

Lending company owned by Oklahoma tribe generates complaints

Online payday lending operations claiming to be “wholly owned” by the Otoe-Missouria Tribe of Indians in Oklahoma have been receiving complaints since around the time they were formed, Better Business Bureau records show.

By **Andrew Knittle** | Published: August 13, 2012 [Leave a comment](#)

RED ROCK — The state Department of Consumer Credit has received official complaints against another online payday loan company owned by an Oklahoma Indian tribe.

Mary Keel, chief examiner with the Department of Consumer Credit, said there have been four official complaints filed by consumers against American Web Loan. She said the complaints are confidential.

Loan companies claiming to be “wholly owned” by the Otoe-Missouria Tribe, including American Web Loan, have been receiving consumer complaints since around the time they were formed, Better Business Bureau records show.

Tribal leaders respond

Tribal leaders say the complaints are not a reflection of the business practices of the lending companies.

“The financial services offered by the Otoe-Missouria Tribe to underbanked consumers in the United States are high-quality products,” said Charles J. Moncooyea, the tribe's vice chairman. “The Otoe-Missouria Tribe is a member of both the Online Lenders Alliance and the Native American Financial Services Association and strictly follows the Best Practices established by both organizations with regard to collection procedures.”

Moncooyea said the tribe's call centers record and monitor “all collection calls to ensure compliance.” He said he believes some of the tribe's loan customers may have become victims of a debt collection scheme with reported links to organized crime in India.

“We are concerned that ‘phantom debt collectors’ operating from overseas locations are illegally contacting our customers,” Moncooyea said. “As ABC News reported last month, online loan applicants’ personal information is being acquired by criminals and consumers are being victimized.”

Two other companies, Great Plains Lending and Clear Creek Lending, also claim to be owned by the tribe, although complaints against them are far less numerous.

Complaints involve billing, collections

On the Better Business Bureau's website, complaints against American Web Loan total 101 since February 2011, just weeks after the tribe's payday lending operations started up.

An Otoe-Missouria Tribe newsletter, which was distributed in late 2010, included a news article about the tribe's new payday lending operation.

In the article, Moncooyea said the "new business has some restrictions."

"It is not available to Otoe-Missouria tribal members or military," Moncooyea said. "It will be a company that will not be open to the public, and all information will be via Internet."

Most of the complaints filed against American Web Loan on the Better Business Bureau's website involve billing and collections issues. Roughly 20 percent of the complaints were concerning other issues.

Betsy Lordan, a spokeswoman with the Federal Trade Commission, wouldn't confirm or deny whether her agency is looking into the companies claiming to be owned by the Otoe-Missouria Tribe.

"Unfortunately we are not going to be able to talk about anything having to do with upcoming investigations, as they are confidential until (and) unless we announce a complaint," Lordan said in an emailed statement.

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Payday Lenders and Indians Evading Laws Draw Scrutiny

By Carter Dougherty - 2012-06-05T20:02:25Z

(Corrects reference to Think Finance direct lending in 34th paragraph of story published June 4.)

U.S. regulators and Congress are scrutinizing partnerships between Native Americans and outside investors in online payday lending businesses accused of exploiting tribal sovereignty to evade state consumer-protection laws.

 Enlarge image



At least 11 Indian tribes have businesses offering payday loans to borrowers nationwide, according to the Native American Lending Alliance and the Native American Fair Commerce Coalition. Photo: Sandy Huffaker/Bloomberg

The push has divided Native American groups, with critics of payday lending opposing tribal involvement in the businesses, which charge interest rates as high as 521 percent for short-term loans. Other Indian groups, formed to represent the nascent industry in Washington, are pushing back against the regulators.

Charles Moncooyea, vice chairman of the Otoe-Missouria Tribe, called the interest of the Consumer Financial Protection Bureau "a declaration of war" and vowed to fight federal intervention into the new businesses.

"The fact is our tribe -- and tribes nationwide -- benefit from the positive economic impact from these and other businesses activities, with revenues directed towards such

critical needs as medical care, education and many other basic necessities," Moncooyea said in a written statement.

The partnerships have drawn the attention of federal regulators largely because of sovereign immunity, the legal doctrine that restricts state interference in tribal affairs.

"It's a model that could go into any kind of area where the states regulate," said Colorado Attorney General John Suthers.

10 Tribes

At least 10 Indian tribes have lending businesses, according to the Native American Lending Alliance and the Native American Fair Commerce Coalition, both year-old trade associations. Barry Brandon, executive director of the coalition, said on May 21 that the two groups are in the process of merging.

One tribe, the Chippewa Cree, has set up Plain Green LLC, a lender that uses a technology platform provided by Fort Worth Texas-based Think Finance Inc, which is backed by Sequoia Capital, a Silicon Valley venture capital firm that funded Google Inc. Victory Park Capital, a Chicago-based private equity firm, helps fund the loans, according to a person briefed on their business arrangements who spoke on condition of anonymity because the contract is private.

"We think this is a big growth market and will be here for a long time," Ken Rees, chief executive of Think Finance, said in an interview. "The legitimacy of a tribal entity to provide loans is very clear. The demand for products is clearly more than ever before."

Online Payday

The tribes and their outside partners are part of the fast-growing ranks of online payday lenders, which originated 35 percent of the \$32 billion in payday loans made in 2010, according to a Jan. 9 report by JMP Securities, a San Francisco-based investment bank. The report was written by John Hecht, now a research analyst at Stephens Inc., a Little Rock, Arkansas-based investment bank. He estimated that online small-dollar lending -- in which loans average about \$400 -- will grow to 62 percent of the payday loan market by 2016.

Traditionally, payday borrowers leave lenders a postdated check for the amount of the loan plus a fee as collateral. Now, many of the transactions are made online, with borrowers authorizing lenders to debit their account electronically when the payments fall due.

Annual interest rates on payday loans can be as high as 521 percent, according to the Consumer Financial Protection Bureau.

The Federal Trade Commission is suing one lender based on an Indian reservation in South Dakota. Commissioner Julie Brill told National Association of Attorneys General on March 6 that her agency and the consumer bureau will cooperate on the issue because in the payday lending business, "the actors have moved online into tribal relationships."

'Zoning In'

Consumer bureau director Richard Cordray, also speaking to the group on March 6, said that his new agency is "zoning in" on tribal payday business.

In a March 21 interview, Cordray, a former Ohio attorney general, said he did not want to suggest he is focusing just on the tribal industry. Instead, he has a wider interest in online lending, though the agency has not announced any investigations.

