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## General Memorandum 10-012

### Colorado Supreme Court to Review Scope of Tribal Sovereign Immunity

The Colorado Supreme Court is about to consider a case that could undercut the doctrine of tribal sovereign immunity. In *Cash Advance v. Colorado*, that Court will decide under what circumstances so-called "payday loan" companies that do business over the internet can avail themselves of tribal sovereign immunity by incorporating as part of a tribe's business operations.

The issue is troubling for Indian Country because of widespread sentiment and public policy arguments against payday loan companies. Recent studies have shown that payday loan companies routinely charge extremely high interest rates. While the loans are marketed as short-term, studies have shown that the average payday loan customer borrows over 9 times a year from the same lender and is indebted 5 out of 12 months a year. The Senate Committee on Indian Affairs held a hearing on June 5, 2008, on predatory lending practices in Indian Country.

In this case, the Colorado Attorney General began an action against the lending practices of two companies doing business in Colorado – Cash Advance (CA) and Preferred Cash Loans (PCL) – that were incorporated as Nevada corporations. The Attorney General charged violation of Colorado's consumer protection laws. Initially there was no apparent connection with any Indian tribe. The Attorney General subpoenaed CA and PCL to produce documents. The companies produced some documents but resisted producing others on the claim that the companies were tribal enterprises of the Miami Tribe of Oklahoma, and the Santee Sioux Tribe of Nebraska, respectively, and were thus arms of the Tribes and entitled to tribal sovereign immunity from state enforcement action.

The Colorado trial court found that both Cash Advance and Preferred Cash Loans were doing business in Colorado and not on tribal lands. The court denied the companies' arguments, holding that even if the companies did possess tribal sovereign immunity, they were subject to at least some forms of regulation by the State.

The companies appealed to the Colorado Court of Appeals, an intermediate appellate court. That Court agreed that if CA and PCL were in fact arms of their respective Tribes, they would be immune from enforcement by the State. However, it said, the state court had preliminary jurisdiction to determine whether CA and PCL were in fact arms of the tribes. The Court sent the case back to the trial court to determine whether the companies possessed such a close relationship to the Tribes as to clothe them with the Tribes' sovereign immunity and prevent any state enforcement activity against

them. The Court directed the companies to produce evidence to show whether they were indeed arms of the Tribes, but said that the State would have the burden of proving that the companies were not arms of the Tribes.

The Court said that the trial court could look at many factors including: (1) whether the business is organized under the Tribes' laws or constitutions; (2) whether the purposes of the business is similar to the Tribes' purposes; (3) whether the business's leadership is composed predominantly of tribal officials; (4) whether tribal officials exercise control over the business's administration and accounting; (5) whether the Tribes' officials have the authority to dismiss the business's officials; (6) whether the business manages or exploits tribal resources; and (7) whether extending sovereign immunity to the business will protect tribal assets and autonomy. These are troubling and invasive factors that, if interpreted too broadly, could allow states to argue that many tribal businesses do not qualify as arms of Tribes.

AC and PLC appealed this decision to the Colorado Supreme Court, which will presumably rule on what kind of relationship is required between a commercial company and the Tribe in order for the company to enjoy the Tribe's sovereign immunity. The Court could narrow the longstanding doctrine of tribal sovereign immunity. Oral argument before the Colorado Supreme Court was held on January 21. Observers from Indian Country felt that it went fairly well. The decision should be announced in a few months.

Please let us know if we may provide additional information or assistance regarding this case. If you have any questions you may contact us at the addresses below.

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