In the Supreme Court of the State of California

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Appellant,

v.

MIAMI NATION ENTERPRISES, ET AL.,

Defendants and Respondents.

Case No. S216878

Court of Appeal, Second Appellate District, Case No. B242644
Superior Court of California, County of Los Angeles
Case No. BC373536
Yvette M. Palazuelos, Judge

OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

1. Can a business—here, an Internet-based payday loan company exacting triple-digit interest rates from its customers—establish tribal sovereign immunity, and thus avoid enforcement of California's consumer protection laws, simply by making a showing that it is formally affiliated with a federally recognized Indian tribe?

2. May a court look behind the evidence of formal tribal affiliation to determine whether the tribe exercises actual control, management, and oversight of the business and, if not, reject the business's assertion of tribal sovereign immunity on that basis?

INTRODUCTION

As a sovereign, a federally recognized Indian tribe is immune from suit in both state and federal courts, unless the tribe has waived its immunity or consented to suit or Congress has authorized the action. Both the United States Supreme Court and this Court have observed that an instrumentality or "arm" of a tribe shares in that tribe's immunity. (See *Inyo County, Cal. v. Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony* (2003) 538 U.S. 701, 705, fn. 1; *Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239, 247-248 (*Agua Caliente*).) To date, however, neither court has set out a test to determine arm-of-the-tribe status, and the lower federal and state courts have developed a variety of conflicting approaches. This case offers an opportunity to clarify the law for California and to establish persuasive authority for other jurisdictions confronting this difficult issue.

The present matter involves a consumer enforcement action brought by the People of the State of California against five Internet cash-advance or "payday" lenders. In ruling on the payday lenders' renewed motion to quash, the Court of Appeal surveyed the case law and devised yet another

arm-of-the-tribe test. That test gave effectively dispositive weight to paper connections between the Tribe and the payday lenders and to tribal statements of intent to confer immunity. Further, the Court of Appeal required the People to prove a negative—that the payday lenders were *not* arms of tribes. Applying its test, the court affirmed dismissal of the People's action, preventing California from ensuring that these particular payday lenders, in their dealings with the State's consumers, comply with the State's consumer finance laws.

The Court of Appeal's approach to determining arm-of-the-tribe status does not comport with the purposes of sovereign immunity. Immunity is not a benefit that a sovereign may confer on a third party simply by stating its intent to do so. Rather, immunity is a legal protection the law recognizes for the sovereign itself, serving to protect the sovereign's fisc and its right to direct its governmental affairs. A valid arm-of-the-tribe test must ensure that a tribe's immunity extends to an entity only where that entity is, in certain essential respects, so closely connected to and aligned with the tribal sovereign that a suit against the entity is in practical effect a suit against the tribe itself.

Because state and tribal sovereignty share fundamental similarities, in clarifying the arm-of-the-tribe doctrine, this Court should look to the comparatively cohesive body of law concerning the immunity of entities claiming to be arms of states. In general, whatever their precise factors, tests for arm-of-the-state status focus on the actual connection, identity of interest, and control between the sovereign and the entity. Applying the logic of arm-of-the-state cases to tribal circumstances produces a sensible, practical, and fair test for arm-of-the-tribe status. That test takes into account three considerations grounded in the purposes of sovereign immunity: (1) the financial relationship between the entity and the tribe; (2) whether the entity serves central governmental functions; and (3) whether

the tribal government exercises actual, practical control over the entity's operations. Further, the overwhelming weight of the law treats arm-of-the-state status as an affirmative defense, thus placing the burden of proof on the entity seeking immunity. An entity claiming arm-of-the-tribe status should bear the same burden.

As set out in greater detail below, while much is unknown or unclear on the present record, it is undisputed that the entities standing behind the payday-lending trade names at issue here—MNE Services, Inc. and SFS, Inc.—are corporations. The resulting limited liability of the corporations' shareholders— Miami Nation Enterprises, a parent corporation owned by the Miami Tribe of Oklahoma (Miami Tribe), and the Santee Sioux Nation of Nebraska (Santee Sioux Nation)—weighs against immunity.[1] Further, it appears that recognizing arm-of-the-tribe status for these corporations would protect primarily the revenue streams of third parties who have no relationship with or responsibility to the Tribes and their members. Protecting private economic interests is not the purpose of sovereign immunity. Finally, evidence resulting from a Federal Trade Commission (FTC) investigation into payday lending suggests that, in practice, the entities' purse strings and key financial decisions are left in the hands of private third parties and are not meaningfully controlled or overseen by the Tribes. Applying the considerations articulated above, and on the existing record, the entities have not established that they should be accorded sovereign immunity as arms of the Tribes.

