. Upper Lake is

⁶ *Id.* at 9.

⁷ *My Tribal Area: Upper Lake Rancheria*, U.S. CENSUS BUREAU, <https://www.census.gov/tribal/> [<https://perma.cc/7ZWB-RLAG>].

hampered by the same geographic and economic isolation indicative of Native communities across the United States.

Upper Lake can trace its roots to the area back more than 8,000 years when their ancestors settled around Clear Lake and looked to the abundance of the surrounding marshlands for sustenance.⁸ The local presence of obsidian for toolmaking enhanced the value of the land for early inhabitants. The massive forestlands just north of the lake saw extensive use by Yuki, Nomlaki Wintu, Patwin Wintu, Eastern Pomo, and Northeastern Pomo groups.⁹ By 1800, there were upwards of 18,000 Pomo Indians living in California speaking seven distinct languages.¹⁰ In 1850, United States soldiers slaughtered many of the women and children of Upper Lake in the Bloody Island Massacre, part of a government policy to subdue California Indians and consolidate their control of increasingly valuable lands. Only one young girl survived the assault, hiding from troops by submerging herself in the lake and breathing through a reed.¹¹ The remaining tribal members were organized onto a rancheria in 1907, one of six such communities on the shores of Clear Lake.

The tribe's federal recognition and trust lands were short lived; the California Rancheria Termination Act dissolved the Upper Lake Rancheria and effectively extinguished their federal status.¹² A group of tribal members later formed the Upper Lake Pomo Association and sued the federal government to restore their federal recognition and trust lands. The tribe received federal recognition again in 1979, and trust lands were restored in 2008.¹³ With renewed recognition, the members of Upper Lake wrote and ratified a new constitution in 2004.¹⁴ With restored lands and a formalized governance structure in their new constitution, Upper Lake set about

⁸ *The Tribe's History and Culture*, HABEMATOLEL POMO OF UPPER LAKE, <http://www.upperlakepomo.com/forms/brochure.pdf> (last visited July 2, 2017) [<https://perma.cc/KU5B-F9GF>].

⁹ *Mendocino Forest: About the Forest*, U.S. DEP'T OF AGRIC., <https://www.fs.usda.gov/main/mendocino/about-forest> (last visited July 2, 2017) [<https://perma.cc/R6BY-E7DY>].

¹⁰ Upper Lake belongs to the Northern and Eastern language groups.

¹¹ *Short-Term, Small Dollar Lending*, *supra* note 1, at 129.

¹² California Rancheria Termination Act, Pub. L. No. 85-671, 72 Stat. 619 (1958).

¹³ See *Upper Lake Pomo Association v. Cecil Andrus*, No. C-75-0181-SW (N.D. Cal. 1979).

¹⁴ See *generally* HABEMATOLEL POMO OF UPPER LAKE CONST. (2004), <http://www.upperlakepomo.com/forms/HPUL-Constitution.pdf> [<https://perma.cc/X2DQ-JWZS>].

asserting their sovereign rights and exploring economic development opportunities.

For tribes located far from economic hubs or major transportation networks, economic opportunities can be extremely limited. Some tribal communities can rely on resource exploitation of their lands through mining, farming, hunting and fishing, or logging to provide jobs and revenues. The modern Upper Lake Rancheria began about a decade ago with a transfer into trust of just 11.24 acres, too little land for timber harvesting or farming.¹⁵ E-commerce, in particular, short-term small-dollar online lending, presented a promising industry, allowing the tribe to provide services across the nation through a simple internet connection. The tribe set up a TLE to lend small amounts of money, generally only a few hundred dollars repaid in monthly installments, to needy households across the country via the world wide web. To manage the complex and evolving requirements of consumer financial law, Upper Lake set off to create a robust system of regulatory controls to guide their lending operations.

The Upper Lake TLEs are governed by an extensive set of lending codes developed by the tribal council. In her testimony before Congress, Chairperson Treppa noted, “This lending ordinance prohibits tribal licensees from engaging in unfair, deceptive, or fraudulent practices, or engaging in any consumer financial services other than those expressly permitted under that ordinance.”¹⁶ To oversee the enforcement of its lending code, the tribe instituted an independent regulatory commission: “This regulatory commission is a separate division of the Tribe’s government, which means that it operates independently of our tribal government. The commission has the autonomy to exercise its enforcement authority should a lending business violate the consumer protection laws that we established.”¹⁷ To ultimately issue the loans, the tribal government developed a series of TLEs to provide small-dollar installment loans to consumers online.

Four different lending operations were named in the suit by the CFPB, and all are owned and operated by the Upper Lake tribal government.¹⁸ Apart from the actual lending companies, the tribe

¹⁵ *Short-Term, Small Dollar Lending*, *supra* note 1, at 130 (statement of Hon. Sherry Treppa, Chairperson, Habematolel Pomo of Upper Lake).

¹⁶ *Id.* at 131.

¹⁷ *Id.* at 131.

¹⁸ CFPB Complaint, *supra* note 5, at 2.

also owns a customer support center and lead generator. Lead generators solicit business through advertising and other forms of communication with potential customers. The Bureau’s complaint highlights the productivity of the TLEs: “From August 2013 to December 2013, Silver Cloud and Golden Valley originated a total of approximately \$27 million in loans and collected a total of approximately \$44 million from consumers.”¹⁹ The CFPB also pled that Golden Valley Lending could originate 235 loans in one day, an amount the Bureau labeled as a “large volume.”²⁰ Between February 2013 and June 2016, the TLEs performed over 597,000 credit inquiries on potential borrowers.²¹ For a tribe that only recently recovered its federal sovereign status, e-commerce through small-dollar online lending has been a boon to tribal social programs. Safeguarding this vital revenue stream is another chapter in the tribe’s fight for survival.

In contrast to the travails of Upper Lake, the CFPB has wielded considerable power and influence in its short existence. The Bureau was originally conceptualized by future United States Senator Elizabeth Warren, a law professor at Harvard University of Cherokee and Delaware descent. In 2007, she wrote an article for *Democracy Journal* in which she lamented the fact that toaster ovens received more scrutiny from federal regulators than home mortgages.²² In a now-famous comparison, she wrote:

It is impossible to buy a toaster that has a one-in-five chance of bursting into flames and burning down your house. But it is possible to refinance an existing home with a mortgage that has the same one-in-five chance of putting the family out on the street—and the mortgage won’t even carry a disclosure of that fact to the homeowner.²³

She decried the failures of federal regulators at that time, concerned more with maintaining the soundness and profitability of the banking and finance industries than the wellbeing of consumers.

¹⁹ *Id.* at 6.

²⁰ *Id.*

²¹ *Id.* at 9.

²² Elizabeth Warren, *Unsafe at Any Rate*, 5 DEMOCRACY: A JOURNAL OF IDEAS, Summer 2007, <http://democracyjournal.org/magazine/5/unsafe-at-any-rate/> [<https://perma.cc/VY32-6VXU>].

²³ *Id.*

Prof. Warren would go on to propose a new federal agency for consumer finance modeled after the Consumer Product Safety Commission.²⁴

Warren's new consumer watchdog would clarify and standardize financial products, similar to how other federal agencies had created safety consistencies in products like appliances and automobiles. She was especially concerned about the language financial institutions used in agreements with consumers, explaining that "lenders have deliberately built tricks and traps into some credit products so they can ensnare families in a cycle of high-cost debt."²⁵ Simplifying complexity and pressing for transparency in loan agreements would be important factors in leveling the playing field in consumer finance and ridding the industry of bad actors.

