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Memorandum

From Rob Rosette, Rosette LLP

To: Interested Parties

Date: October 7, 2014

Subject: Key Takeaways – *The Otoe-Missouria Tribe of Indians et al. v. New York State Department of Financial Services et al.*, No. 13-3769 (2d Cir. Oct. 1, 2014)

The immediate reaction of many to the news that the U.S. Court of Appeals for the Second Circuit had denied a preliminary injunction for two Indian Tribes against the State of New York's efforts to "choke off" their tribal e-commerce loan businesses was that this meant the end of the case, the end of the businesses, and perhaps even the end of the Tribes' efforts to better their communities and the lives of their members. Although the opinion declined to reverse the District Court's denial of the Tribes' motion for a preliminary injunction, its reasoning reaffirms longstanding legal precedent recognizing the sovereign status of Tribes and affirms the Tribes' long-term economic interests for the future.

This case is following a time-worn path. Because the States and the Tribes are both sovereigns, litigation is not just *an* option to resolve conflicts, it is the *only* option. Important cases of this mold have frequently led to appeals and ultimately to the Supreme Court, where a special body of law has been developed and refined over many decades. In its ruling on the motion for a preliminary injunction, the District Court addressed the Tribes' sovereign rights, but found that they were not implicated by New York's action due to the physical location of consumers in New York and that the matter did not pose "a likelihood of success on the merits or even a sufficiently serious question going to the merits."

Securing a preliminary injunction was not the sole goal of the appeal of the District Court's decision. It was also important to secure a ruling that leveled the playing field by confirming the Tribes' sovereign rights and to set a course for determining whether and how those rights were implicated by New York's action and, ultimately, what to do about it. Confirming the Tribes sovereign rights is something that the Court of Appeals indeed did:

- **The Court found that the case involved a "conflict" between the actions of "two sovereigns," not just the sovereign action of New York. These sovereign public interests "collided,"** (Op. at 4-5). "[B]oth the tribes and New York believed that high interest loans fell within their domain," the Court observed (Op. at 7) and recognized the potential need to "weigh the interests of each sovereign—the tribes, the federal government, and the state—in the conduct targeted by the state's regulation." (Op. at 19).

- **The Court made no presumption that the loans take place off-reservation.** "[N]either our court nor the Supreme Court has confronted a hybrid transaction like the loans at issue here, e-commerce that straddles borders and connects parties separated by hundreds of miles. We need not resolve that novel question today…" (Op. at 23). The Court went on to find that "[a] court might ultimately conclude that . . . the transaction being regulated by New York could be regarded as on-reservation, based on the extent to which one side of the transaction is firmly rooted on the reservation." (Op. at 26).

- **The Court recognized that tribes have a significant interest in operating businesses pursuant to tribal law for the betterment of their communities.** "[T]he tribes are independent nations, and New York's regulatory efforts may hinder the tribes' ability to provide for their members and manage their own internal affairs." (Op. at 16).

- **The Court acknowledged that federal governmental and tribal interests have been aligned in matters of tribal economic development.** The court accurately pointed out the Supreme Court has long recognized that the federal government and tribes have a "shared commitment to the continued growth and productivity" of tribal businesses. (Op. at 20).

- **The tribes' investment in a tribal entity is an essential factor in the sovereign-rights analysis.** "[A] tribe's interest peaks when a regulation threatens a venture in which the tribe has invested significant resources." (Op. at 21).

- **A non-Indian customer base does not automatically settle the issue, analogizing the tribal lending entities to tribal gaming operations.** The Court compared this case to the landmark *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), finding that "[i]n theory, the tribes may have built the electronic equivalent of 'modern[,]…comfortable, clean, attractive facilities'" and may "have 'engaged in a concerted and sustained undertaking to develop and manage' limited capital resources." (Op. at 28 (quoting *Cabazon*)). Hence, the Court stated that this was not necessarily a case of tribes simply marketing an exemption from state law and noted the potential "value added" by the product.

- **Tribal lending provides immense benefits to tribes.** The Court noted that "[p]rofits from lending have fueled expansion of childhood education programs, employment training, healthcare coverage, [etc.]," and "[w]ithout revenue from lending, the tribes faced large gaps in their budgets." (Op. at 10).

In contrast to District Court, the Court of Appeals did not find that there were no "sufficiently serious questions going to the merits" of the case. Instead, the Court's opinion reflected the nuanced and fact-driven nature of the legal analysis governing conflicts between state and tribal sovereigns, illustrating serious questions going to the merits of the underlying claims. Indeed, this is a central part of the opinion.

What the Court could not determine on the limited factual record available to it was how the Tribes' rights were implicated. This included the State of New York's arguments – the Court stated they "rest on uncertain factual premises," (Op. at 27, FN6) and emphasized that "factual questions pervade every step of the analysis." (Op. at 22).

In concluding the opinion, the Court stated plainly that the evidence may ultimately favor the tribes, if they "may amass and present evidence that paints a clearer picture," (Op. at 32) "may ultimately prevail in this litigation," (Op. at 32) and that the tribes' arguments regarding the lack of state regulatory authority "may be right in the end…" (Op. at 13-14).

So the tribes and their case both remain very much alive, although their businesses and their communities have indeed suffered a significant blow. While state interference with sovereign tribal enterprises has been a recurring and unfortunate theme in the history of the tribes' progress toward economic self-sufficiency, the tribes remain resilient in the face of hardship and vigilant in protecting their inherent sovereignty.