



CASHCALL DEEMED “TRUE LENDER” IN TRIBAL LENDING PROGRAM

The United States District Court for the Central District of California held that CashCall, Inc. was the “true lender” in a tribal lending program, and as the true lender CashCall and other related defendants violated the federal Consumer Financial Protection Act (CFPA). *Consumer Financial Protection Bureau v. CashCall, Inc.*, No. CV 15-7522-jfw (RAOx) (C.D. Cal. Aug. 31, 2016).

The Consumer Financial Protection Bureau (CFPB) had sued CashCall and other defendants, claiming that they violated the CFPA when purchasing, servicing and collecting Western Sky loans. Western Sky was a South Dakota limited liability company that was licensed to do business by the Cheyenne River Sioux Tribe (CRST). The loan agreements included a CRST choice of law.

In ruling on the CFPB’s partial motion for summary judgment, the district court held that CashCall was the “true lender” under the program. The district court said that it was obligated to look to the substance, and not the form, of the transactions. According to the district court, the totality of the circumstances showed that CashCall was the true lender because CashCall (and not Western Sky) had the “predominant economic interest” in the loans because CashCall put its own money at risk as evidenced by the facts that (i) CashCall funded the loans, (ii) CashCall purchased the loans before any payments were due and at a premium, (iii) CashCall guaranteed Western Sky certain rates of return in connection with the program and (iv) CashCall agreed to fully indemnify Western Sky for losses in connection with the program.

Because the district court deemed CashCall to be the true lender, the district court determined that the choice of CRST law as the governing law in the loan agreements was invalid. As a result, the loans were void and uncollectible under state law because the loans did not comply with applicable state usury limitations and CashCall did not comply with applicable licensing requirements. Consequently, CashCall’s attempts to collect and service the void loans constituted a deceptive act or practice under the CFPA because CashCall gave borrowers the net impression that the loans were enforceable and that borrowers were obligated to repay the loans in accordance with the terms of their loan agreements.

Although *CashCall* dealt with a tribal lending program, other courts have applied the “predominant economic interest” test and similarly found that nonbank servicers were the “true lenders” in bank loan programs. See, e.g., our Alert on July 7, 2014 on *CashCall v. Morrissey*. However, the “predominant economic interest” test is not universally accepted. See, e.g., our Alert of June 2, 2014 on *Sawyer v. Bill Me Later, Inc.*

We can provide advice on how to structure programs to minimize the risks associated with a “true lender” challenge. □

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