"Internet lending is a broader area where I know states are frustrated because I know when I was a state attorney general, I was frustrated with it," Cordray said. "And that's an area where we intend to be helpful to them."

Sovereign Immunity

After he spoke on March 6, consumer bureau staff met with the National Congress of American Indians, a Washington-based group with a broad membership of tribes, according to two people briefed on the meetings. The staff assured the group that the bureau is not starting a campaign directed at Native American lenders, and does not want to attack tribal sovereign immunity.

The executive director of the congress, Jacqueline Johnson Pata, declined an interview request.

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Some Native Americans have embraced online lending in part because sovereign immunity limits the reach of state consumer-protection laws, and only Congress can modify this immunity. That legal status has generated investor interest in working with the tribes.

The emergence of Internet lending has opened the business to tribes that are far from major population centers. That allows them to profit from non-Indian customers who live all over the country and form the bulk of their revenue, according to Allen Parker, an industry consultant based in Beaumont, California.

Federal Laws

Tribes are not exempt from federal consumer-protection laws, such as the ones against unfair, deceptive and abusive practices that are enforced by the consumer bureau and the FTC. They must also comply with the Truth in Lending Act, which governs the disclosure of borrowing costs.

Senator Jeff Merkley, an Oregon Democrat, will introduce legislation on tribal lending in the next few weeks, Courtney Warner Crowell, his spokeswoman, said in an interview. The legislation would allow states to petition the consumer bureau, a federal agency, to stop lending by tribes in states where payday loans are illegal. That way, states would not directly litigate against tribes, thus preserving sovereign immunity, Crowell said.

The move into the business has drawn the opposition of some Native American groups that have long pushed for restrictions on what they see as a predatory form of lending. The Navajo Nation in 2006 imposed a usury cap of 15 percentage points above the prime rate.

'Predatory Lending'

In a position paper on its website, the congress states that it opposes "predatory lending" because many Native Americans are especially vulnerable to its abuses in the absence of mainstream financial institutions, such as banks.

A group of Native American community development organizations met with the consumer bureau in early May to outline the "devastating effects" of payday lending among Indians, they said in a May 15 press release.

Charles Trimble, a member of the Oglala Lakota Nation in South Dakota and a former executive director of the congress, denounced tribal payday lending as an abuse of sovereign immunity.

"It's like having a pimp in the family," Trimble wrote in an online column published on March 14, 2011. "He shames everyone but you can't disown him because he is family."

Some states, such as West Virginia, ban payday lending through an interest rate cap, while others, like Washington, require lenders to be licensed.

Federal Help

A Feb. 13 decision by a Colorado court prompted that state's attorney general, Suthers, to complain to Cordray that the states needed federal help before tribes entered other business lines.

Colorado had attempted to prove that lenders affiliated with the Miami Nation of Oklahoma and the Santee Sioux were in fact controlled by Scott Tucker, a payday lending business owner and semi-professional race car driver. The court concluded that tribal sovereign immunity blocked Colorado from obtaining documents from the tribe itself. The court also

found that Tucker "performed services" for the tribes but did not own the business, according to its Feb. 13 decision.

On April 2, the FTC filed a lawsuit against a series of companies linked to Tucker, including the ones targeted by Colorado. Tucker did not respond to faxes or calls to listed numbers of his businesses.

The payday loan industry, which sometimes partners with Indian tribes to set up the lenders, is proceeding on the assumption that states will be unable to enforce their laws, said Parker, the industry consultant. As long as they comply with federal law, tribes need not fear legal repercussions on their business. "I don't think anyone's going to attack tribal sovereignty," Parker added.

States Losing

"The states are losing the battle, and even if they can beat the fake Indian payday lenders, there is enough legal room for tribes" to lend themselves, Ira Rheingold, president of the National Association of Consumer Advocates, said in an interview.

Rees, the Think Finance chief executive, said his company has shifted away from doing direct lending itself because "byzantine state laws" made it complicated. Native American tribes, he said, "don't have to look to each state's lending laws."

The Plain Green lending business established by the Chippewa Cree on the Rocky Boy Indian Reservation in northern Montana uses a Think Finance software platform to offer first-time borrowers installment loans of as much as \$1,000, at an annual rate of 299 percent, according to its website.

Good Jobs

Billi Anne Raining Bird-Morsette, Plain Green's chief executive, said that the business has created jobs for 18 people in a call center on the reservation. The tribe has 6,177 members, about half of whom live on the reservation, according to Montana's Office of Indian Affairs.

"We have people working for us who have never had the chance to have a real, good job," Raining Bird-Morsette said in an interview.

Plain Green uses a software platform developed by Think Finance to track lending. Victory Park Capital funds the Plain Green loans by taking a 99 percent participation in them once they are made by the tribe, the person briefed on the business said.

Think Finance had a previous business, called ThinkCash, offering small-dollar loans in partnership with the First Bank of Delaware. (FBOD) The bank stopped offering the loans in December 2010, Think Finance spokeswoman Kelly Ann Scott said in an e-mail. Visitors to the ThinkCash web address are now redirected to the Plain Green website.

Victory Park

A \$90 million line of credit that Think Finance obtained from Victory Park helped finance ThinkCash, Scott said.

Asked about the connection to Victory Park, Raining Bird-Morsette said the tribe has "a number of investors" that she would not name. She said the tribe hopes to eventually generate enough working capital to fund loans itself.

Victory Park spokeswoman Sheila Mulligan declined to comment, as did Sequoia spokesman Andrew Kovacs.

Plain Green generated about \$2 million in revenue during its first six months in business, and \$896,000 was the "tribal share," according to a newsletter distributed to tribal members. The tribe is now adding new types of loans to its business lines, Raining Bird-Morsette said.

The first, under the brand Bear Paw Cash, offers a basic payday loan, which is repaid when the borrower's next paycheck clears. The second, SureCashXtra, allows customers to enroll a prepaid debit card in a service that draws a payday loan if the account balance falls to zero.

Jean Ann Fox, the director of financial services for the Consumer Federation of America, said the expansion of Internet-based payday lending under the shield of sovereign immunity sets a dangerous precedent.

"Now we have payday lending," Fox said in an interview. "How about insurance?"

