

[Banking and Finance Law Daily Wrap Up, CONSUMER FINANCIAL PROTECTION BUREAU—9th Cir.: Tribal lending companies must comply with CFPB's civil investigative demands, \(Jan. 23, 2017\)](#)

Banking and Finance Law Daily Wrap Up

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By [Richard A. Roth, J.D.](#)

The Consumer Financial Protection Bureau is not "plainly lacking" in authority to serve civil investigative demands on three small-dollar loan companies created by Indian tribes, the U.S. Court of Appeals for the Ninth Circuit has decided. The Consumer Financial Protection Act includes the tribes as "persons" on whom CIDs can be served under 12 U.S.C. 5562(c), even though they also are included as "states" that have an enforcement role (*CFPB v. Great Plains Lending, LLC*, Jan. 20, 2017, Rawlinson, J.).

Three Indian tribes—the Chippewa Cree, Tunica Biloxi, and Otoe Missouri—jointly created for-profit companies to make small-dollar loans using the Internet. The three tribes also created consumer lending regulatory regimes. The CFPB decided that it needed to look into whether the lenders were complying with federal consumer financial protection laws and, to do so, served CIDs on the companies. The three tribes that owned the companies directed them not to comply. Instead, they offered to form a cooperative regulatory regime with the CFPB. When the bureau rejected that idea, the tribes unsuccessfully sought to have the bureau set aside the CIDs.

The CFPB then asked the federal court to order the lenders to comply, and the court did so. The tribes appealed the order.

Act of general applicability. The appellate court began its analysis by noting that the CFPA is an act of general applicability. That means it ordinarily is enforceable against Indian tribes unless Congress has said it is not. There are, however, three exceptions to that rule:

1. the law affects exclusive self-governance rights in matters that apply only to the tribes;
2. applying the law would abrogate treaty rights; or
3. legislative history or some other evidence proves Congress intended the law not to apply to the tribes.

In any of these three cases, the law will be deemed not to apply to the tribes unless Congress has explicitly said that it does.

Tribes' arguments. The tribes attempted unsuccessfully to convince the court that the CFPA did not apply to them because it says that CIDs can be served on "persons" and the word "persons" generally excludes sovereign entities like states or Indian tribes. However, the CFPA enforcement authority definition of "State," which includes Indian tribes, does not say that states cannot also be persons who must comply with CIDs, the court said.

None of the three exceptions to the enforcement of a law of general applicability covered the situation, the court then said. The lenders made loans to individuals who had no relationship to any of the tribes other than as borrowers, and the CFPA legislative history did not demonstrate an intent to exclude the tribes. There was no argument that treaty rights would be affected, the court noted.

The CIDs were to be enforced unless the CFPB plainly lacked the authority to issue them, the court summed up. That was a high hurdle for the tribes to clear, and they were unable to do so.

The case is [No. 14-55900](#).

Attorneys: Neal Kumar Katyal (Hogan Lovells US LLP) for Great Plains Lending, LLC, Mobilloans, LLC, and Plain Green, LLC. Kristin Bateman for Consumer Financial Protection Bureau.

Companies: Chippewa Cree Tribe; Great Plains Lending, LLC; Mobilloans, LLC; Plain Green, LLC; Tunica Biloxi Tribe; Otoe Missouria Tribe.

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