Barely a year from the publication of Prof. Warren's call for a new federal consumer finance regulatory agency, she was elected to the United States Senate, and America encountered one of its worst financial collapses since the Great Depression. Between the last quarter of 2007 and the first quarter of 2009, household net worth declined \$12 trillion.²⁶ Nine million Americans lost their jobs.²⁷ Relaxed government oversight and loose underwriting in the subprime home market played a heavy hand in triggering the meltdown.²⁸ Just as the domino effect of mortgage defaults and bank failures picked up pace, the United States Department of the Treasury finished a report outlining a new consumer protection agency based on Senator Warren's prior recommendations. The new federal agency would be guided by transparency, simplicity, and access.²⁹ The Bureau would protect consumers from unfair,

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Households and Nonprofit Organizations; Net Worth, Level* (April 2017), FED. RESERVE BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/TNWBSHNO> [<https://perma.cc/3GUZ-T7CR>].

²⁷ *Consumer Spending and U.S. Employment from 2007–2009 Recession Through 2022*, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS (Oct. 2014), <https://www.bls.gov/opub/mlr/2014/article/consumer-spending-and-us-employment-from-the-recession-through-2022.htm> [<https://perma.cc/666C-Q5DC>].

²⁸ See Jeff Holt, *A Summary of the Primary Causes of the Housing Bubble and the Resulting Credit Crisis: A Non-Technical Paper*, 8 J. BUS. INQUIRY 120 (2009) (discussing that housing bubble was caused by a combination of low mortgage interest rates, low short-term interest rates, relaxed standards for mortgage loans, and irrational exuberance).

²⁹ DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION: REBUILDING FINANCIAL SUPERVISION AND REGULATION 63–71

deceptive, and abusive acts, promote accountability, and prevent regulatory arbitrage.³⁰ The agency, operating independently of the executive branch (similar to the Securities and Exchange Commission), would be governed by a director and board. It would retain supervisory and enforcement authority over nonbank financial institutions and would coordinate enforcement efforts with the states.³¹ The major federal legislation written to arrest the mortgage crisis, the Dodd–Frank Wall Street Reform and Consumer Protection Act, would borrow heavily from Senator Warren’s paper and the Treasury report.

The Dodd–Frank Act of 2010 established the Consumer Financial Protection Bureau with the responsibility to regulate consumer financial products and services and enforce consumer protection laws.³² The CFP Act deviated in a major way from the Treasury’s recommendations regarding management structure; the final legislation established only a single director to oversee the Bureau’s operations. Further, the CFPB’s director can be fired only for cause, which includes “inefficiency, neglect of duty, or malfeasance in office.”³³ President Obama chose Ohio Attorney General Richard Cordray to serve as the first director of the Bureau for a term of five years. His appointment was not without controversy. Cordray was originally nominated to the post in 2011, a year after Dodd–Frank created the agency. After uproar over the president’s use of his recess appointment authority sparked Republican outrage and a lawsuit,³⁴ Cordray was finally confirmed by the Senate in 2013.³⁵ The director and his agency have been under fire ever since.

For many reasons, the CFPB has come under considerable scrutiny and consternation from federal courts and legal scholars.³⁶

(2009), https://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf [<https://perma.cc/54K8-SBP2>].

³⁰ *Id.* at 57.

³¹ *Id.* at 59–61.

³² Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011, 124 Stat. 1376, 1964 (2010) (codified at 12 U.S.C. § 5491(a) (2012)).

³³ 12 U.S.C. § 5491(c)(3) (2012).

³⁴ *See State Nat’l Bank of Big Spring v. Lew*, 795 F.3d 48 (D.C. Cir. 2015).

³⁵ *See* Megan Slack, *Senate Confirms Richard Cordray as Consumer Watchdog*, THE WHITE HOUSE, PRESIDENT BARACK OBAMA (July 17, 2013, 6:46 PM), <https://obamawhitehouse.archives.gov/blog/2013/07/17/senate-confirms-richard-cordray-consumer-watchdog> [<https://perma.cc/6N26-YWJG>].

³⁶ *See, e.g., PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016) (single, independent director structure of agency violates separation of powers

Originally, officials envisioned a structure for the Bureau that avoided capture by special interest groups and other corrupting influences. At the time of its formation, there were massive amounts of campaign contributions and other considerations funneling from the finance and banking industries to politicians.³⁷ An independent agency structure would shield Bureau officials from the influence of politics and industry in fulfilling the CFPB’s mission. Dodd–Frank opted for a single director to head the agency, eschewing the Treasury’s recommendation to also include a governing board. The CFP Act further bucked trends by giving the director of the CFPB broad policy powers in the form of rulemaking, supervision, and enforcement, breaking from the more traditional market monitoring functions of independent agency directors at the Office of the Comptroller of the Currency and the Food and Drug Administration.³⁸ Dodd–Frank went even further by exempting the CFPB from the Congressional appropriations process, instead setting aside a significant portion of the Federal Reserve’s annual budget to be used for whatever purposes were desired by the Bureau’s director.³⁹ The totality of these choices did not just construct an agency insulated from political and financial influence, it also forged an agency with a narrow mission, substantial funding, and little accountability to the president or Congress.

To add to the Bureau’s massive coffers and independence, Dodd–Frank bestowed upon the CFPB extensive supervisory, enforcement, and rulemaking authority. In general, the Bureau “shall seek to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive.”⁴⁰ The CFPB fulfills its purpose through market monitoring, enforcement

enumerated in the U.S. Constitution), *reh’g en banc granted, order vacated* (Feb. 16, 2017); Brenden Soucy, *The Consumer Financial Protection Bureau: The Solution or the Problem?*, 40 FLA. ST. U. L. REV. 691 (2013); Eric Pearson, *A Brief Essay on the Constitutionality of the Consumer Finance Protection Bureau*, 47 CREIGHTON L. REV. 99 (2013).

³⁷ Pearson, *supra* note 36, at 103.

³⁸ Todd J. Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 874 (2013).

³⁹ Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1017, 124 Stat. 1376, 1975 (2010) (codified as amended at 12 U.S.C. § 5497 (2012)).

⁴⁰ *Id.* at § 1021(a), 124 Stat. at 1979–80.

against unfair, deceptive, and abusive acts and practices, financial education programs, and rulemaking that complements existing consumer finance laws. One important limitation on the CFPB is a prohibition on the agency from enacting any type of usury or interest rate limit for credit offered by a “covered person” under the CFP Act.⁴¹ Before proceeding to the CFPB’s complaint against Upper Lake’s TLEs and discussion on the Bureau’s authority in that instance, it is first important to review another pending case where the CFPB is attempting to exert its authority over another group of TLEs.

Great Plains Lending v. CFPB concerns the Bureau’s use of civil investigative demands (CIDs) while exploring potential violations of consumer finance laws by TLEs associated with the Otoe-Missouria Tribe of Oklahoma, the Chippewa Cree Tribe, and the Tunica-Biloxi Tribe.⁴² The Ninth Circuit recently heard an appeal in the case centering on whether tribal governments and their sovereign economic subdivisions are “covered persons” under the CFP Act, and thus subject to CIDs.⁴³ When the CFPB originally sought to engage the TLEs through a CID, the tribes instructed the TLEs not to comply, instead offering to oversee any investigations via their tribal regulatory agencies. In federal court, the TLEs argued that since the CFP Act treats states, defined to include federally recognized Indian tribes, as co-regulators with the CFPB of federal consumer financial laws, the CFPB lacked the jurisdiction to regulate TLEs directly without the cooperation of tribal regulators.⁴⁴ The court rejected this argument.

The Ninth Circuit ruled that the CFP Act was a law of general applicability.⁴⁵ In doing so, the three exceptions developed in *Donovan v. Couer d’Alene Tribal Farms*⁴⁶ were applied to resolve whether the CFP Act would ultimately be imposed on the TLEs. The court explained that a law of general applicability will apply to a tribe unless:

⁴¹ *Id.* at § 1027(o), 124 Stat. at 2003.