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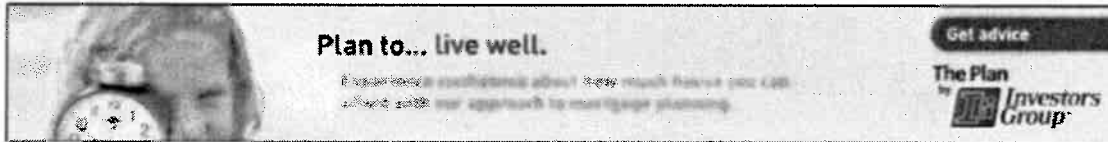
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Tribes' payday loans under scrutiny

Some Indian tribes are being paid to offer their sovereign immunity to payday lenders that are trying to dodge state regulations, U.S. officials say. Federal consumer protection agency may crack down.

April 29, 2013 | David Lazarus

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A growing number of Indian tribes are getting into the payday loan business, saying they just want to raise revenue for their reservations while helping cash-strapped consumers nationwide.

But federal officials suspect that, at least in some cases, tribes are being paid to offer their sovereign immunity to non-Indian payday lenders that are trying to dodge state regulations.



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So far, the tribes have prevailed over California and other states that have tried to assert authority over tribal lending operations. But they may now face a crackdown by the federal Consumer Financial Protection Bureau.

"The states have historically been the ones that have regulated and overseen the payday-loan industry," said Tom Feltner, director of financial services for the Consumer Federation of America.

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"They're the ones that have implemented rules for interest rates or even whether a payday loan can be issued," he said. "The vast majority of these tribal lenders are not complying with state laws."

And that can have serious repercussions for consumers.

Neil Barry was having trouble coming up with the rent for his small print shop in Reseda. He received a pitch in the mail from a company called Mobiloans. It promised a "new, more flexible way to borrow emergency cash."

"My credit is really bad," Barry, 82, told me. "I didn't know what else to do. So I figured I might as well give it a shot."

That was in October. He estimates he's now only about halfway toward paying off the \$1,000 loan, with monthly payments coming out of his Social Security checks.

By the time he gets Mobiloans out of his life, Barry figures, he'll have paid at least another \$1,000 in interest. If so, he can consider himself lucky: A 100% annual percentage rate would be only a fraction of what similar loans can cost.

"I had no idea what I was getting myself into," Barry said. "It's like being caught in a spider web."

It's unlikely that California officials would be able to help. Mobiloans is owned by the Tunica-Biloxi tribe of Louisiana and thus says its sovereign status makes it accountable only to federal law enforcement.

In California, payday lenders are prohibited from lending more than \$300 at a time, and they can't charge more than 15% interest. Thus, a borrower who received a loan of \$200 for two weeks would owe \$230 when his or her paycheck arrived.

On an annual percentage basis, that works out to 460%, which is absurdly high but not as onerous as the rates charged by some tribal lenders.

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"These online payday loans can have annual percentage rates of 600% or more," said Ellen Harnick, senior policy counsel for the Center for Responsible Lending, an advocacy group. "This is a relatively new way for the industry to get out from under state laws."

One particularly troublesome aspect of online tribal lenders is that they often require access to customers' bank accounts. This is ostensibly to facilitate depositing money into the account as quickly as possible after a loan is granted.

But it also allows the lender to withdraw monthly payments, which can get a borrower into trouble if he or she is short of funds. Bank overdraft charges can quickly pile up.

Instructing your bank to cut off access to the account won't solve anything. "Then the lender will just sue you for not making payments," Harnick said.

Barry Brandon, executive director of the Native American Financial Services Assn., told me that the ranks of tribal lenders are rapidly expanding. His organization now counts 16 tribes as members and is adding one nearly every month, he said.

"Tribal lending is a financial lifeline for many tribes," Brandon said, noting that some tribes' reservations are too remote for casinos. In such cases, he said, payday loans may be the best way of bringing in much-needed revenue.

Brandon said he was unable to share financial returns for his group's members or even to quantify the scope of outstanding loans.

Who actually runs the loan operations? "They are wholly owned and operated by the tribes," Brandon insisted — at first.

But there have been reports of some tribes extending their sovereign status to non-Indian payday lenders in what some have called "rent a tribe" deals.

The Federal Trade Commission filed a lawsuit last year against AMG Services, a Kansas payday loan company that allegedly tied up with Indian tribes to avoid state regulations.

According to the FTC suit, AMG, founded by race car driver Scott Tucker, claimed that it was owned by the Miami and Modoc tribes of Oklahoma and the Santee Sioux of Nebraska. But Colorado officials, who also are trying to crack down on tribal lenders, have said in separate state court hearings that the tribes received only a small fraction of AMG's earnings.

The FTC's lawsuit is pending.

Brandon finally acknowledged to me that some tribes do indeed work with others to fund or run their payday lending, just as some Indian casinos bring in outside management teams with gambling-industry experience.

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The Future of Tribal Lending Under the Consumer Financial Protection Bureau

By Hilary B. Miller
Posted: March 22, 2013
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Some Indian tribes - particularly impecunious tribes located remotely from population centers, without sufficient traffic to engage profitably in casino gambling - have found much-needed revenue from consumer lending over the Internet.

In a typical model, the tribe forms a tribal lending entity (TLE) that is financed by a third party. The TLE then makes loans over the Internet to consumers nationwide, usually on terms that are unlawful under the internal laws of the states where the borrowers reside. Because the TLE is deemed an "arm" of the tribe, the TLE benefits from the tribe's sovereign immunity. As a result, the TLE may be sued only under very limited circumstances; and, perhaps even more importantly, the TLE is exempt from most state-court discovery intended to unearth the economic relationship between the TLE and its non-tribal financier.

Because this model has, at least to date, provided a relatively bulletproof means to circumvent disparate state consumer-protection laws, the model has attracted Internet-based payday and, to a lesser extent, installment lenders. Although data are spotty, it is likely the fastest-growing model for unsecured online lending. Tribal sovereign immunity renders this model the preferred legal structure for online lenders desirous of employing uniform product pricing and terms nationwide, including for loans to borrowers who reside in states that prohibit such lending entirely.

The tribal model is increasingly being adopted by online lenders who had formerly employed other models. Yet the legal risks of the model to those who would "partner" with TLEs are rarely emphasized.

Introduction to the Tribal Model

Payday loans are designed to assist financially constrained consumers in bridging small (\$100 to \$1,000) cash shortages between loan origination and the borrower's next payday. The permitted interest rates for such loans, where they are allowed, are high - generally in the APR range of 400 percent. Such permitted rates are, perhaps incredibly, less than the economic equilibrium price for such credit. A borrower who desires to extend a loan, or

who is unable to repay a loan on the due date, may refinance, or "roll over," the loan. State laws and the "best practices" of the storefront payday lenders' trade association frequently limit such "rollovers" and permit a borrower with payment difficulties to demand an interest-free extended repayment plan.

