



April 29, 2019

## SECOND CIRCUIT AFFIRMS DISTRICT COURT'S RULING AGAINST TRIBAL LENDER OFFICERS

The U.S. Court of Appeals for the Second Circuit has held that (i) tribal sovereign immunity does not bar a suit against tribal officers for prospective, injunctive relief based on violations of state and substantive federal law and (ii) the arbitration clauses of the program loan agreements are unenforceable and unconscionable. *Gingras v. Think Finance, Inc. et al.*, No. 16-2019-cv (2d Cir. Apr. 24, 2019).

In this case, borrowers brought an action alleging that their loan agreements violate Vermont and federal law. The loans were originated by an online lending originator which held itself out as a tribal lending entity. The borrowers did not name the tribal lending entity as a party to this lawsuit, but instead brought the action against the tribal lending entity's CEO and two Board of Directors members (collectively, the "Tribal Officers") and the entities that service the program loans.

The Tribal Officers filed a motion to dismiss based on tribal sovereign immunity, stating that because the tribal lending entity is an arm of the Tribe, the Tribal Officers are entitled to immunity from all state law claims as well as the federal RICO claim alleged by the borrowers. The Second Circuit held that tribal sovereign immunity does not bar state and substantive federal law claims for prospective, injunctive relief against tribal officials in their official capacities for conduct occurring off of the reservation because tribes cannot empower their officials to violate state [or federal] laws.

The defendants in the case also filed a motion to compel arbitration. The Second Circuit affirmed the district court's ruling denying these motions. The Second Circuit concluded that the arbitration agreements are unenforceable because they are designed to avoid federal and state consumer protection laws by requiring the application of tribal law only and disclaiming the application of state and federal law. The Second Circuit stated that by applying tribal law only, arbitration for the borrowers appears wholly to foreclose them from vindicating rights granted by federal and state law, thus making the arbitration agreements unenforceable and unconscionable.

The Second Circuit noted that in the complaint, the borrowers alleged that the program servicer and the tribal lending entity created an arrangement to "circumvent the stringent laws that have been

enacted to prescribe how loans can be made and to prevent lenders from preying on indigent people" and to take advantage of the legal doctrine of tribal immunity. The Second Circuit did not opine on whether the program was in fact an arrangement to circumvent state and federal lending laws. The Second Circuit did state in dicta that the tribal lending program was cleverly designed to enable the defendants to skirt federal and state consumer protection laws under the cloak of tribal sovereign immunity.

We will continue to monitor this case for any "true creditor" updates. As "true creditor" case law continues to evolve, we can provide advice on how programs can be structured and operated to minimize the risk of "true creditor" challenges. □

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