⁴² *CFPB v. Great Plains Lending*, 846 F.3d 1049 (9th Cir. 2017) (holding that the CFP Act is a law of general applicability and applies to tribes in the manner of civil investigative demands by the agency).

⁴³ *Id.* at 1053.

⁴⁴ *Id.* at 1050.

⁴⁵ *Id.* at 1051.

⁴⁶ *See Donovan v. Couer d’Alene Tribal Farms*, 751 F.2d 1113, 1115 (9th Cir. 1985).

(1) the law touches exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended the law not to apply to Indians on their reservations.⁴⁷

Finding that none of the exceptions applied in this instance, the Ninth Circuit held that the CFP Act applied to TLEs in the issuance of CIDs.⁴⁸ The TLEs have expressed their desire to appeal this decision to the United States Supreme Court and were recently granted an extension to file a petition for writ of certiorari.⁴⁹ Depending upon the outcome of the *Great Plains* case at the United States Supreme Court, the CFPB may find itself arguing the applicability of the CFP Act to Upper Lake's TLEs before a district court in Illinois.

Both the Upper Lake Pomo and CFPB experienced tremendous growth over the past few years. The tenacity of Upper Lake's members helped the tribe regain federal recognition, trust lands, and sovereign power to provide for their people through e-commerce. On the other side, almost overnight the CFPB went from a pipe dream by a law-professor-come-consumer-advocate to a powerful, independent federal agency with incredible statutory authority and deep pockets because of a major financial crisis. The CFPB is now placing its immense resources into a unique challenge to the economic activity of a sovereign tribal nation. The arguments put forth by the CFPB are unprecedented and warrant examination.

III. A COMPLAINT NEVER BEFORE SEEN IN INDIAN COUNTRY

The CFPB alleges two major violations in its initial complaint against the Upper Lake TLEs. First, the Bureau alleges a violation of the Truth in Lending Act.⁵⁰ Next, the CFPB argues the tribal lending operations participated in unfair, deceptive, and abusive acts or practices by collecting on loans in states in which the

⁴⁷ *Id.* at 1116.

⁴⁸ See *CFPB v. Great Plains Lending*, 846 F.3d 1049, 1055 (9th Cir. 2017).

⁴⁹ *Id.*, petition for cert. filed (Aug. 3, 2017).

⁵⁰ CFPB Complaint, *supra* note 5, at 9.

TLEs failed to secure state lending licenses and charged annual percentage rates (APR) higher than the state usury cap permits.⁵¹ This section reviews the history behind TILA and UDAAP in relation to the CFPB’s complaint, focusing particularly on how the agency is utilizing UDAAP to impose state laws the Bureau itself is forbidden from developing.

TILA appeared in the late 1960s as a way to standardize loan disclosure forms.⁵² It requires a clear disclosure of certain loan terms, most importantly the APR of the product. One would expect that a law with such a simple purpose would be simple in and of itself, especially considering Senator Warren’s deep concern that banks and lenders use loan terms to “trick and trap” consumers. Unfortunately, TILA is anything but simple. Congress has amended TILA more than twenty times since its inception; the law spawned more than 10,000 lawsuits in its first decade of existence.⁵³ The law itself now covers fifty pages. The implementation rule for TILA, Regulation Z, has been amended at least fifty times and garnered more than 1,500 agency interpretations.⁵⁴ TILA regulations and guidance are a far cry from the transparency that stood as a hallmark principle during the development of the CFPB.

In its complaint, the Bureau explained that the Upper Lake TLEs failed to disclose the APR until the final loan agreement, giving the borrowers only a more generalized estimate of financing costs through advertisements and websites.⁵⁵ The TLEs expressed the interest in terms not based on APR, but by “generally describ[ing] the finance charge for each installment payment as a block rate of \$30 per \$100 of principal, a 30% finance charge, or the total amount the consumer would have to repay.” Regardless of the outcome on rate disclosures, it is the Bureau’s UDAAP allegations that potentially carry a more significant impact to how Indian Country conducts business.

UDAAP stands for unfair, deceptive, or abusive acts or practices. It is the CFPB’s general enforcement tool for unlawful behavior by financial institutions outside the nearly twenty federal

⁵¹ CFPB Complaint, *supra* note 5, at 23–25.

⁵² Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146, 148 (1968) (codified as amended at 15 U.S.C. § 1604 (2012)).

⁵³ Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 905–06 (2013).

⁵⁴ *Id.* at 906.

⁵⁵ CFPB Complaint, *supra* note 5, at 9.

laws that regulate online small-dollar lending. UDAAP's origins date back more than a century, getting its start during the trust-busting years prior to World War I. Although originally intended to stamp out anti-competitive behavior in industry, the CFPB has managed to morph UDAAP into an anti-sovereignty weapon.

UDAAP in its modern form, minus the abusive part, dates back to amendments to section 5 of the Federal Trade Commission Act in 1938, prohibiting “unfair methods of competition in commerce, and unfair or deceptive acts in or practices in commerce.”⁵⁶ However, the Federal Trade Commission (FTC), another independent federal agency with broad powers over consumer protection and anti-competitive business practices, pressed some authority over unfair business practices back to the agency's infancy in the early twentieth century. When the FTC was established, Congress declined to delineate an exhaustive list of unfair behavior, leaving the FTC to issue guidance on the topic.⁵⁷ The FTC was and remains governed by a five-member board.⁵⁸ The FTC's authority under the FTC Act was deliberately left vague by Congress because it would be too difficult to list every unfair practice, allowing businesses to easily evade regulation through loopholes. Lacking a precise definition, it was left to the agency and the courts to determine the term's meaning through the gradual process of inclusion and exclusion.⁵⁹

To define “unfair” and “deceptive,” the CFPB borrows heavily from past FTC guidance on the terms.⁶⁰ Section 1061 of Dodd–Frank transfers all of the powers, guidance, and rules developed for consumer financial protection by the FTC to the CFPB, including the original UDAP under the FTC Act.⁶¹ Alternately, the FTC retains the authority to enforce any rules

⁵⁶ Federal Trade Commission Act Amendments of 1938 (Wheeler–Lea Act), § 5(a), Pub. L. No. 75-447, 52 Stat. 111 (1938).

⁵⁷ For an early history of the FTC, see Cary Silverman & Jonathan Wilson, *State Attorney General Enforcement of Unfair and Deceptive Acts or Practices Laws: Emerging Concerns and Solutions*, 65 KAN. L. REV. 209, 210–12 (2016).

⁵⁸ Federal Trade Commission Act, Pub. L. No. 203, ch. 311, 38 Stat. 717 (1914).

⁵⁹ See, e.g., *FTC v. Raladam Co.*, 283 U.S. 643, 648 (1931).

⁶⁰ Abusive acts or practices were never included in the FTC's authority under the original UDAP; it was only recently added when UDAP was shifted to the CFPB by the Dodd–Frank Act. Subsequently, the FTC has never offered any guidance or further explanation of “abusive.”

⁶¹ Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 2, 124 Stat. 1376, 1386 (2010) (codified as amended at 12 U.S.C. § 5301 (2012)).

related to the FTC Act promulgated by the CFPB. Under Dodd–Frank, prior interpretations of the FTC Act by the FTC will still receive deference from federal courts.⁶² While this massive transfer of authority and prior guidance on UDAAP ensured consistency between FTC’s UDAP and CFPB’s UDAAP, it also means that the CFPB is relying upon interpretations of a statute that are decades old in many cases, lagging significantly behind the modern business practices associated with online lending and financial technology. Since the CFPB has asserted violations of each part of UDAAP, the three different provisions will be examined independently.