TLEs are customarily tribally chartered. In the best embodiment, the TLEs have offices on tribal lands, operate payday-loan-decisioning computer servers there, and employ tribal personnel in various stages of the loan-origination process. But TLEs generally make extensive use of non-tribal subcontractors and typically receive substantially all of their financing from non-tribal financiers. As a result, the economic benefits of TLEs' lending operations frequently flow primarily to the financiers and not to the tribes.

The principal benefit of the tribal model to the TLE is the ability to charge - at least to date, with relative impunity - market rates for payday loans, typically in excess of \$20 per \$100 advanced for a two-week loan (equivalent to an APR of 520 percent). These rates generally exceed permissible charges in borrowers' states. Thirty-two states permit payday loans to their residents, but in most cases with maximum finance charges of \$15 or less; the remaining states and the District of Columbia have applicable usury laws that either expressly or impliedly bar payday lending altogether.

Because TLEs deem themselves exempt from compliance with all borrower-state laws, a TLE engaged in payday lending usually charges a single rate nationwide and generally does not comply with state-law limitations on loan duration or rollovers. Online lenders generally seek to comply with federal laws applicable to consumer loans (e.g., TILA and ECOA).

Commercial payday lenders have entered into collaborations with Indian tribes in order to seek to benefit from the tribes' sovereign immunity. As noted above, in many cases the non-tribal participant may preponderate in the finances of the TLEs, causing regulators and some scholars to call into question the bona fides of the arrangements. The popular press often refers to these arrangements as "rent-a-tribe" ventures, similar to the "rent-a-bank" payday lending ventures formerly in use until the latter were effectively ended by federal bank regulators in 2005.

Following President Obama's putative recess appointment on January 4, 2012, of Richard Cordray as director of the Consumer Financial Protection Bureau (CFPB) - thereby enabling supervision of non-depository institutions - the CFPB is likely to subject the tribal model to increased scrutiny.

Tribal Sovereign Immunity

Indian tribes were sovereign nations prior to the founding of the United States. Thus, rather than grant sovereignty to tribes, subsequent treaties and legislative and juridical acts have served to recognize this inherent preexisting sovereignty. Because they are separate sovereigns, recognized Indian tribes are subject to suit only under limited circumstances: specifically, when the tribe has voluntarily waived its immunity, or when authorized by Congress. *Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc.*, 523 U.S. 751, 754 (1998).

The extent of immunity is governed largely by the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Concepts of tribal immunity have been addressed extensively in prior articles and will not be belabored here. In brief summary, state and local laws may be applied to on-reservation activities of tribes and tribal members only under very limited circumstances generally inapplicable to tribal lending.

As recent examples of these principles, the appellate courts of California and Colorado were confronted with the assertion that tribal sovereign immunity prevents the use of state-court discovery methods to determine whether a tribe-affiliated Internet payday lender had a sufficient nexus with the tribe to qualify for sovereign immunity and, secondarily, to pursue discovery of the alleged sham relationship between the TLE and its financial backer. Relying in each case on the Supreme Court's determination that tribal sovereign immunity prevents compelled production of information to assist a state in investigating violations of and enforcing its laws, both of those courts denied meaningful discovery.

Sovereign immunity applies not only to tribes themselves but also to entities that are deemed "arms" of the tribe, such as tribally chartered TLEs.

Because the immunity of TLEs is substantially beyond cavil, the "action" in litigation over the tribal model has moved on from the tribes and their "arms" to non-tribal financiers, servicers, aiders, and abettors. Discovery of the details of the financial relationships between TLEs and their financiers has been a key aim of these state-court proceedings by regulators, since the non-tribal "money

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By Michael C. Tomkies

Volume 17, Number 6: July/August 2008

partners" of the TLEs almost certainly cannot assert tribal immunity. The principal risk to such financiers is recharacterization as the "true" lender in one of these arrangements.

Pre-CFPB Federal Regulation of Payday Lending

Prior to the enactment of the Dodd-Frank Act (the Act), federal enforcement of substantive consumer lending laws against non-depository payday lenders had generally been limited to civil prosecution by the Federal Trade Commission (FTC) of unfair and deceptive acts and practices (UDAP) proscribed by federal law. Although it could be argued that unfair practices were involved, the FTC did not pursue state-law usury or rollover violations. Because of the relative novelty of the tribal lending model, and perhaps more importantly because of the propensity of FTC defendants to settle, there are no reported decisions regarding the FTC's assertion of jurisdiction over TLEs.

The FTC's most public (and perhaps its first) enforcement action against a purported tribal-affiliated payday lender was not filed until September 2011, when the FTC sued Lakota Cash after Lakota had attempted to garnish consumers' wages without obtaining a court order, in order to collect on payday loans. The FTC alleged that Lakota had illegally revealed consumers' debts to their employers and violated their substantive rights under other federal laws, including those relating to electronic payments. The case, as with nearly all of the other FTC payday-lending-related cases, was promptly settled. Thus, it provides little guidance to inform future enforcement actions by the FTC or the CFPB.

The Looming Battle Over CFPB Authority

Article X of the Act created the Consumer Financial Protection Bureau with plenary supervisory, rulemaking and enforcement authority with respect to payday lenders. The Act does not distinguish between tribal and non-tribal lenders. TLEs, which make loans to consumers, fall squarely within the definition of "covered persons" under the Act. Tribes are not expressly exempted from the provisions of the Act when they perform consumer-lending functions.

The CFPB has asserted publicly that it has authority to regulate tribal payday lending. Nevertheless, TLEs will certainly argue that they should not fall within the ambit of the Act. Specifically, TLEs will argue, *inter alia*, that because Congress did not expressly include tribes within the definition of "covered person," tribes should be excluded (possibly because their sovereignty should permit the tribes alone to determine whether and on what terms tribes and their "arms" may lend to others). Alternatively, they may argue *a fortiori* that tribes are "states" within the meaning of Section 1002(27) of the Act and thus are co-sovereigns with whom supervision is to be coordinated, rather than against whom the Act is to be applied.