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[1] The Court of Appeal's Opinion refers to Miami Nation Enterprises as "MNE." The People will spell out Miami Nation Enterprises when referring to that entity to avoid confusion with MNE Services, Inc. In addition, the People refer to both Tribes using their current official names. (79 Fed. Reg. 4748, 4750, 4751 (Jan. 20, 2014).)

STATEMENT OF APPEALABILITY

On March 3, 2014, the People timely sought review of the Court of Appeal's final decision of January 21, 2014 (Opinion), which affirmed the superior court's May 10, 2012 order granting the renewed motion to quash service of the summons and complaint and dismissing the complaint. (25 CT 6074 [notice of appeal]; 24 CT 5754-5769 [order].)[2] An order granting a motion to quash service of summons is appealable pursuant to Code of Civil Procedure section 904.1, subdivision (a)(3).

FACTUAL AND PROCEDURAL BACKGROUND

I. STATE AND FEDERAL GOVERNMENTS TAKE ACTION TO PROTECT CONSUMERS OF PAYDAY LENDING SERVICES

As the Court of Appeal noted, citing a study from the Pew Charitable Trusts,

> 12 million Americans take out payday loans each year, spending approximately $7.4 billion annually. The average loan is $375. The average borrower is in debt for five months during the year, spending $520 in interest to repeatedly renew the loan.

(Opinion, at pp. 2-3, fn. 2.)[3] Further, while payday loans are marketed as a way to bridge a gap until the borrower's next paycheck, in practice they often lead to longer-term debt. "Sixty-nine percent of first-time borrowers

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[2] This brief uses the following references to the record, preceded by the volume number and followed by the page number:
CT = Clerk's Transcript;
SCT = Supplemental Clerk's Transcript;
SSCT = Second Supplemental Clerk's Transcript.

[3] The Pew Charitable Trusts' *Payday Lending in America* series is available at <http://www.pewtrusts.org/en/research-and-analysis/collections/payday-lending-in-america> [as of July 23, 2014].

use the loan for recurring bills, including rent or utilities; only 16 percent use them to deal with an unexpected expense such as a car repair." (*Id.*)

The volume and circumstances of payday lending highlight the need to protect consumers through effective government oversight and enforcement. California is among the many states that have enacted statutes regulating consumer finance practices, including payday lending.[4] The People brought this action to enforce the State's payday lending statutes. (See Fin. Code, § 23000 et seq.)[5]

While there are no federal laws that specifically target payday lending, the FTC has investigated and filed enforcement actions against payday lenders using the Federal Trade Commission Act (15 U.S.C. §§ 41-58) (prohibiting deceptive trade practices) and the Truth in Lending Act (15 U.S.C. §§ 1601-1667f) (requiring specific disclosures in lending documents). On April 2, 2012, the FTC filed a lawsuit in the United States District Court for the District of Nevada against 19 defendants, including MNE Services, Inc. and SFS, Inc. (See *FTC v. AMG Services, Inc.* (D.Nev. May 28, 2014, No. 2:12cv536) __ F.Supp.2d __ [2014 WL 2927148].) To date, the FTC has prevailed against MNE Services, Inc., SFS, Inc., and other related defendants on certain claims related to misleading website

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[4] See Papke, *Perpetuating Poverty: Exploitative Businesses, the Urban Poor, and the Failure of Reform* (2014) 16 Scholar: St. Mary's L. Rev. & Soc. Just. 223, 248; see also <http://www.pewtrusts.org/en/multimedia/data-visualizations/2014/state-payday-loan-regulation-and-usage-rates> [as of July 24, 2014].

[5] Payday lenders doing business in California must be licensed by the State. (Fin. Code, § 23005, subd. (a).) Further, the State requires written loan contracts disclosing the fee as an Annual Percentage Rate (APR); limits payday loan amounts to $300; limits loan fees to 15 percent of the loan amount; and prohibits multiple, simultaneous loans to the same consumer. (Fin. Code, §§ 23001, subd. (a); 23035, subds. (a), (e)(1); 23036, subds. (a), (c).)

statements and inaccurate disclosures. Additional claims remain pending. (*Id.* at *4-5, 14-15.)[6]

In the face of increased enforcement, some online payday lenders have sought tribal affiliation in an effort to take advantage of tribal immunity, promising some share of revenues in return. (See Martin & Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk*? (hereinafter, Martin) (2012) 69 Wash. & Lee L. Rev. 751, 754-755, 763, 766-777; see also Harte and Zuckerman Bernstein (June 17, 2014) *Payday Nation, Part I.*)[7] The amount a given tribe actually receives in any specific affiliation deal will vary, but at least one commentary has noted that a tribe's share of revenues often amounts to "crumbs." (Martin, *supra,* at p. 767.)