A. *Abusive*

Abusive acts or practices is a new standard only added during the creation of the CFPB in the Dodd–Frank Act. As such, the Bureau has yet to proffer any guidance on the meaning of “abusive” outside its statutory definition, and Director Cordray remains vigilant in refusing to issue agency guidance on UDAAP provisions.⁶³ Section 1031(d) of the CFP Act reads as follows:

(d) ABUSIVE.—The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice—

- (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
- (2) takes unreasonable advantage of—

(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

(B) the inability of the consumer to protect the interests of the consumer

⁶² *Id.*

⁶³ *The 2016 Semi-Annual Reports of the Bureau of Consumer Financial Protection: Hearing Before the H. Comm. on Fin. Servs.*, 115th Cong. (2017) (statement of CFPB Director Cordray that agency intends to issue no guidance on rules/regulations because it would be too much to read).

in selecting or using a consumer financial product or service; or
(C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.⁶⁴

The abusive standard focuses on a consumer’s ability to understand the risks and costs associated with a financial product. It has been likened to the old and highly subjective “unconscionability” standard that has fallen out of favor with courts.⁶⁵ The abusive provision could create a higher duty of care regarding the types of products and services offered by companies, but without guidance it is impossible to determine just what purpose the standard ultimately serves.

In its complaint, the CFPB relies heavily upon the TLEs’ purported violations of state usury and licensing laws to satisfy the materiality and consumer lack of understanding provisions in the abusive standard. The CFPB argued, “Consumers residing in the Subject States likely were unaware that Defendants lacked the legal authority to collect the loans because the loans violated usury and licensing laws in those states.”⁶⁶ By relying upon the alleged violations of a state law that does not apply to tribes, the CFPB’s argument for abusive acts or practices exists on uneasy footing. With a stronger understanding of unfairness and deception, it is easy to see why the CFPB is stretching its argument in an attempt to regulate tribal commerce.

B. *Unfairness*

As the two parts of the traditional UDAP standard, “unfair” and “deceptive” acts or practices possess a storied and extensive history in agency guidance and federal courts. Like “abusive,” “unfairness” is also defined in the CFP Act, but “deceptive” was left out of Dodd–Frank and relies exclusively on FTC guidance and

⁶⁴ Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, § 1031(d), 124 Stat. 1955, 2006 (codified as amended at 12 U.S.C. § 5531 (2012)).

⁶⁵ Kate Davidson, *New ‘Abusive’ Standard Stokes Fear from Bankers*, AM. BANKER (Sept. 5, 2011, 7:57 PM), <https://www.americanbanker.com/news/new-abusive-standard-stokes-fear-from-bankers> [<https://perma.cc/B4ZY-C7PX>].

⁶⁶ CFPB Complaint, *supra* note 5, at 25.

court rulings. Section 1031(c) of the CFP Act provides a basic definition for unfairness:

(c) UNFAIRNESS.—

(1) IN GENERAL.—The Bureau shall have no authority under this section to declare an act or practice in connection with a transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service, to be unlawful on the grounds that such act or practice is unfair, unless the Bureau has a reasonable basis to conclude that—

(A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and

(B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.

(2) CONSIDERATION OF PUBLIC POLICIES.—In determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.⁶⁷

According to guidance developed by the FTC in 1980, three standards established by the United States Supreme Court in *FTC v. Sperry & Hutchinson* dictate the unfairness analysis.⁶⁸ The *Sperry* factors were first explained in a footnote in the Supreme Court's decision and later expanded upon by the agency.⁶⁹ First, the consumer must incur substantial harm. The FTC confirmed that

⁶⁷ Consumer Financial Protection Act of 2010, § 1031(c), 124 Stat. at 2006.

⁶⁸ Letter entitled FTC Policy Statement on Unfairness from Michael Pertschuk, FTC Chairman, et al. to Sens. Wendell H. Ford & John C. Danforth (Dec. 17, 1980), <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness> [<https://perma.cc/YV7J-DENN>].

⁶⁹ *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972).

substantial harm tends to be monetary, like “when sellers coerce consumers into buying unwanted goods or services.”⁷⁰ The CFPB’s complaint expresses a tenuous connection between monetary harm and the actions of Upper Lake’s TLEs, arguing, “Defendants caused substantial injury by servicing, extracting payments for, and collecting on loans that laws in the Subject States rendered void or limited consumers’ obligation to repay.”⁷¹ The CFPB once again relied upon the TLEs possible violations of state laws.

The second injury consideration requires that the injury to consumers not be outweighed by consumer or market competition benefits. In particular, the courts will review the net total outcome between harm and benefits, only finding this factor satisfied if the harm outweighs the countervailing benefits.⁷² In enforcing its unfairness standard, the federal regulators will look for “some form of seller behavior that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision-making.”⁷³ The CFPB alleges that consumers lacked awareness as to whether they were obligated to repay a loan that does not adhere to state usury laws.⁷⁴ The CFPB also pled that the injuries sustained to consumers outweighed the benefits of the loan products but failed to elaborate on the imbalance.

The CFPB previously brought a suit against a loan service provider alleging unfair and deceptive acts, among other things. In *CFPB v. Intercept Corp.*, the federal district court in North Dakota dismissed the CFPB’s lawsuit on summary judgment for a failure to plead sufficient facts.⁷⁵ In granting the defendant’s motion to dismiss, the district court judge wrote:

Although the complaint contains several allegations that Intercept engaged in or assisted in unfair acts or practices, it never pleads facts sufficient to support the legal conclusion that consumers were injured or likely to be injured. Nothing in the complaint allows the defendants or the court to ascertain whether any

⁷⁰ Letter from Michael Pertschuk, FTC Chairman, *supra* note 68.

⁷¹ CFPB Complaint, *supra* note 5, at 9.

⁷² Letter from Michael Pertschuk, FTC Chairman, *supra* note 68.

⁷³ Letter from Michael Pertschuk, FTC Chairman, *supra* note 68.

⁷⁴ CFPB Complaint, *supra* note 5, at 9.

⁷⁵ *CFPB v. Intercept Corp.*, No. 3:16-cv-144, 2017 WL 3774379 (D.N.D. Mar. 17, 2017) (dismissing case for failure to plead sufficient facts demonstrating harm to consumers).

potential injury was or was not counterbalanced by benefits to the consumers at issue.⁷⁶

The conclusory statements by the CFPB in its complaint against the Upper Lake TLEs echo the concerns of the North Dakota judge in *Intercept*. If the consumers could not have secured credit from another source, the CFPB may struggle to demonstrate harm to the consumers.

Finally, the injury to consumers must be such that the consumers could not have reasonably avoided it. The CFPB has not pled anything specific to this component in its complaint. Coupled with the scarce facts related to the degree of injury sustained by consumers, the CFPB has done little to demonstrate the harm to consumers that secured small-dollar installment loans with the Upper Lake TLEs.

If a regulator can demonstrate that the substantial harm to consumers is not outweighed by harm to competition, the court will next explore public policy considerations. The regulator should ask whether the conduct of the service provider “violates public policy established by statute, common law, industry practice, or otherwise.”⁷⁷ This factor often helps the agency further define the severity of the injury to consumers. Although not contained in the complaint, the public policy considerations conflict between consumer protection and tribal economic development. Both are heavily memorialized in federal statutes⁷⁸ and United States Supreme Court precedent.⁷⁹ The competing public policy interests surrounding this case will leave the court with much to consider should the CFPB advance beyond the harm factor.

The final *Sperry* factor relates to unethical or unscrupulous behavior. This final factor was originally intended “to reach conduct that violates generally recognized standards of business ethics.”⁸⁰ However, as the FTC points out, “conduct that is truly unethical or

⁷⁶ *Id.* at *4.

