

Court Decision Signals End of Faux Tribal Payday Lending

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Washington - The Second Circuit Court of Appeals in a decision today against Think Finance and the officers of Plain Green Loans has made crystal clear that online tribal payday lenders must comply with state interest rate limits, licensing laws and other state laws, and can be sued through their officers for injunctive relief if they do not.

“This decision sounds the death knell for tribal payday lending,” said Lauren Saunders, associate director of the National Consumer Law Center.

“The faux tribal payday lending model has always been based on the mistaken belief that payday lenders could evade state laws by hiding behind Native American tribes. The Supreme Court has long made clear that tribes must obey state law when they operate off reservation, and that is true of online tribal payday lenders as well. This decision follows the path laid out by the Supreme Court in a 2014 decision showing how to enforce state law against purportedly tribal entities,” Saunders added.

The faux tribal payday lending model attempts to exploit tribal sovereign immunity, a legal doctrine that limits when tribes may be sued. But sovereign immunity - an English doctrine that goes back to the idea that the king may do no wrong - is not the same thing as an exemption from the law. Rather, it just limits when and how a sovereign party (i.e. a state or a tribe) can be sued. Under the 1908 Supreme Court decision *Ex Parte Young*, a sovereign may be sued indirectly through its officers in their official capacity for injunctive relief to require the sovereign to comply with the law.

The Second Circuit’s decision does not address whether the plaintiffs—consumers who were charged illegally high interest rates for small-dollar loans—can recover damages. Other courts have found that when a tribe has little to do with the lending operation, the lender is not an arm of the tribe and can be sued for damages. The Second Circuit did not find it necessary to decide whether Plain Green was an arm of the tribe, as the lender claimed.

The court also struck down forced arbitration clauses in the loan contracts on the ground that the clauses were unconscionable and “unenforceable because they are designed to avoid federal and state consumer protection laws.” **“The decision that payday lenders cannot use tribal arbitration to avoid consumer protection laws is a small victor against forced arbitration clauses that block access to justice, but unfortunately the injustice of forced arbitration was enhanced in a separate decision today by the Supreme Court, making it more difficult for people to band together even in arbitration,” said Saunders.**

It is unknown how many online payday lenders use a purported tribal affiliation to avoid state laws, but a 2017 report by Public Justice lists many websites that were still in operation at that time.

For more information, see the National Consumer Law Center's Press Release, "Supreme Court Decision Strikes Blow against Tribal Online Payday Lenders" (May 29, 2014), <https://nclc-old.ogose.net/images/pdf/pr-reports/pr-scotus-bay-mills.pdf>.