In order to resolve this inevitable dispute, courts will look to established principles of law, including those governing when federal laws of general application apply to tribes. Under the so-called *Tuscarora-Coeur d'Alene* cases, a general federal law "silent on the issue of applicability to Indian tribes will . . . apply to them" unless: "(1) the law touches 'exclusive rights of self-governance in purely intramural matters'; (2) the application of the law to the tribe would 'abrogate rights guaranteed by Indian treaties'; or (3) there is proof 'by legislative history or some other means that Congress intended [the law] not to apply to Indians on their reservation'"

Because general federal laws governing consumer financial services do not affect the internal governance of tribes or adversely affect treaty rights, courts seem likely determine that these laws apply to TLEs. This result seems consistent with the legislative objectives of the Act. Congress manifestly intended the CFPB to have comprehensive authority over providers of all kinds of financial services, with certain exceptions inapplicable to payday lending. Indeed, the "leveling of the playing field" across providers and distribution channels for financial services was a key accomplishment of the Act. Thus, the CFPB will argue, it resonates with the purpose of the Act to extend the CFPB's rulemaking and enforcement powers to tribal lenders.

This conclusion, however, is not the end of the inquiry. Since the principal enforcement powers of the CFPB are to take action against unfair, deceptive, and abusive practices (UDAAP), and assuming, *arguendo*, that TLEs are fair game, the CFPB may have its enforcement hands tied if the TLEs' only misconduct is usury. Although the CFPB has virtually unlimited authority to enforce federal consumer lending laws, it does not have express or even implied powers to enforce state usury laws. And payday lending itself, without more, cannot be a UDAAP, since such lending is expressly authorized by the laws of 32 states: there is simply no "deception" or "unfairness" in a somewhat more pricey financial service offered to consumers on a fully disclosed basis in accordance with a structure dictated by state law, nor is it likely that a state-authorized practice can be deemed "abusive" without some other misconduct. Congress expressly denied the CFPB authority to set interest rates, so lenders have a powerful argument that usury violations, without more, cannot be the subject of CFPB enforcement. TLEs will have a *reductio ad absurdum* argument: it simply defies logic that a state-authorized APR of 459 percent (permitted in California) is not "unfair" or "abusive," but that the higher rate of 520 percent (or somewhat more) would be "unfair" or "abusive."

Some Internet-based lenders, including TLEs, engage in specific lending practices that are authorized by no state payday-loan law and that the CFPB may ultimately assert violate pre-Act consumer laws or are "abusive" under the Act. These practices, which are by no means universal, have been alleged to include data-sharing issues, failure to give adverse action notices under Regulation B, automatic rollovers, failure to impose limits on total loan duration, and excessive use of ACH debits collections. It remains to be seen, after the CFPB has concluded its research with respect to these lenders, whether it will conclude that these practices are sufficiently harmful to consumers to be "unfair" or "abusive."

The CFPB will assert that it has the power to examine TLEs and, through the examination process, to ascertain the identity of the TLEs' financiers - whom state regulators have argued are the real parties in interest behind TLEs - and to engage in enforcement against such putative real parties. This information may be shared by the CFPB with state regulators, who may then seek to recharacterize these financiers as the "true" lenders because they have the "predominant economic interest" in the loans, and the state regulators will also be likely to engage in enforcement. As noted above, these non-tribal parties will generally not benefit from sovereign immunity.

The analysis summarized above suggests that the CFPB has examination authority even over lenders completely integrated with a tribe. Given the CFPB's announced intention to share information from examinations with state regulators, this scenario may present a chilling prospect for TLEs.

To complicate planning further for the TLEs' non-tribal collaborators, both CFPB and state regulators have alternative means of looking behind the tribal veil, including by conducting discovery of banks, lead generators and other service providers employed by TLEs. Thus, any presumption of anonymity of TLEs' financiers should be discarded. And state regulators have in the past proven entirely willing to assert civil claims against non-lender parties on conspiracy, aiding-and-abetting, facilitating, control-person or similar grounds, without suing the lender directly, and without asserting lender-recharacterization arguments.

The Future

Given the likelihood of protracted litigation regarding the CFPB's authority over TLEs, it is not unthinkable that the CFPB will assert that authority in the near future and litigate the issue to finality; the CFPB cannot be counted on to delay doing so until it has concluded its economic research with respect to payday lending (in which TLEs cannot be expected to rush to cooperate) or until litigation over the recess appointment of Director Cordray has been resolved.

TLEs, anticipating such action, will wish to consider two distinct strategic responses. On the one hand, hoping to insulate themselves from direct attacks by the CFPB under the "unfair" or "abusive" standards, TLEs might well amend their business practices to bring them into line with the requirements of federal consumer-protection laws. Many TLEs have already done so. It remains an open question whether and to what extent the CFPB may seek to employ state-law violations as a predicate for UDAAP claims.

On the other hand, hoping to buttress their immunity status against state attacks (possibly arising from shared CFPB-generated information about their relationships with tribes), TLEs might well amend their relationships with their financiers so that the tribes have real "skin in the game" rather than, where applicable, the mere right to what amounts to a small royalty on revenue.

There can be no assurance that such prophylactic steps by TLEs will serve to immunize their non-tribal business partners. As noted below with respect to the *Robinson* case, the "action" has moved on from litigation against the tribes to litigation against their financiers. Because the terms of tribal loans will remain illegal under borrower-state law, non-tribal parties who are deemed to be the "true" lenders-in-fact (or even to have conspired with, or to have aided and abetted, TLEs) may find themselves exposed to significant liability. In the past, direct civil proceedings against "true" lenders in "rent-a-bank" transactions have proven fruitful and have resulted in substantial settlements.

To be clear, state regulators do not need to join TLEs as defendants in order to make life unpleasant for TLEs' financiers in actions against such financiers. Instead, they may proceed directly against the non-tribal parties who finance, manage, aid, or abet tribal lending.

Nor does the private plaintiffs' class action bar need to include the tribal parties as defendants. In a recent example, a putative class plaintiff payday borrower commenced an action against Scott Tucker, alleging that Tucker was the alter ego of a Miami-nation affiliated tribal entity - omitting the tribal entity altogether as a party defendant. Plaintiff alleged usury under Missouri and Kansas law, state-law UDAP violations, and a RICO count. He neglected to allege that he had actually paid the usurious interest (which presumably he had not), thereby failing to assert an injury-in-fact. Accordingly, since *Robinson* lacked standing, the case was dismissed. *Robinson v. Tucker*, 2012 U.S. Dist. LEXIS 161887 (D. Kans. Nov. 13, 2012). Future plaintiffs are likely to be more careful about such jurisdictional niceties.

In the past, online lenders have been able to count on some degree of regulatory lassitude, as well as on regulators' (and the plaintiff bar's) inability to differentiate between lead generators and actual lenders. Under the CFPB, these factors are likely to fade.