⁷⁷ Letter from Michael Pertschuk, FTC Chairman, *supra* note 68.

⁷⁸ *See generally* Consumer Financial Protection Act of 2010, Pub. L. No. 111-203, 125 Stat. 1955 (codified as amended in scattered sections of 12 U.S.C.); Native American Business Development, Trade Promotion, and Tourism Act of 2000, Pub. L. No. 106-464, 114 Stat. 2012 (codified as amended at 25 U.S.C. 25 U.S.C. §§ 4301–4307 (2012)).

⁷⁹ *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring) (delineating key goal of federal government to make tribes more self-sufficient through economic development).

⁸⁰ Letter from Michael Pertschuk, FTC Chairman, *supra* note 68.

unscrupulous will almost always injure consumers or violate public policy as well.”⁸¹ Thus, the final factor is never implemented in discussion when substantial harm is already present, and the FTC relayed that it had no intention of using this final factor. Without demonstrating harm in its complaint, the CFPB may strain to prove unfairness.

C. Deception

Although the CFP Act defines the other two standards, it does not define deceptive acts or practices. Similar to unfairness, the CFPB instead relies on the informed standards of the FTC.⁸² Deception further follows a three-part test when determining a violation. The CFPB explains, “an act or practice is deceptive when: (1) The act or practice misleads or is likely to mislead the consumer; (2) The consumer’s interpretation is reasonable under the circumstances; and (3) The misleading act or practice is material.”⁸³ The CFPB again prefaces its complaint under the allegation that the Upper Lake TLE loans were void under state law, thereby alleging misrepresentations by the tribal lenders whenever they attempted to collect on the loans.⁸⁴ The overwhelmingly conclusory statements about harm, misrepresentation, and disclosures in the Bureau’s complaint may open the door to allowing the Upper Lake TLEs to seek an *Intercept*-style dismissal on summary judgment for a failure by the agency to plead sufficient facts.

It is the CFPB’s use of state law against sovereign tribal entities through its UDAAP powers that makes this case so troubling for Indian Country. As centuries of Supreme Court precedent demonstrates, both the practice of rate exporting and principles of tribal sovereign immunity would protect the TLEs from suit by various state attorneys general for similar violations. However, by funneling state law through a federal enforcement statute, the CFPB has ignited a new debate on the preemption of state law and tribal self-determination.

⁸¹ Letter from Michael Pertschuk, FTC Chairman, *supra* note 68.

⁸² CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts, 3 n.16 (July 10, 2013), http://files.consumerfinance.gov/f/201307_cfpb_bulletin_unfair-deceptive-abusive-practices.pdf [<https://perma.cc/6VV2-GEFG>].

⁸³ *Id.*

⁸⁴ CFPB Complaint, *supra* note 5, at 23–24.

IV. A NEW WRINKLE IN THE DEBATE OVER TRIBAL SOVEREIGNTY

The genesis of federal Indian law comes from Supreme Court Chief Justice John Marshall's explanation of state authority over Native affairs in *Worcester v. Georgia*, where he surprisingly declared that the laws of Georgia had no force in Cherokee territory.⁸⁵ Preemption is at the heart of the sovereign status of tribal nations. While jurisprudence has slightly modified this rule over the past two centuries, it still stands as a fundamental tenet of federal Indian law. Equally applicable, but not unique to Indian law, is the concept of rate exporting—a permissible practice by creditors for decades and one that is typically exempt from UDAAP challenges. However, the lack of a comprehensive regulatory statute for tribal lending similar to gaming (Indian Gaming Regulatory Act) or banking (National Banking Act) may cast just enough doubt for the court to forge a new path in the online lending industry. Finally this section looks at how tribal sovereignty applies to commercial activities and how a failed attempt at forum shopping by the CFPB almost circumvented these established practices.

Considering the CFPB is using the purported violation of state usury laws against sovereign economic subdivisions of a federally recognized tribe to impute an infringement of federal consumer protection laws, it is best to begin by reviewing the preemption of state law as it relates to tribal affairs. *Worcester v. Georgia*, a case stemming from the Georgia imprisonment of a missionary for entering the Cherokee Nation, is the seminal decision on preemption. Worcester, a resident of Vermont, received approval from the federal government and permission from the Cherokee Nation to enter the tribe's lands and serve as a missionary to the Cherokee people.⁸⁶ The discovery of gold in Cherokee territory shortly before Worcester's arrival led the Georgia State legislature to pass a series of laws that extinguished Cherokee claims to the land, divided up the territory, and brought it under Georgia law.⁸⁷ Worcester received four years of hard labor for entering Cherokee

⁸⁵ *Worcester v. Georgia*, 31 U.S. 515, 561 (1832).

⁸⁶ *Id.* at 540.

⁸⁷ *Id.* at 542.

territory in violation of Georgia law, and he petitioned the United States Supreme Court for his release.⁸⁸

Chief Justice John Marshall began the Court's opinion by recognizing the tribe's claim to possession of the land. He wrote that the Cherokees were "the undisputed possessors of the soil, from time immemorial."⁸⁹ With that possession followed a number of rights exclusive to the tribe at the exclusion of state interests. Chief Justice Marshall placed a stop on Georgia's attempted takeover of Cherokee lands; he wrote definitively that:

The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress.⁹⁰

Worcester was ordered released from prison, and Georgia lost any pretext that it might hold dominion over the Cherokee people and their homelands.⁹¹ While subsequent courts hesitated to disturb Marshall's proclamation in *Worcester*, modern preemption analysis is less absolute and more fact specific.

Modern preemption analysis starts with *Williams v. Lee*. Lee, a non-Indian, owned a general store on the Navajo Nation reservation and sold some goods on credit to Paul and Lorena Williams.⁹² He brought suit in Arizona state court when the Williamses failed to pay.⁹³ Because the suit involved at least one non-Indian party, the Arizona state court concluded it had jurisdiction to hear the suit.⁹⁴ On appeal to the United States Supreme Court, the opinion explained that Congress had not authorized state jurisdiction over suits arising from a non-Indian suing over reservation activity.⁹⁵ Discussing the effects of the Indian Reorganization Act of 1934, the Court found that tribes were

⁸⁸ *Id.* at 540.

⁸⁹ *Id.* at 559.

⁹⁰ *Id.* at 561.

⁹¹ *Id.* at 562–63.

⁹² *Williams v. Lee*, 358 U.S. 217, 218 (1959).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 222.

discovering the fullest extents of their own jurisdictions by forming centralized governments and establishing tribal courts.⁹⁶ The Supreme Court ultimately held that state law could not be applied to reservation activity if it interfered with a tribe's right to make its own laws.⁹⁷ Lee's suit could not be tried in Arizona state court.

Fifteen years later the Supreme Court added another layer to preemption analysis in *McClanahan v. Arizona State Tax Commission*.⁹⁸ In *McClanahan*, the state of Arizona withheld \$16.20 in taxes from the wages of a Navajo citizen that lived on the Navajo reservation and derived all of her income from reservation sources.⁹⁹ The lower courts examined the case based on the *Williams v. Lee* standard.¹⁰⁰ On the narrow question of whether a state tax is permissible on tribal citizens who earn all of their income from reservation sources, the Supreme Court held that state law would only apply if: (1) the law did not interfere with tribal self-government; and (2) the suit involved a non-Indian.¹⁰¹ The Court declined to impose the tax on the Navajo citizen, and the preemption analysis earned a second consideration.