II. CONSUMER COMPLAINTS SPUR DEPARTMENT ENFORCEMENT AGAINST THE PAYDAY LENDERS

Roughly a decade ago, in 2004, the California Department of Corporations, predecessor agency to the California Department of Business Oversight, began receiving complaints from California consumers who had taken out payday loans over the Internet. One early complaint about Ameriloan is typical. The consumer applied for a loan online. Money quickly appeared in his bank account, but without any information about the lender or how to repay the loan. (17 CT 3908.) He "tried to look them up online, but could not find the same company . . . ." (*Ibid.*) The

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[6] The district court did not have occasion to determine whether MNE Services, Inc. and SFS, Inc. would be immune as arms of tribes. The court held that under the FTC Act, Congress granted FTC the authority to regulate tribes. (*FTC v. AMG Services, Inc., et al.* (D. Nev. 2012) No. 2:12cv536, Doc. No. 559 (filed 03/07/14).)

[7] *Payday Nation Part I* is available at <http://projects.aljazeera.com/2014/payday-nation/index.html> [as of July 24, 2014].

consumer concluded that "this company intentionally keeps you from knowing who has funded the loan and what the terms are . . . so that they can collect as many fees by 'automatically renewing the loan' as they can before you are even aware that they are doing it." (*Ibid.*; see also 3 SSCT 638 [discussing extended history of complaints].) Any delay in repaying a payday loan may have serious consequences, as effective annual interest rates in the range of 300 to 400 percent are not unusual. (See Opinion at pp. 2-3, fn. 2.)

The Department investigated and determined that a number of Internet payday lending operations were violating California law. On August 22, 2006, the Department's Commissioner issued a Desist and Refrain Order to certain payday lenders requiring the businesses to come into compliance. (16 CT 3864-3868.)[8] Having no additional information about these businesses' legal status or structure, the Department issued the order using the names listed on their websites—Ameriloan, United Cash Loans, USFastCash, and Preferred Cash Loans. (16 CT 3864.)

III. THE PAYDAY LENDERS IGNORE THE DEPARTMENT'S DESIST AND REFRAIN ORDER; THE PEOPLE FILE SUIT

Faced with the Payday Lenders' continued non-compliance, and spurred by mounting complaints, in June 2007 the People brought an enforcement action against five Internet payday lenders, identifying each by its website name: Ameriloan, UnitedCashLoans, USFastCash, OneClickCash, and PreferredCashLoans (collectively, the Payday Lenders).[9] The People alleged that the Payday Lenders charged fees

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[8] See Fin. Code, § 23050.

[9] See Gov. Code, § 11180; Fin. Code, § 23051, subd. (a). A screenshot of the representative Ameriloan website taken May 18, 2007, is attached. (See Attachment at p. 1, 4 SSCT 729.)

exceeding the amounts permitted under California law, failed to provide required loan notices, were operating without a license, and were violating the Desist and Refrain Order. The complaint sought injunctive relief, restitution, and civil penalties. (1 CT 38-39.)

As of June 2007, the Payday Lenders' websites—the sole method by which consumers applied for loans—reflected only these businesses' trade names. (4 SSCT 729-733, 735-738, 739-740, 742-745, 753-754.) Therefore, the complaint designated each Payday Lender as "a business organization, form unknown" and, alternatively a corporation, a limited liability company, or a partnership. (1 CT 27; see also 4 SSCT at 28-29.)

IV. THE PAYDAY LENDERS ASSERT ARM-OF-THE-TRIBE STATUS AND CLAIM IMMUNITY

On July 30, 2007, the superior court issued a temporary restraining order against the Payday Lenders. (See 1 CT 48.) Shortly thereafter, the businesses appeared specially, one group asserting that they were instrumentalities or "arms" of the Miami Tribe (Ameriloan, UnitedCashLoans, and USFastCash) (1 CT 47-53) and the other claiming the same relationship with the Santee Sioux Nation (OneClickCash and PreferredCashLoans) (1 CT 67-68). The businesses contended that they were therefore entitled to invoke these Tribes' sovereign immunity. This was the State's first notice that these businesses claimed any tribal connection.