Perhaps the prediction of the CFPB's early assertion of authority over TLEs is misplaced. Nevertheless, it is likely that the CFPB's influence over the long term will cause tribal lending and storefront lending to converge to similar business terms. Such terms may not be profitable for TLEs.

Finally, because the tribal lending model relies on continued Congressional tolerance, there remains the possibility that Congress could simply eliminate this model as an option; Congress has virtually unfettered power to vary principles of tribal sovereign immunity and has done so in the past. While such legislative action seems unlikely in the current fractious environment, a future Congress could find support from a coalition of the CFPB, businesses, and consumer groups for more limited tribal immunity.

Hilary B. Miller is a member of Connecticut, New York, and District of Columbia bars. He practices law in Greenwich, Connecticut.

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Payday Loans and the Tribal Sovereignty Model

posted by Nathalie Martin

Think about what happens when you pit tribal sovereign immunity against effective consumer protection laws. In my view, no one wins. Yet payday lenders are now very actively seeking tribes with whom to partner, in order to get the benefits of tribal sovereign immunity. As one might expect, the payday lenders make out big and in most cases, the tribes get very little, at least so far.

Many news reports have come out describing these new relationships, and today another caught my eye, this time in [The Fresno Bee](#). The article mentions how three tribes and their loan business partners were sued by the Federal Trade Commission after consumers complained about their business practices. This Fresno article also mentions a new payday loan trade association called Native American Financial Services Association, which caters to these new alliances.

Before you jump to conclusions about the legitimacy of all this, realize that it is complicated. Tribal self-determination is critical to a just society, since justice never flows from oppression. Consumer protection is also important to a just society. Read more about this conflict in my and Josh Schwartz's [article](#), [The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?](#)

Turtle Talk, one of the most influential legal blogs in the U.S. recently [commented](#) on our paper, calling it balanced (admittedly not a word often used to describe my approach to payday lending). Turtle Talk is a fantastic blog and has been following the payday - tribal sovereignty issue closely. I hope you'll check out Turtle Talk often, just to expose yourself to the kinds of issues that come up in Indian country. Obviously, like any other group of Americans, not all Native Americans agree on everything, including the value of taking up payday lending.

July 12, 2012 at 6:26 PM in [Consumer Finance](#), [Payday & Title Lending](#)

Comments

The question that intrigues me here is whether lenders equipped with such tribal shield can initiate collection actions in state court and still use it as a defense to counterclaims. It is my unscientific conclusion that many offshore payday lenders will not invoke the legal system, I assume with that concern; they collect by bank account assignment, telephone harassment, or not at all. If it works, it works, but there are some obvious commercial vulnerabilities to that model.

Posted by: Ken Doran | [July 14, 2012 at 11:16 AM](#)

It's a LOT more complex, and oppression has many sources. Many tribal governments have proved to be little more than continuations of old clan wars by other means. The Navajos have long had this problem, for example. The commissions from the outside contractors seem small in comparison to the population of the whole tribe, but that isn't how they're distributed. The spoils go only to the insiders.

Then you have situations like the Yakama Indian Nation, which was cobbled together from whole cloth by the Treaty of 1855. The Yakima River bands were related to each other, but the Columbia River bands were related to bands downstream, had different language and culture, and were frequently at war with the Yakima River bands (It didn't help that the whites made Tah pa shah of the Klickitats the first chief under the treaty when Kamiakin refused to come to the reservation.). The attitudes haven't changed much. Guess how much real influence the Columbia bands have in the tribal government?

Posted by: Knute Rife | [July 14, 2012 at 11:21 AM](#)

I am certain this matter is going to receive quite amount of written opinions and authority whomever is granted as such. Ah the pen and writing brings back so many memories in history that placed Native American Indians on reservations, aka "projects" where most suffer from not having any normal amenities with the stroke of a pen but not to worry to be concerned. We can outsource American business world wide, help other countries(but I don't seem to see how yet), have over 25M Americans unemployed, but that isn't important. At least the Navajos and Yakima are

still around and not extinct. I suppose Native American Indians should just sit and wait until the Great Father in DC decides to send more rations.

Posted by: [Raymond Bell](#) | [July 16, 2012 at 09:47 AM](#)

There's a large body of case law on the "commercial activity exception" to the Foreign Sovereign Immunity Act that seems relevant here, if only by analogy. It will no doubt be complicated by the particular clauses in treaties... leaving only the lawyers as winners.

Posted by: [C.E. Petit](#) | [July 17, 2012 at 12:00 PM](#)

If people want to patronize reservation businesses, that's their business just like it's their business to go to Canada or elsewhere for affordable healthcare and medication. Good governance would mean fixing the causes that drive Americans to these places, and not simply "cracking down" on the symptoms. I like this development because it causes two liberal themes to contradict each other: the poor, exploited Indian and the poor, exploited borrower. Maybe this will start some sensible discussions in statehouses about reasonable regulations instead of just capping rates at a level where the businesses can't possibly exist.

Posted by: [BritainLoans](#) | [July 17, 2012 at 02:49 PM](#)

BritainLoans: That position makes sense if, and only if:

- (1) The fact that a business is a "reservation business" is known, and
- (2) People who would consider patronizing that type of business understand the implications of doing business with "reservation business"es, and
- (3) People who would consider patronizing that type of business have real choice among at least two such businesses, at least one of which is NOT a "reservation business", and
- (4) People desperately in debt are rational actors in both the short and long term.

Since not one of these conditions holds in fact -- and the argument requires all four of them to hold in fact -- I think this cryptolibertarian argument tries too hard to count the number of angels dancing on the head of a pin. No, not that pin, THIS pin.

Posted by: [C.E. Petit](#) | [July 18, 2012 at 07:40 PM](#)

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Posted by: [Laura](#) | [July 19, 2012 at 04:06 AM](#)

Sorry to have such a strong attitude about this but the truth is that lenders are being more pushed to do tribal lending than they desire to do it.

Title Loan companies are just like payday loan companies - just larger loans. My site <http://www.maxcashtitleloans.com> helps put both the consumer and the lender together and we talk to hundreds of people a day. You want to know what the common complaint is? They have little options and need the money right now.

The BANKS are not helping them. They got their bailout.

Their friends cannot help because the economy through millions of people into a lower bracket of credit and they are in the same boat. Their employer can't help them, because this move is so risky in bad economic times and employees are not making much (thus hard to repay)

So what are these people to do? The government has gone out of their way to make it hard for these lenders to do business so now the lenders are seeking Tribal lending as a safe haven.

