



Tribal Payday Lending

Summary of Tribal Payday Lending Models: Tribes that are not geographically situated to profit from gambling have turned to consumer payday lending via the internet.¹ Two Indian pay-day lending models have developed. Under the first model, a tribe forms a Tribal Legal Entity (TLE), a tribally chartered business organization, which provides payday loans to consumers nationwide, either via the internet or via store-front operations.² Under the second, less prevalent model, a tribal member establishes either a store-front or internet only pay-day lending company.³ In this less common model, it is not always clear whether the payday lending company is a TLE or simply a registered business organization in the state where it operates. Both models have allowed payday lenders to benefit from a tribe's sovereign immunity.

State and Federal Assertions of Regulatory Authority: The recent emergence, and prevalence, of tribal payday lenders, either operating as TLEs or owned by tribal members, calls into question the authority of states,⁴ the Federal Trade Commission (FTC), and the Consumer Financial Protection Bureau (CFPB) to regulate tribal payday lending companies. For example, states struggle with enforcing state lending and usury laws in cases involving tribal lenders, because state law only applies to tribal activities under certain limited circumstances, and second, tribal sovereign immunity makes state-court discovery rules inapplicable.⁵ Thus, TLEs and member owned payday lending operations may be able to avoid state regulation that applies to other, non-tribal payday lending entities.

Similarly, federal regulators struggle with tribal sovereign immunity as it applies to federal lending and usury laws. In *Federal Trade Commission v. Payday Financial, LLC*,⁶ for example, the FTC brought suit against Payday Financial, LLC and its wholly owned subsidiaries alleging violations of the Federal Trade Commission Act, 15 U.S.C. § 56(a)(1), for garnishing borrowers' bank accounts without first obtaining a

¹ This summary of the emergence and regulation of tribal payday lending draws from the recent articles of Hilary Miller, *The Future of Tribal Lending Under the Consumer Financial Protection Bureau*, A.B.A.J. 1, 1 (Mar. 2013), and Richard P. Eckman, Catherine M. Brennan, H. Blake Sims, and Justin B. Hosie, *Update on Tribal Loans to State Residents*, 68 BUS. LAW 677, 682 (Feb. 2013), available [here](#). Thanks also to Cristina Mulcahy for her work on this article.

² *Wright v. Colville Enter. Corp.*, 147 P.3d 1275 (Wash. 2008) (tribal sovereign immunity comprehensively protects recognized American Indian tribes from suit, unless Congress explicitly waives or abrogates such immunity).

³ See, e.g., *Jackson v. Payday Financial*, 2012 U.S. Dist. LEXIS 94095 at *2 (N.D. Ill. July 9, 2012) (forum selection clause selecting tribal court upheld in a suit involving claims filed by a group of individual, non-tribal borrowers against *Payday*, an entity doing business as Lakota Cash, and owned by a tribal member but not registered as a TLE in federal court).

⁴ States, however, are attempting to enforce state law against payday lenders. See, e.g., Jessica Silver-Greenburg and Ben Protess, *New York Tells Online Lenders to Abide by State's Interest Rate Cap*, New York Times, August 5, 2013, available [here](#) (discussing New York's Superintendent of Financial Services recent cease-and-desist letters written to Western Sky, a tribal member-owned payday lender); see also *New York v. Western Sky Financial, LLC*, Case No. ____ (filed 08/12/2013) (alleging that the defendants "have engaged in an illegal and deceptive scheme to originate high-interest, personal loans to consumers in New York").

⁵ *Ameriloan v. Superior Court*, 169 Cal. App. 4th 81 (2008); *State of Colorado v. Cash Advance*, 242 P.3d 1099 (2010).

⁶ *FTC v. Payday Financial*, No. 3:11-cv-03017-RAL, FTC File No. 112 3023 (S.D.S.D. filed Sept. 12, 2011).



Native American Law Watch

Fall 2013



court order and the Electronic Funds Transfer Act, 15 U.S.C. §§ 1693-1693r, and its implementing Regulation E, 12 C.F.R. § 205.10, requiring borrowers to authorize electronic withdrawals from their bank accounts as a condition for obtaining a loan. The case ultimately settled and thus provides little guidance on litigating lending enforcement actions when a tribal pay-day lender asserts sovereign immunity. On another federal front, the new director of the CFPB has indicated his intent to regulate tribal payday lenders.⁷ However, a question remains as to whether the Dodd-Frank Act applies to tribes or tribal entities because Congress did not include tribes within the definition of “covered persons.”⁸

Tribal Response: In response to New York’s assertion of regulatory jurisdiction over tribal payday lenders, the Native American Finance Services Association (“NAFSA”), which represents 16 tribes, sent letters to various financial institutions “arguing the New York Department of Financial Services’ action infringes on their rights.” Andrew R. Johnson, *Indian Tribes to Banks: Ignore That Man Behind the Curtain*, Wall Street Journal, August 14, 2013 (“Indian tribes are urging banks to ignore attempts by New York’s top banking regulator to stop processing transactions for online lenders whose loans allegedly violate state interest-rate caps.”). The NAFSA, however, distinguished between payday lenders operating under tribal law, and those who do not. *Id.* Thus, the NAFSA has stated that it supports the lawsuit against Western Sky because “Western Sky does not operate under tribal law as its members do.” *Id.*

In response to the CFPB’s assertion of regulatory authority over tribal payday lenders, the Executive Director of the Native American Fair Commerce Coalition countered that tribes “regulate business practices through the enactment of tribal laws and the implementation of regulatory authorities to provide consumer protections” and that tribal payday lending businesses provide “economic development on the reservation, while serving thousands of consumers nationwide with short term financing required to help address emergency needs.”⁹

Stay Tuned: Although the TLE or member-owned payday lender may be immune from suit, the non-tribal financial institution is likely not immune. In many instances the “true lenders” are non-tribal financial institutions. These non-tribal financial institutions both finance the payday loans and receive the majority of the economic benefits from the payday lending transactions. Because these non-tribal financial institutions lack the protection of sovereign immunity, the next trend in tribal payday lender litigation may be targeted at non-Indian financial institutions.

For more information, please contact [Deana M. Bennett](mailto:deanab@modrall.com) at deanab@modrall.com.

⁷ See Carter Dougherty, *Consumer Bureau ‘Zoning In’ on Tribal Payday Firms*, Bloomberg (March 6, 2012), available [here](#).

⁸ Dodd-Frank Wall Street Reform and Consumer Financial Protection Act, 12 U.S.C. § 5481 (2010).

⁹ Alan S. Kaplinsky, *The Native American Tribes respond to Director Cordray*, CFPB Monitor (March 8, 2012), available at <http://www.cfpbmonitor.com/2012/03/08/the-native-american-tribes-respond-to-director-cordray/>.