As tribal governments expanded their influence and flexed their sovereign muscles on reservation lands, states continued their efforts to chip away at tribal jurisdiction. In *New Mexico v. Mescalero Apache Tribe*, New Mexico sought to apply its own hunting and fishing regulations to non-Indians conducting these activities on tribal land.¹⁰² The tribe developed its own game management plan with the federal government and set its own rules for hunting and fishing on tribal lands that promoted its management plan.¹⁰³ New Mexico game wardens began arresting non-Indians for practices that violated state hunting and fishing laws but followed tribal regulations. The Supreme Court determined that "the exercise of state authority which imposes additional burdens on a tribal enterprise must ordinarily be justified by functions or services performed by the State in connection with the on-reservation activity."¹⁰⁴ Since the tribe already had regulations and a

⁹⁶ *Id.* at 220.

⁹⁷ *Id.* at 222.

⁹⁸ *McClanahan v. Ariz. State Tax Comm'n*, 411 U.S. 164 (1973).

⁹⁹ *Id.* at 166.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 170–71.

¹⁰² *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 325 (1983).

¹⁰³ *Id.* at 329.

¹⁰⁴ *Id.* at 336.

management plan in place that supervised the activities of non-Indians, state interference was unwarranted. The value generated on the reservation through hunting and fishing favored the preemption of state law.

As more tribes entered the gaming industry in the 1980s, states became increasingly resistant to casino operations and many sought to block tribal gaming. The Supreme Court's decision in *California v. Cabazon* was not just another preemption decision; it ushered in a new era of tribal economic development.¹⁰⁵ California attempted to stop the tribe from offering bingo and poker games on the reservation. The state had a law that limited bingo to charity promotions staffed by volunteers.¹⁰⁶ Since the California law sought to regulate bingo instead of prohibit the game, the Supreme Court decided that the state law was civil in nature and outside the scope of California's participation in Public Law 280.¹⁰⁷ The state lacked the authority to regulate gaming on reservations. In fact, it was the policy of the federal government to encourage reservation economic development opportunities like gaming, not limit them.¹⁰⁸ Later Supreme Court opinions on gaming only reinforced this policy.¹⁰⁹ Despite almost two centuries of Supreme Court jurisprudence related to preemption, some forum shopping by the CFPB threatened to ignore this invaluable precedent in favor of case law that sought to undermine preemption.

Jackson v. Payday Financial is a 2014 decision in the Seventh Circuit, the same jurisdiction in which the CFPB filed its suit against the Upper Lake TLEs. In *Payday Financial*, the circuit court found that state lending laws applied to a loan transaction between a private tribal citizen's lending operation and an Illinois resident.¹¹⁰ Payday Financial was a lending entity owned and operated by a private tribal citizen based on the Cheyenne River Sioux Reservation.¹¹¹ The loan agreement required that disputes be settled with tribal law through arbitration led by either a tribal elder

¹⁰⁵ *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

¹⁰⁶ *Id.* at 205.

¹⁰⁷ *Id.* at 208.

¹⁰⁸ *Id.* at 220.

¹⁰⁹ *See Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1996) (asserting that states have been divested of essentially all authority over Indian commerce via the Indian Commerce Clause).

¹¹⁰ *Jackson v. Payday Financial, LLC*, 764 F.3d 765 (7th Cir. 2014).

¹¹¹ *Id.* at 768.

or a three member panel made from the tribal council.¹¹² The court found that none of the tribal elders or council members had any experience resolving disputes through arbitration. In one instance the tribal elder appointed to serve as arbitrator was the father of an employee at the lending business.¹¹³ The court determined that the arbitration clause was illusory, since there was no way a borrower could receive a reasonable arbitration hearing under the terms of the loan agreement. The court lamented:

Although the contract language contemplates a process conducted under the watchful eye of a legitimate governing tribal body, a proceeding subject to such oversight simply is not a possibility. The arbitrator is chosen in a manner to ensure partiality, but, beyond this infirmity, the Tribe has *no rules* for the conduct of the procedure. It hardly frustrates FAA [Federal Arbitration Act] provisions to void an arbitration clause on the ground that it contemplates a proceeding for which the entity responsible for conducting the proceeding has no rules, guidelines, or guarantees of fairness.¹¹⁴

The judge voided the loan agreement, but chose to take the ruling one step further. Not content with simply nullifying the borrower's obligation to repay the loan, the court insisted on wading into dangerous waters concerning preemption and the expression of tribal sovereignty. The Seventh Circuit wrote:

Here, the Plaintiffs have not engaged in *any* activities inside the reservation. They did not enter the reservation to apply for the loans, negotiate the loans, or execute loan documents. They applied for loans in Illinois by accessing a website. They made payments on the loans and paid the financing charges from Illinois. Because the Plaintiffs' activities do not implicate the sovereignty of the tribe over its land and its concomitant authority to regulate the activity

¹¹² *Id.* at 769.

¹¹³ *Id.* at 770.

¹¹⁴ *Id.* at 779.

of nonmembers on that land, the tribal courts do not have jurisdiction over the Plaintiffs' claims.¹¹⁵

Relying somewhat on the preemption analysis espoused in *McClanahan*, the court bypassed preemption and the principle of rate exporting to place the loan transaction in Illinois and under state law. This dicta could have had a major impact on how the Upper Lake case is tried and on future litigation involving tribal lenders in the Seventh Circuit, but a timely transfer of venue to Kansas should mitigate the potentially harmful dicta. Further, a number of differences between the two cases could distinguish them enough to make the dicta in *Jackson* inapplicable to Upper Lake.

Before contrasting *Jackson* with the current Upper Lake complaint, it is first necessary to explain the unique position tribal governments occupy in local economic development efforts. Native Americans are only referenced once in the United States Constitution, under the power of Congress “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”¹¹⁶ As the earliest trade partners to American colonists, tribes established vital business relationships with European settlers for guns, tools, livestock, and horses. Through hundreds of treaties, foreign powers and later the United States recognized the sovereign rights of the various tribes scattered across North America. Once Chief Justice Marshall distilled the essence of tribal sovereignty through the courts, Indians began slowly using their unique status to spur economic opportunities and provide for their communities. Tribes were left with a certain degree of autonomy to create their own governments, exercise immunity from suit, and develop jobs for tribal citizens via tribally owned enterprises.

An important consideration in tribal economic development is the transfer of sovereign immunity to tribally owned businesses by the tribal government. This extra layer of protection helps tribes self-determine their future for residents without fear of constant legal challenges draining tribal resources away from other pressing reservation needs. The principles of sovereign immunity afforded to tribal businesses are historically supported by federal policy and the Supreme Court. Supreme Court decisions extend immunity to tribal

¹¹⁵ *Id.* at 782.

¹¹⁶ U.S. CONST. art. 1, § 8, cl. 3.

business activity on and off reservation.¹¹⁷ But as Payday Financial discovered, not every tribal business garners immunity, and courts across the nation have begun using an “arm of the tribe” analysis to determine which entities deserve sovereign protections. Coupled with modern jurisprudence regarding rate exporting, the Upper Lake TLEs could escape the fate of the lender in *Jackson* by demonstrating their arm-of-the-tribe status and promoting Supreme Court precedent regarding off reservation commercial activity.

Kiowa v. Manufacturing Technologies marked a watershed moment for defining the sovereign powers of tribally owned commercial activity. The Kiowa Tribe of Oklahoma agreed to purchase stock in Manufacturing Technologies via a promissory note for \$285,000.¹¹⁸ The contract was actually signed in Oklahoma City, miles away from Kiowa lands.¹¹⁹ Although the agreement did not limit the tribe’s sovereign immunity, the tribe defaulted and the Oklahoma Court of Civil Appeals found that the tribe could be sued in state court for commercial activity occurring off-reservation.¹²⁰ The United States Supreme Court took a different approach to off-reservation commercial activity.

