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## Payday Lenders and Indian Tribes Evading Laws Draw Scrutiny

By Carter Dougherty on June 04, 2012

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.

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 ThinkFinance LLC, 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.

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 abandoned doing direct lending itself because “byzantine state laws” made it unprofitable. 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) ([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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