Tribal lending is expensive yes, and a little risky but the fact is, it is needed.

Posted by: [Car Title Loan](#) | [September 25, 2012 at 02:24 PM](#)

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Action Line: Payday Financial illegally sues consumers

By PHIL MULKINS World Action Line Editor on Mar 25, 2012, at 2:23 AM Updated on 3/25/12 at 4:04 AM



(/site/email/default.aspx?articleid=20120325_15_e2_bdeara93924)

ACTION LINE

Commodity Futures Trading Commission designed to protect investors

(/article.aspx/Commodity_Futures_Trading_Commission_designed_to_protect/20130508_15_E4_TheUSC303556?subj=316)

The U.S. Commodity Futures Trading Commission protects investors and the public from fraud in the commodity futures and options markets. Created by Congress in 1974, it is an independent agency with the mission of educating consumers on U.S. futures markets and revealing fraud in the marketplace similar to those that caused the Great Recession.

Action Line: Mattress-buying tips help consumers get right fit at right price

(/article.aspx/Action_Line_Mattress_buying_tips_help_consumers_get/20130505_15_E2_TheMay10832?subj=316)

The May issue of Consumer Reports magazine details Consumers Union's ratings of 12 mattress models that performed well in tests and cost less

Dear Action Line: What do you know about payday loan company Payday Financial LLC advertising on cable TV and the Internet that is threatening to sue me in Cheyenne River Sioux Tribal Court for a tribal court order to garnish my wages? - S.K., Tulsa.



On March 1, the Federal Trade Commission sued Payday Financial LLC in U.S. District Court for the District of South Dakota alleging it illegally sued debt-burdened consumers in the tribal court without jurisdiction to do so. That court has no jurisdiction over claims against non-Cheyenne River Sioux people who don't live on its reservation or in the state.

An FTC amended complaint charged the company and its contract language are deceptive. The amended complaint seeks civil penalties for violating FTC's Credit Practices Rule. Company owner Martin A. Webb and nine codefendants pitch short-term, high-fee, unsecured payday loans to consumers on television and the Internet: Payday Financial, LLC; Great Sky Finance, LLC; Western Sky Financial, LLC; Red Stone Financial, LLC; Financial Solutions, LLC; Management Systems, LLC; 24-7 Cash Direct, LLC; Red River Ventures, LLC; High Country Ventures, LLC.

When customers fall behind in their payments, the firm improperly files suits against them in the Cheyenne River Sioux Tribal Court, attempting to obtain a tribal court order to garnish their wages, the amended complaint alleges.

In its original complaint filed in September 2011 (read the suit at tulsaworld.com/FTCSuit), the agency alleged the defendants illegally tried to garnish employees' wages without court orders. Under federal law, the government can directly require employers to garnish wages for debts it is owed without a court order, but private creditors must obtain a court order before garnishing a debtor's wages. The FTC also alleged the defendants violated the FTC Act.

The act prohibits falsely telling employers they had the legal authority to garnish an employee's wages without first obtaining a court order. Defendants also allegedly violated FTC's Credit Practices Rule by requiring consumers who take out payday loans to consent to have wages taken directly from their paychecks in the event of default, and the Electronic Funds Transfer Act and Regulation E by requiring authorization for recurring electronic payments from their bank.

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than \$1,000 (see the account as a condition of obtaining payday loans.

report at tulsaworld.com/crmattressbuy (<http://tulsaworld.com/crmattressbuy>).

March 13, the FTC sent a letter to the Consumer Financial Protection Bureau (read the letter at tulsaworld.com/FTCletter) (<http://tulsaworld.com/FTCletter>).

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918-581-8339

Email

(<mailto:phil.mulkins@tulsaworld.com>).

"During the past year, the Commission has engaged in aggressive law enforcement activities to address new and troubling issues in the debt collection area (time-barred debt and collection on decedents' accounts) and has obtained tough and effective remedies to promote compliance with the law."

Submit Action Line questions by calling 918-699-8888, emailing phil.mulkins@tulsaworld.com (<mailto:phil.mulkins@tulsaworld.com>) or by mailing them to Tulsa World Action Line, P.O. Box 1770, Tulsa, OK 74102-1770.

Original Print Headline: Payday Financial illegally files suit

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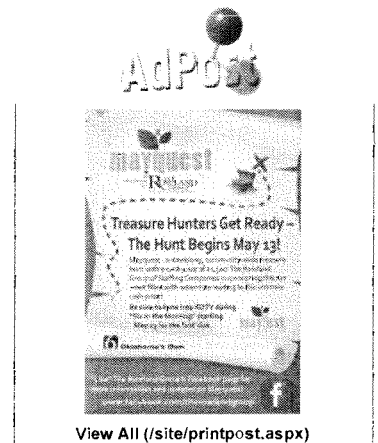
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Federal Trade Commission seeks to shut down tribes' online payday businesses

Online payday lending operations owned by two Oklahoma Indian tribes deceived and bullied customers, a federal complaint filed Monday states. In earlier cases against some of the same firms, the tribes have successfully argued that they are exempt from government oversight. [Continue to site](#)

By **Don Mecoy** | Published: April 3, 2012 [Leave a comment](#)

The Federal Trade Commission is seeking to shut down an online payday lending operation that involves two Oklahoma Indian tribes after consumers filed more than 7,500 complaints to authorities in recent years.

The commission filed a complaint Monday in U.S. District Court in Nevada against high-fee, short-term lending firms operated by the Miami Tribe of Oklahoma and the Modoc Tribe of Oklahoma. The complaint names several individuals as controlling the operation, including race car driver Scott Tucker.

The FTC claims the payday lending companies “piled on undisclosed and inflated fees, and collected on loans illegally by threatening borrowers with arrest and lawsuits.” The case raises questions about the tribes' ability to avoid government oversight of their businesses by claiming their sovereign rights.

The complaint charges that a web of defendants, including the Miami Tribe's AMG Services Inc., three other Internet-based lending companies, seven related companies and six individuals violated federal law by deceiving payday loan customers. The agency seeks an injunction to stop the companies from operating while authorities pursue the case.

A message left for Miami Nation Chief Thomas Gamble with Miami Nation Enterprises was not returned Monday. Modoc tribal officials did not respond to a message seeking comment on the complaint. Attempts to contact Tucker through his racing company's website were unsuccessful.