V. EVIDENCE CONCERNING THE PAYDAY LENDERS' STATUS AS ARMS OF TRIBES

The following factual summary is based on what the People know or understand from the evidence presently available.

A. Use and Registration of the Payday Lenders' Marks

The best available evidence concerning what entities actually own and are legally responsible for the Payday Lender businesses is the history of the ownership and use of the relevant marks.

Between May and July of 2004, a Kansas limited liability company named CLK Management, LLC (CLK) applied to register a number of marks with the U.S. Patent and Trademark Office for businesses providing payday loans. (23 CT 5529-5533; 24 CT 5704-5708, 5720-5721, 5620-5621.)[10] These businesses included four of the five Payday Lenders: Ameriloan, UnitedCashLoans, USFastCash, and OneClickCash. (23 CT 5529-5533; 24 CT 5704-5708, 5720-5724, 5620-5624.) According to the registration documents, some of the trademarks had been in use since 2002. (23 CT 5539-5541; 24 CT 5704-5705, 5720-5724, 5620-5624.) An individual named Scott Tucker was listed as CLK's President and signed the registration documents. (23 CT 5530; 24 CT 5621, 5705, 5721.)[11] The record contains no evidence that CLK had or has any tribal affiliation.

The name PreferredCashLoans has never been registered with the U.S. Patent and Trademark Office. (People's Request for Judicial Notice (RJN), Ex. J.)

Websites using the Payday Lenders' marks are all currently active. (RJN, Exs. A-E.)

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[10] The citations are to exhibits to the declaration of FTC investigator Victoria M. L. Budich. (See 18 CT 4149-4191 [text of declaration]; 18 CT 4193 through 24 CT 5748 [exhibits].)

[11] Scott Tucker is a defendant in the FTC's enforcement action. His role in the Payday Lenders' operations is discussed further below.

B. SFS, Inc.

1. Public information regarding SFS, Inc.'s ownership and use of marks OneClickCash and PreferredCashLoans

In September 2006—one month after the issuance of the Desist and Refrain Order, and approximately nine months before this case was filed—CLK conveyed the OneClickCash trademark to an entity named SFS, Inc. (24 CT 5630-5632.) SFS, Inc. retained ownership of the mark in May 2012, when the superior court ruled on the renewed motion to quash. (24 CT 5754; 18 CT 4189-4190 [Budich Decl., ¶ 95].) The U.S. Patent and Trademark Office website reflects that SFS, Inc. is still the owner of the OneClickCash mark. (RJN, Ex. I.) In 2007, OneClickCash's Web site did not state any tribal affiliation. (4 SSCT 739-740 [screenshot].)[12] The website now claims affiliation with the Santee Sioux Nation through SFS, Inc. (RJN, Ex. D.)

As noted, the U.S. Patent and Trademark Office has no records relating to PreferredCashLoans. (RJN, Ex. J.) The current website for PreferredCashLoans does not assert a connection to SFS, Inc. or the Santee Sioux Nation. (RJN, Ex. E.)

2. SFS Inc.'s creation, formation documents, and governing laws

SFS, Inc. is a corporation created under the procedures and laws of the Santee Sioux Nation. In February 2005, the Santee Sioux Tribal Council, the Tribe's governing body, passed a resolution incorporating SFS, Inc. "pursuant to the laws of the Santee Sioux Nation." (4 SSCT 771

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[12] This citation is to an exhibit to the declaration of Department examiner Peter Mock. (See 3 SSCT 634-638 [text of declaration]; 3 SSCT 639 through 4 SSCT 754 [exhibits].)

[Constitution], 800-801.)[13] The resolution authorized SFS, Inc. to engage in "short-term loans and cash advance services ('payday loans')," stating that "it is in the best interest of the Tribe to establish a tribally-owned corporation to facilitate the achievement of goals relating to the Tribal economy, self-government, and sovereign status of the Santee Sioux Nation." (4 SSCT 800.) SFS, Inc.'s original Articles of Incorporation (Articles) were attached to the resolution. (4 SSCT 800, 802-806.) Amended Articles were issued in June 2008. (4 SSCT 808-812.)

As set out in the Articles, the Tribe owns all shares of SFS, Inc. (4 SSCT 802, 808.) The Articles state that SFS's Inc.'s Board of Directors consists of the Tribal Council and that the Board "shall manage" the corporation. (4 SSCT 803, 809.) The Articles do not define what such management entails.