Before ruling, the Supreme Court distinguished between the right to demand compliance with state laws and the means available to enforce them.¹²¹ The state had the authority to tax cigarette sales for instance, but lacked the power to collect those taxes from the tribe and ultimately held that the tribe was immune from suit for off-reservation commercial activity.¹²² Again, the Supreme Court left any changes to this principle to Congress.¹²³ As the branch of government constitutionally charged with regulating commerce with tribes, only Congress retained the power to abrogate tribal immunity in commercial matters.

Despite its holding, the Supreme Court did provide a word of caution to non-Indian parties seeking to conduct business with tribal entities. The majority wrote, “In this economic context, immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice

¹¹⁷ *Kiowa Tribe v. Mfg. Tech., Inc.*, 523 U.S. 751, 755 (1998).

¹¹⁸ *Id.* at 753.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 754.

¹²¹ *Id.* at 755.

¹²² *Id.*

¹²³ *Id.* at 758.

in the matter, as in the case of tort victims.”¹²⁴ This concern is likely assuaged in the Upper Lake case. For instance, Golden Valley Lending provides a disclaimer on the homepage of its website informing consumers that it is “owned and operated by Golden Valley Lending, Inc., a tribal lending entity wholly owned and operated by the Habematolel Pomo of Upper Lake, California, which is a sovereign nation located within the United States of America, and is operating within the tribe’s reservation.”¹²⁵ The CFPB even pled that the loan agreements clearly state that loans originate on tribal land and are governed by tribal law, regardless of residence of borrower.¹²⁶ The TLEs also provided a mailing address to the tribe’s regulatory commission for borrowers to send additional questions or concerns. For instance unlike a tort case in which a tribal employee hits a non-Indian with a company vehicle, the consumers are given notification of the tribe’s interest in the TLE and many of the legal ramifications of accepting the loan. It is unlikely the concerns of the court in *Kiowa* would be present in the Upper Lake case.

The Supreme Court revisited its decision in *Kiowa* in 2014 in *Michigan v. Bay Mills Indian Community*. In *Bay Mills*, a compact with the state restricted the tribe from pursuing gaming outside tribal lands.¹²⁷ Nonetheless, Bay Mills opened a class III gaming operation in Vanderbilt, about 125 miles from its reservation in the Upper Peninsula.¹²⁸ The tribe had bought the property in Vanderbilt with proceeds from a federal appropriation in which “any land acquired shall be held as Indian lands are held.”¹²⁹ The Supreme Court examined whether tribal sovereign immunity barred the suit for off-reservation gaming. Since Michigan had argued the gaming operation was outside tribal lands, the Indian Gaming Regulatory Act (IGRA) did not apply.¹³⁰ The state could have easily bargained to restrict Indian gaming off reservation in its gaming compact with Bay Mills. The Supreme Court further recognized that in the fifteen years since *Kiowa*, Congress had declined to abrogate sovereign

¹²⁴ *Id.*

¹²⁵ GOLDEN VALLEY LENDING, <https://www.goldenvalleylending.com> [<https://perma.cc/Z3Z5-R89R>].

¹²⁶ CFPB Complaint, *supra* note 5, at 13.

¹²⁷ *Michigan v. Bay Mills Indian Cmty.*, 134 S.Ct. 2024, 2029 (2014).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 2032.

immunity for off-reservation commercial activity.¹³¹ Thus, the court reinforced *Kiowa* and retained important tribal sovereign immunity protections for Native economic development.

The Supreme Court pointed out in *Bay Mills* that tribes followed the decision in *Kiowa* closely and built important business practices around the holding. The court reasoned, “tribes across the country, as well as entities and individuals doing business with them, have for many years relied on *Kiowa* (along with its forebears and progeny), negotiating their contracts and structuring their transactions against a backdrop of tribal immunity.”¹³² With this in mind, Upper Lake set up its loan agreements to impute its own tribal lending code. The tribe has agreements with a few different states, not unlike gaming compacts under IGRA, that further define their sovereign rights and the rights of consumers in those states that enter into loan agreements with the tribe’s TLEs.¹³³ Through its lawsuit, the CFPB seeks to dismantle the tribe’s considerable work in negotiating responsible lending compacts with states and developing its own lending code to govern operations.

Enhancing tribal efforts on self-regulation, the United States Department of the Treasury issued a series of initiatives shortly after the passing of Dodd–Frank aimed at promoting responsible and sustainable lending and access to capital in Indian Country. Under one particular initiative, the Treasury wrote:

Empowering tribal governments to enforce the laws on reservations: Tribal governments will be permitted to enforce the CFPB’s rules in areas under their jurisdiction, the same way that states will be permitted to enforce those rules. In addition, tribal consumer financial protection codes will be protected, so that tribal governments can set standards that are tougher than the federal standards to afford greater protections for their citizens under those codes.¹³⁴

¹³¹ *Id.* at 2038.

¹³² *Id.* at 2037.

¹³³ *Short-Term, Small Dollar Lending*, *supra* note 1, at 2–4 (statement of the Hon. Sherry Treppa, Chairperson, Habematolel Pomo of Upper Lake).

¹³⁴ *The Dodd–Frank Wall Street Reform and Consumer Protection Act Benefits Native Americans*, U.S. DEP’T OF THE TREASURY (October 2010), <https://www.treasury.gov/initiatives/wsr/Pages/Native-Americans.aspx> [<https://perma.cc/SP76-NW6D>].

Likely with this consideration in mind, Upper Lake established an independent regulatory commission to enforce its tribal lending code and address customer issues. But as the CFPB demonstrated in its CID case against other TLEs, the Bureau is unwilling to respect tribal sovereignty in this area, the Supreme Court's precedent in *Kiowa*, or an initiative from the Treasury.

For sovereign tribal nations, their immunity extends to economic and political subdivisions, often called "arms of the tribe."¹³⁵ Since the Supreme Court has yet to articulate an arm-of-the-tribe analysis, various state and lower federal courts have developed their own methods of separating true extensions of the tribal government from private businesses operated from tribal lands, like in *Jackson*.¹³⁶ At the state level, different jurisdictions have turned to analysis of the business through some combination of method of creation, financial relationship, and operational relationship examination. California takes a balanced approach and uses a five-factor test reviewing how the entity was created, immunity sharing by the tribal government, the entity's purpose, tribal council control over the entity, and the financial relationship between tribe and entity.¹³⁷ Arizona places a higher emphasis on the potential liability to the tribe if the entity is sued.¹³⁸ The state of Washington focuses on whether the entity was created and owned by the tribe.¹³⁹ There is slightly more standardization in federal courts.

The Tenth Federal Circuit Court relies on the *Breakthrough* factors.¹⁴⁰ The *Breakthrough* factors closely mirror the recently adopted California standard, except they require that "the purposes of tribal sovereign immunity are served by granting [the entity] immunity."¹⁴¹ The Ninth Circuit follows a similar standard.¹⁴² While few facts have been pled thus far to conduct a proper arm-of-the-

¹³⁵ *Inyo Cty. v. Paiute-Shoshone Indians*, 538 U.S. 701, 705 n.1 (2003).

¹³⁶ See Bree Black Horse, Note, *The Risks and Benefits of Tribal Payday Lending to Tribal Sovereign Immunity*, 1 AM. INDIAN L.J. 388 (2013).

¹³⁷ See *People ex rel. Owen v. Miami Nation Enters.*, 386 P.3d 357, 371 (Cal. 2016).

¹³⁸ *Dixon v. Picopa Constr. Co.*, 772 P.2d 1104, 1109–10 (Ariz. 1989).

¹³⁹ *Wright v. Colville Tribal Enter. Corp.*, 147 P.3d 1275, 1279 (Wash. Sup. Ct. 2006).