Payday loans are small-dollar, short-term unsecured loans that borrowers promise to repay out of their next paycheck or regular income payment. They typically carry extremely high interest rates, but the short-term nature of the loan is designed to limit the borrower's costs.

Commission's claims

The commission's filing claims the lending companies would make repeated small withdrawals from customers' accounts, with each payment incurring a fee. In one example cited, a customer was charged \$675 in fees to pay off a \$300 loan.

The companies also threatened customers with lawsuits or arrest to obtain payments, according to the filing.

According to documents filed with the court, Tucker and his co-defendant and brother, Blaine Tucker, transferred more than \$40 million dollars collected from consumers by the payday lending



companies to another company Scott Tucker controls, Level 5 Motor Sports, for “sponsorship” fees that benefit Scott Tucker’s automobile racing, the commission said.

The operation has claimed in state legal proceedings that its affiliation with Indian tribes makes it immune from legal action. Recently, the Miami Tribe claimed victory in a Colorado case when the court affirmed its immunity after authorities there sued the tribe for teaming with Tucker to establish an online lending agency.

Accountability : Finance : Consumer Finance : Debt Deception?

IMPACT: Tribal payday lender sued by Federal Trade Commission

Auto racer profiled in Center investigation accused of deceptive lending practices

By David Heath   email 5:30 pm, April 2, 2012 Updated: 5:30 pm, April 2, 2012



Payday lender turned racecar rookie, Scott Tucker Level 5 Motorsports/Flickr

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The Federal Trade Commission today took up a case that had thwarted state authorities for years, accusing an Internet payday lender with ties to Indian tribes of illegally deceiving borrowers.

Advertisement

The agency is asking a federal judge in Nevada to order AMG Services of Overland Park., Kan., to stop the deceptive practices and pay back borrowers who its says got cheated.

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"The defendants have deceived consumers about the cost of their loans and charged more than they said they would, said Malini Mithal, the FTC's assistant director of financial practices. "The FTC is trying to stop this deception and get refunds for consumers."

While the company has won arguments in state courts that it has tribal sovereign immunity, allowing it to make loans even in states that restrict or forbid payday loans, that protection

doesn't apply to the federal courts. Court records suggest the business has made more than \$165 million, charging interest rates as high as 800 percent on small loans. Borrowers have complained in droves about the lender's tactics. Law enforcement authorities have received more than 7,500 complaints about the business, the FTC says.

Among the defendants in the lawsuit is Scott Tucker, a professional race-car driver from Kansas City, Kan. Tucker became a millionaire from the payday-lending business he started more than a decade ago. When state investigators started digging into the company's practices, Tucker came up with a plan to sell the business to three Indian tribes while continuing to run the company and to collect most of its profits, according to recent court records filed in Colorado.

The Center for Public Integrity and CBS News jointly investigated and exposed Tucker's involvement in the tribal payday lending business in September.

Critics have dubbed this tactic "rent-a-tribe" and other lenders have copied the practice. Several states have tried to take action against the company without success. The business has even won major court challenges in the California Court of Appeals and the Colorado Supreme Court.

Colorado Attorney General John Suthers has been trying to stop Tucker and the tribes from lending in his state for seven years and uncovered evidence that the deal Tucker cut with the tribes allowed him to keep 99 percent of the revenue. But a Denver judge recently ruled that, despite this evidence, the state was unable to prove that the deal was a sham. As a result, the business continues to make unlicensed loans even in states where payday lending is restricted or illegal.

"Despite the hard work of state attorneys general, these defendants have been successful in evading prosecution so far," Mithal said. "But the law that applies to the federal government is different than the law that applies to the states, so the FTC action should put an end to the defendants' deceptive and unfair practice."

The FTC released exhibits of bank records that show that Tucker and his brother control the bank accounts of the lending business. From September 2008 to March 2011, AMG Services had deposits and withdrawals of more than \$165 million. Money from the business was used to pay for Tucker's \$8 million vacation home in Aspen, Colo., flights on a private jet to races, and even plastic surgery, according to court documents. The FTC says Tucker's racing team has received \$40 million in sponsorship fees from the payday-lending business.

Besides Tucker, the FTC is also suing business leaders from the Miami and Modoc tribes of Oklahoma and the Santee Sioux tribe of Nebraska who claim to own and manage the business as well as the tribal companies involved. Among the other companies named in the lawsuit is Tucker's racing team, Level 5 Motorsports, and even a limited partnership Tucker used to buy his home in Aspen.

Neither Tucker nor attorneys from the tribes responded to a request for comment.

The FTC accuses the company of deceiving borrowers about how much they'd have to pay back. On a typical \$300 loan, borrowers were told they'd have to pay only \$90 in interest. But the FTC alleges that the lender would automatically "renew" the loan every two weeks, so that the borrower would in reality have to pay \$975 on the loan.

The FTC alleges the company also deceived borrowers who were late on payments by falsely threatening to sue them or even to have them arrested. And the lawsuit alleges that borrowers were required to sign over electronic access to their checking accounts, which under federal law cannot be a condition of a loan.

"This provision allows defendants to prey on vulnerable consumers by making automatic withdrawals from their bank accounts," the lawsuit alleges.

The loans are often made through a separate lead generator called MoneyMutual.com, which uses former talk-show host Montel Williams to promote its loans, sources told The Center for Public Integrity. Neither MoneyMutual.com nor Williams were named in the lawsuit.

The loans are made under several brand names, including OneClickCash, UnitedCashLoans, USFastCash, Ameriloan and 500FastCash.

This is not the first case the FTC has brought against tribal payday lenders. The consumer-protection agency has also filed lawsuits against Payday Financial LLC of South Dakota for trying to garnish wages of its borrowers and threatening to sue them in the Cheyenne River Sioux tribal court. The FTC says the company has no authority to garnish wages or to file cases against nontribal members in a tribal court.

Online payday lenders are the fastest growing segment of the industry, accounting for more than \$10 billion a year in loans. Only a fraction of that money goes to tribal affiliated lenders.

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Angela Vanderhoof of Olympia, Wash., borrowed \$400 from OneClickCash in October 2010, not realizing she would eventually pay \$690 in interest on her loan or that she would be hit with as many as four overdraft charges on her checking account in a single day. The withdrawals left her nearly penniless, she said.

When she talked to the Center for Public Integrity last fall, she wondered if she would ever be able to get any of that money back. Today, she's one of the borrowers listed in the FTC court documents.

"I think it's great that somebody doing something," she said. "I didn't know if anybody would be able to do anything."

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