Pursuant to its Articles and the Tribe's Business Corporation Code, SFS, Inc. has the usual attributes of a corporation. The Tribe as shareholder, the Tribal Council, and SFS, Inc.'s officers or directors cannot be held liable to SFS, Inc.'s creditors. (5 SSCT 913 [Santee Sioux Tribe of Nebraska Business Corporation Code (BCC), § 11-1022], 915 [BCC § 11-1092].) Any recovery against SFS, Inc. is limited to its assets. (5 SSCT 912 [BCC § 11-1003, subd. (3)(b)].) The Articles require SFS, Inc. to maintain bank accounts in its own name and to hold its funds separate from those of any other person or entity. (4 SSCT 804, 810.)

Additionally, pursuant to its Articles and tribal law, SFS, Inc. also possesses typical corporate powers and privileges. (See 4 SSCT 802-806, 808-812; 5 SSCT 912 [BCC § 11-1003, subd. (3)].) The corporation has its

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[13] The citations to documents in this subsection are to exhibits of the declaration of Robert Campbell. (See 4 SSCT 761-767 [text of declaration]; 4 SSCT 769 through 5 SSCT 970 [exhibits].)

own assets, funds, and property interests, as well as "the authority to acquire, manage, own, use, pledge, encumber, or otherwise dispose of" such property, "subject to the contractual and sovereign rights of others, including the Tribe." (5 SSCT 914 [BBC § 11-1030, subd. (1)].) It appears that, under tribal law, SFS, Inc. as a corporation has the power to sue in its own name. (See 5 SSCT 907 [BBC § 11-783, transferring right to sue in corporation's name to officers, etc., on dissolution].) The corporation has authority to consent to be sued, provided that the consent is explicit, is contained in a written contract or commercial document that names the corporation as a party, and is specifically approved by the Board of Directors, and that any recovery is limited to the corporation's assets. (5 SSCT 912 [BCC § 11-1003, subd. (3)].) The Articles express an intention that SFS, Inc. share in the Tribe's immunity (see 4 SSCT 805, 811), but the corporation may not waive that immunity to allow recourse beyond the corporation's separate assets (4 SSCT 800).

Because SFS, Inc. is tribally owned, under tribal law any "net income" that the corporation receives from its operations is required to be "distributed to the Tribe at such time as the Tribal Council may determine." (5 SSCT 914-915 [BCC § 11-1030, subd. (2)].) Tribal law does not further define "net income," and nothing in SFS, Inc.'s formation documents or tribal law specifies how any net income must be used once distributed.

3. The Payday Lenders' declaration concerning SFS Inc.'s operations

To support their renewed motion to quash service, OneClickCash and PreferredCashLoans relied primarily on information provided in Robert Campbell's April 2012 declaration. Campbell is a member of the Santee

Sioux Nation and the Santee Sioux Tribal Council, and Treasurer of SFS, Inc. (4 SSCT 762-763 [¶¶ 2, 7].)[14]

Campbell's declaration contained limited information about the day-to-day operations of SFS, Inc. Among other things, Campbell stated that during a four-year period between 2007 and 2011, the Tribal Council—the corporation's Board—did not attain a quorum on a regular basis for routine meetings. (4 SSCT 765 [¶ 14].) Campbell also declared that, from its inception, SFS, Inc. has contracted with third parties—most recently AMG Services, Inc. (AMG)—to provide employees to perform the corporation's core function of "loan servicing." (4 SSCT 763-764 [¶¶ 9-10].)[15] What precisely this entails, or how much it affects net revenues flowing to the Tribe, is not discussed.[16] Campbell stated that "SFS[, Inc.]'s loan transactions . . . are approved daily by an SFS[, Inc.] officer or employee at which time the loans are 'consummated.'" (4 SSCT 764 [¶ 10].) He did not explain what constitutes approval or consummation, and whether it involves any substantive review of individual loans or of SFS, Inc.'s loan practices.

Campbell did not provide information on any required distributions from SFS, Inc. to the Tribe. He declared summarily that the payday lending revenues from SFS, Inc. "assist" in funding the Tribe's "operations, expenditures and social welfare programs." (4 SSCT 765 [¶ 13].)

Campbell stated that "SFS[, Inc.] does not currently actively issue loans under the trade name 'Preferred Cash Loans,' although it has the

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[14] Campbell is also a defendant in the FTC action.

[15] AMG is a defendant in the FTC action.

[16] AMG's fees are likely substantial. In 2011 alone, AMG reported to the State of Kansas that well over $20.5 million in employee wages were paid to 14 people, six of whom have the last name of "Tucker." (20 CT 4670.)