¹⁴⁰ *Breakthrough Mgmt. Grp. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1175, 1191 (10th Cir. 2010).

¹⁴¹ *Id.*

¹⁴² *Cook v. Avi Casino Enter., Inc.*, 548 F.3d 718, 726 (9th Cir. 2008).

tribe analysis, previous statements by Chairperson Treppa to Congress tend to support the extension of sovereign immunity to Upper Lake's TLEs, including the tribal government's creation of the TLEs, the use of TLE revenues for sovereign government functions, and TLE oversight via a tribally developed regulatory commission.¹⁴³ Further, through her concurrence in *Bay Mills*, Justice Sotomayor echoed the importance of tribal economic development to federal Indian policy: "A key goal of the Federal Government is to render Tribes more self-sufficient, and better positioned to fund their own sovereign functions, rather than relying on federal funding."¹⁴⁴ Exerting their sovereign powers through economic arms of the tribe is the best method for tribes to achieve self-sufficiency.

Rate exporting is the practice by which a financial institution is permitted to charge an interest rate commensurate with the laws of the institution's home state rather than the laws of the debtor's state. This practice is consistent with the century-old National Banking Act (NBA) and Supreme Court precedent. However, as the refusal of the Seventh Circuit in *Jackson* to recognize this practice and impose the laws of Illinois on the loan transaction demonstrates, the CFPB's choice of venue might not have occurred by chance. By angling for favorable circuit precedent in Illinois, the Bureau attempted to nullify tribal lending laws and strengthen the agency's use of state law violations in their UDAAP claims.

In 1978, the Supreme Court asked in *Marquette Bank v. First of Omaha* whether a bank could charge interest rates consistent with its home state regulation if it was higher than the rates permitted by the consumer's home state.¹⁴⁵ Nebraska law permitted a bank to charge 18% interest on the first \$999 charged to the credit card and 12% for the subsequent balance.¹⁴⁶ Minnesota law capped interest for the entire balance at 12%.¹⁴⁷ *Marquette* was forced to institute a small initiation fee to remain as profitable as Omaha. However, the Minnesota bank began losing customers due to the fee. Omaha could maintain profitability without the fee.¹⁴⁸ The NBA permitted banks

¹⁴³ *Short-Term, Small Dollar Lending*, *supra* note 1, at 2–4.

¹⁴⁴ *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2043 (2014) (Sotomayor, J., concurring).

¹⁴⁵ *Marquette Nat'l Bank v. First of Omaha Serv. Corp.*, 439 U.S. 299, 301 (1978).

¹⁴⁶ *Id.* at 302–03.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 304.

to charge interest rates consistent with the laws of the state where the bank's deposits "are to be carried on."¹⁴⁹ The Supreme Court was asked to clarify a bank's location under the NBA.

The court refused to conclude that a bank soliciting customers in Minnesota was *de facto* located in Minnesota under the NBA. The court wrote:

Although the convenience of modern mail permits Minnesota residents to holding Omaha Bank's Bankamericard to receive loans without visiting Nebraska, credit on the use of their cards is nevertheless similarly extended by Omaha Bank in Nebraska by the bank's honoring of the sales drafts of participating Minnesota merchants and banks.¹⁵⁰

And the practice of rate exporting was given the Supreme Court's seal of approval.

Almost two decades later, the Supreme Court again was asked to resolve another exporting case, except this time the case involved the issuance by a bank of late fees deemed permissible in the bank's home state but illegal in the customer's home state. At the same time as this case was being decided, the Office of the Comptroller of the Currency (OCC) issued guidance on the subject and concluded that late fees constituted "interest" under the NBA and were subject to the same rate export standards espoused in *Marquette*.¹⁵¹ The Supreme Court lent deference to the agency's interpretation of the NBA and concluded that late fees were interest under the NBA.¹⁵² However, the jurisprudence on rate exporting uncovers a few potential points of contention in the Upper Lake case.

First, there is no National Bank Act for small-dollar lending. Whereas the National Bank Act has stood for a century, small-dollar online lending is still in its infancy. This could make reliance on *Marquette* and its progeny shaky in the face of the Seventh Circuit's dicta in *Jackson*. Further, the CFPB is afforded automatic *Chevron* deference under Dodd-Frank.¹⁵³ Although the agency has not yet

¹⁴⁹ *Id.* at 309.

¹⁵⁰ *Id.* at 311.

¹⁵¹ *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 737 (1996).

¹⁵² *Id.* at 740.

¹⁵³ 12 U.S.C. § 5512(b)(4)(B) (2012).

issued any guidance on UDAAP and tribal rate exporting, there is nothing to stop the Bureau from doing so. In fact, the OCC's guidance in *Smiley* was issued precisely because of that particular litigation, so it is not as if the CFPB is barred from such tactics during litigation.¹⁵⁴ The Upper Lake TLEs have managed to fight the unfavorable precedent in Illinois through the recent granting of a motion to change venue to Kansas where their call center and other ancillary services are housed.¹⁵⁵ The move to Kansas should give the tribal defendants more favorable precedent on rate exporting and arm-of-the-tribe sovereign considerations.

Like so many cases involving tribal affairs, the issue of the exercise of tribal sovereignty will be at the center of the litigation. The established principles of preemption, arm-of-the-tribe sovereign immunity, and rate exporting would ordinarily shield TLEs from a suit alleging violations of state usury laws. However, the unique nature of the CFPB's UDAAP pleading leaves the outcome of this case in doubt. The impacts of an adverse decision against the TLEs could reverberate throughout Indian Country and hamper not only the exercise of tribal sovereignty, but reservation economic development as well.

V. CONCLUSION

On July 10, 2017, the CFPB issued its final rule concerning consumers' rights to bring class action lawsuits against financial service providers, targeting the common requirement that borrowers agree to binding arbitration when signing the loan agreement.¹⁵⁶ The new rule included an exemption for tribal governments and their "arms."¹⁵⁷ Although Congress would later repeal the rule through the Congressional Review Act, this rule was a recognition at the agency that only Congress, or a tribe through an express waiver, may abrogate sovereign immunity from suit. Unfortunately, this awareness is contradicted in the agency's enforcement division,

¹⁵⁴ *Smiley*, 517 U.S. at 740.

¹⁵⁵ *CFPB v. Golden Valley*, No. 17 Civ 3115, 2017 WL 3970514 (N.D. Ill. Sept. 8, 2017) (granting defendants' motion to transfer venue).

¹⁵⁶ 82 Fed. Reg. 33,210 (July 19, 2017) (codified at 12 C.F.R. § 1040 (2017)), *repealed by* 82 Fed. Reg. 55,500 (Nov. 22, 2017).

¹⁵⁷ 12 C.F.R. § 1040.3(b)(2)(ii) (2017), *repealed by* 82 Fed. Reg. 55,500 (Nov. 22, 2017).

where it now seeks to abrogate tribal immunity from state law through its UDAAP enforcement statute.

If a private party or even state attorney general brought this suit, precedent is clear that it would be quickly dismissed by the courts on preemption and immunity grounds. However, the CFPB added a unique wrinkle to these traditional concepts of federal Indian law by relying on a federal statute to enforce otherwise inapplicable state laws against a sovereign tribal enterprise. Such agency overreach was never the intent of its creator or decades of United States Supreme Court precedent regarding rate exporting and the lack of authority state law holds over tribes and their sovereign functions.

For tribes like the Habematolel Pomo of Upper Lake, cultural, geographic, and economic isolation have perpetuated cycles of poverty, abuse, and despair. E-commerce represents an opportunity for remote tribal communities to connect with the nation at large and participate in one of the fastest growing sectors in the national and international economy. This case will go far in determining the future of the multi-billion dollar tribal lending industry, as well as potentially alter tribal sovereignty for generations to come.