DREHER TOMKIES LLP ALERT

FOR CLIENTS AND FRIENDS OF DREHER TOMKIES LLP

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FOURTH CIRCUIT OVERTURNS RULING AGAINST TRIBAL LENDER

The United States Court of Appeals for the Fourth Circuit dismissed a class action suit against Lake Superior Chippewa Indian Tribe, holding that the Tribe's lending entities were entitled to tribal sovereign immunity from state interest rate laws as an "arm of the tribe." *Williams v. Big Picture Loans, LLC*, No. 18-1827 (4th Cir. July 3, 2019).

Five Virginia residents brought a suit against the Tribe alleging that the residents obtained payday loans on the internet from tribal lending entities and that those loans violated Virginia usury law. The tribal lending entities moved to dismiss the case for lack of subject matter jurisdiction on the basis that the tribal lending entities are entitled to sovereign immunity as arms of the Tribe.

In its arm-of-the-tribe immunity analysis, the Fourth Circuit adopted the first five factors developed by the Tenth Circuit court in *Breakthrough Management Group, Inc. v. Chukchansi Gold Casino & Resort*, 629 F.3d 1173 (10th Cir. 2010). These five factors are: (i) the method of the entities' creation, (ii) their purpose, (iii) their structure, ownership and management, (iv) the tribe's intent to share its sovereign immunity and (v) the financial relationship between the tribe and the entities.

The Fourth Circuit reviewed the Tribe's lending activities under each of these factors and determined that all of the factors weigh in favor of immunity for one tribal lending entity and all but one of the factors weigh in favor of immunity for the other tribal lending entity. In this case, the tribal lending entities were created by the Tribe and operating pursuant to the Tribe's Business Ordinance with the ultimate purpose to diversify the economy of the Tribe's Reservation in order to improve the Tribe's economic self-sufficiency. The tribal lending entity that satisfied all five factors was managed by tribal members and it employed 15 tribal members, whereas the other tribal lending entity was managed by a non-Tribe member (therefore, weighing slightly against immunity for the second entity). The Tribe unequivocally stated its intention to share its immunity in both tribal lending entities' formation documents. Finally, the Fourth Circuit stated that a financial relationship exists because a judgment against either tribal lending entity could significantly impact the tribal treasury. The Fourth Circuit concluded that a finding of no immunity in this case would weaken the Tribe's ability to govern itself according to its own laws, become self-sufficient and develop economic opportunities for its members.

In its opinion, the Fourth Circuit noted that the Supreme Court has recognized that tribal immunity may remain intact when a tribe elects to engage in commerce using tribally created entities, but the Supreme Court has not articulated a framework determining whether a particular entity should be considered an arm-of-the-tribe.

Tribal lending programs have been subject to heightened scrutiny in the past few years due to "true lender" and "rent-a-tribe" challenges. *See* our prior ALERTS of February 9, 2018 and September 9, 2016. Recently, the Second Circuit determined that tribal sovereign immunity does not bar a suit against tribal offers for prospective injunctive relief based on violations of state and federal law. *See* our prior ALERT of April 29, 2019. The *Williams* case is the first time that a tribal lending arrangement has been upheld at the federal appellate level and provides an example of a thoughtfully organized tribal lending arrangement that can be used to model future tribal lending programs. We can provide advice on how to structure programs to minimize the risks associated with a "rent-a-tribe" challenge. ❑

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